

RESPONSIBLE FAMILIES

**A CRITICAL APPRAISAL OF
THE FEDERAL
GOVERNMENT'S REFORMS**

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SYNOPSIS

In this thesis, I critically appraise the latest reforms of the Australian family law system and assess the underlying philosophy of these measures.¹ I specifically analyse the introduction of shared parenting and mandatory family dispute resolution.

My starting point is that legislative changes alone cannot be used as a means of social change. Legal models cannot function correctly if they reflect an ideal rather than social reality, and in light of the current reforms, the Australian family law system risks such a fate. The system, which presumes that parents share parental responsibility upon separation (and therefore during the intact family), does not represent social truth. It appears to make an assumption that shared parenting is the societal practice, but I believe the law is really being used to impose such an ideal. If the reforms are to be successful, I argue that substantial social and economic structural change is required, in order to break down the dichotomy between men's and women's roles, which continue to define the male role as economic and public and the female responsibility as caregiving and private. This is particularly important if the Government is genuine about its aim to make parenting gender neutral in practice and not just in theory.

This thesis demonstrates that the reform measures are a response to the perceived rather than real problems identified in the family law system, and that they are largely issues raised under the influence of fathers' rights groups. The response of the Government to remedy the system is therefore flawed as it is based on misconceived notions about the family law system. It incorrectly identifies judicial discretion as a fundamental cause of the problems and tries to replace it with a more rules-based

¹ My thesis was largely written while these amendments to the system were mere proposals, however, the fact that they are now being implemented does not change the core of my argument in any way.

approach to determining children's matters. I suggest that the real problems can be found in the continuance of deeply entrenched customs and gendered role constructions, and the remedies lie in their overhaul.

The social culture that makes the mother the primary caregiver and allocates to the father diminished parental responsibility from the time the child is born needs to be transformed. A suitable legal response to the current impasse would be to begin by educating the public about the way the system works and provide counselling to families on how to structure their united life well before they reach the breakdown point. Assisting families while they are still functional, as opposed to when they are dysfunctional, would arguably make a large difference in how the family law system is understood. Moreover, it would be able to facilitate ongoing communication for separating couples and, most importantly, thereby uphold the best interests of the child.

STATEMENT OF CANDIDATE

This work has not been submitted for a higher degree to any other university or institution.

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While undertaking my Masters I have been residing in Cambridge, UK, and I wish to thank the University of Cambridge, specifically the Centre for Family Research, for inviting me to attend lectures. They have provided useful information on the family laws and policies of other countries, exposed me to recently published research and findings on roles of mothers and fathers in various cultures and challenged my critical thinking.

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Finally, I wish to thank my daughter Lara, who was born half way into my Masters degree and who has given me first-hand experience in the challenges faced by women to balance work and home life. She has also allowed me to put into practice (or at least, experiment with) my proposal to share parenting from the beginning of family life.

CHAPTER 1: INTRODUCTION

The Australian family law system (“the system”) has increasingly come under attack by the Government and certain lobby groups, notably fathers’ rights groups, for being biased against men in contact and residence disputes and for its adversarial process, which is said to exacerbate rather than alleviate the stress associated with divorce. These criticisms have been the subject of parliamentary investigation and are the driving force for major reforms of the system currently being implemented by the Government.¹

The purpose of this thesis is to critique the major reforms presently being introduced to the family law system and to suggest an alternative way to improve the way parenting arrangements are dealt with after separation. The two main changes – the presumption of shared parenting and mandatory family dispute resolution – will be the main focus of this analysis and will be addressed separately in this order.

My argument is that the Government’s response to the problems with the system is flawed, as it has misidentified the real problems and because it intends to use legislative change as a means of social change. If the Government genuinely wishes to implement a family law system that promotes the best interests of the child, and simultaneously upholds a formal equality model of parental responsibility, it needs to make some fundamental changes elsewhere. I assert that the real solution to the perceived problems

¹ In June 2003 the Government announced that it was establishing an inquiry into “child custody” arrangements in the event of family separation together with child support and grandparents’ rights of contact. The Standing Committee on Family and Community Affairs of the House of Representatives (“the Committee”) was asked to examine a number of issues, including whether there should be a presumption that children will spend equal time with each parent and if so, in what circumstances such a presumption could be rebutted. The Report of the Inquiry was published in December 2003: House of Representatives Standing Committee on Family and Community Affairs, *Every Picture tells a Story: Report of the Inquiry into child custody arrangements in the event of family separation*, Parliament of Australia, December 2003. This Report is discussed in some detail in this thesis. It can be found at www.apf.gov.au/house/committee/fca/childcustody/report/htm. Many of the Government’s proposals for

with the system lies in a culture change that requires economic and social restructuring. I also argue that more assistance must be provided to families before they reach breakdown point. I ask how legislative changes can be made to de-gender parenting when in reality we live in a culture that upholds a gendered notion of parenting and does not promote a mentality of shared domestic responsibility. I identify a major problem being the Government's tendency to encourage joint parenting only in theory; and I wish to assess the practical problems with a formal equality model for parental responsibility when it is not a social reality. I will substantiate my argument with the help of feminist legal theory and sociological literature, and use both primary and secondary material. I aim to challenge the way the Government is in fact using the law to maintain a gender hierarchy in society, and I intend to present a new set of ideas that move and change with the times.

Given the subject of my thesis is essentially the criticisms faced by the system and the Government's attempts to resolve them, I start, in chapter 2, by discussing in detail the perceived problems with the system and the Government's response to those problems – the current reforms. Amongst the changes is the introduction of Family Relationship Centres, the concept of shared parenting, compulsory family dispute resolution, changes to the court system and community education campaigns. I state what I view are the problems with the Government's response, notably, that it has misidentified the real issues, neglected to make certain practical considerations in its big plans and, in some ways, seeks to make changes to the law that would simply repeat what it already stipulates.

changes to the system are currently being implemented and therefore my thesis has become a response to these changes, rather than to mere proposals: www.australia.gov.au/familyrelationships.

Having detailed the Government's amendments to the system, in chapter 3 I look at what the system relating to children's issues was before the introduction of these changes and at the long-standing fundamental principles of the system. I discuss what the framework for children's matters has been until today, and specifically, its defining features. I briefly examine its history to see how we have arrived at the law that deals with contemporary children's matters and procedural issues concerning these matters. I also look at existing initiatives made by the Family Court of Australia ("the FCA") to improve the system. A discussion of the results of the limited but useful research undertaken into the effects of the *Family Law Reform Act 1995* is used to determine the potential impact the Government's current reforms would have in practice. In this discussion, it becomes evident that the law has been used to push a formal equality model of parental responsibility, which is only further emphasised by the current changes. Hence, I go on to discuss various problems with the formal equality model of parental responsibility, notably, that it is quite unrealistic in our culture that makes the mother the primary caregiver to the children, and allocates diminished responsibility to the father from birth.

This leads me to a discussion, in chapter 4, of the institution of the family and how it is regulated in Australia. I look at how the traditional notion of the family is reinforced in contemporary society, for example, with the lack of availability of child care and poor parental leave laws. I research how other countries use their family policies in the workplace to encourage a more equal delegation of domestic roles in order to demonstrate that there must be willingness amongst the population for equal parental responsibility and to assess whether or not a change in that direction in Australia would be feasible in practice.

In short, to obtain equal parental responsibility in reality, changes must be made to external structures that indirectly affect the family, as well as within the private realm of the family. Legislative changes ought not to be made until practices of parenting catch up to the current law, as the dividing line between the ideal and practice will simply grow. This is where the Government should be concentrating on initiating change, through counselling and education programs for each family while they are still intact, and preferably before children are born into the family. As family law is linked to wider structures such as the workforce and labour laws, and families are often affected by workplace policies on the family, employment conditions for men and women must undergo a transformation. These changes should have ideally occurred before the Government's reforms were introduced. Laws encouraging the exercise of shared parental responsibility, by means of part-time work and flexible working time for both men and women would be useful in aligning social reality with current family laws. My argument is that the current law reform and changes to the system could only be the answer if the law and the system were the problems.

Having stressed the importance of encouraging equally shared parental responsibility in everyday life, I analyse, in chapter 5, theories of equality in order to assess the best way (if there is one) in which to achieve gender justice both in the public and private spheres. I compare the formal equality or gender-neutral approach with the differences approach and the subordination or dominance approach to gender equality. I aim to demonstrate that the formal equality approach is a simplistic response to a complex issue.

The current reforms are arguably intended to appease men's groups. However, the problem here is that the demands of men's groups deploy the simplistic (and incorrect)

model of equality. In chapter 6, I look at the rise of men's movements and their tendency to misidentify the real issues. A popular idea amongst the men's groups is the introduction of a rebuttable presumption of shared parenting. The Government's reforms are based on these misconceptions and they are therefore flawed and will simply fail. The main emphasis is on curtailing judicial discretion.

Chapter 7 examines the distinction between the concepts of shared parenting and shared parental responsibility. In doing so, I rely on the views of the judiciary and children, who have been the subject of studies. After the discussion in the previous chapters of our culture of unequal shared parenting that continues to delegate the role of primary caregiver to the mother, I ask here how fathers' rights lobby groups can rationally allege that the family law system is biased against them in the determination of children's matters. At the conclusion of this chapter, I propose a way to mend the misconceptions of the system.

In chapter 8, I analyse the second component of the Government's answer to what it perceives are the problems with the family law system – mandatory family dispute resolution.² I assert that the Government has somewhat reluctantly recognised the need for a culture change, however, it believes the way to make that change is through the establishment of a less litigious society. In my view, this is not enough of a change to rectify what it sees as problematic in the system. I look at the various types of dispute resolution and whether or not the Government is heading in the right direction. I also argue that, taking into account the nature of family law disputes regarding parenting

² It is important to note here that the new terminology, when discussing alternative dispute resolution in the context of family law, is "family dispute resolution" – see Parts II, III, IIIA and IIIB of the *Family Law Act 1975*. However, in my discussions with members of the profession (family lawyers and mediators), the terms "alternative dispute resolution", "primary dispute resolution" and "family dispute resolution" are still used interchangeably. As a result, although I recognise the changes in the terminology, this thesis also uses the above terms interchangeably. In light of the rapidity of the changes in the terminology, it could change again before final submission of this thesis.

after separation and the way the large majority of families are structured in reality, it is far better to devise a policy of early intervention into family life and a culture that truly encourages a mentality of equal shared parenting.

I am embarking on this project after having spent three years working specifically in the area of family law. While working in private practice, I also devoted my time as a Duty Solicitor at the FCA and as a volunteer Solicitor at the Inner City Legal Centre in Darlinghurst, NSW, a community-based centre offering free legal advice. I have had the conduct of a variety of my own family law files, with an emphasis on children's matters. I made frequent court appearances in the FCA, the Local Court Family Matters and the Federal Magistrates Court. In October 2003, I also undertook the training course required to become a separate representative for children (now referred to as an independent children's lawyer). I am passionate about family law and an advocate of the fundamental principles behind the Australian family law system, which prioritises the rights of the child and makes the best interests of the child the paramount consideration. With the right support from the Government, I believe our system would make a very sound system and accordingly, face far fewer criticisms.

CHAPTER 2: THE PERCEIVED PROBLEMS AND THE NEW REFORMS

In this chapter, I will discuss the perceived problems with the system and the current reforms, which have been introduced to supposedly rectify those problems. Amongst the changes is the introduction of Family Relationship Centres, substantially shared parenting, compulsory dispute resolution, changes to the court system and community education campaigns. I also discuss what I view are the problems with the reforms, notably, that they do not address the real issues, are not practical and, in some ways, simply repeat what the law already stipulated.

2.1 The perceived problems in the family law system

The Australian Government has identified specific aspects of the family law system as the primary source of what it believes is the problematic way in which parenting arrangements are made for children post-separation. Consequently, the Government has introduced reforms and is providing \$397.2 million over four years in order to “bring about a cultural change in the way family breakdowns are handled”.¹

The major issues that have concerned the Government over the last few years, and that are essentially the genesis of the changes, are said to be: the increasing rate of separation and divorce; the effect of escalating tension amongst separating parents on their children; fathers’ diminished involvement in the lives of their children post-separation; and a family law system that does not adequately resolve these issues, largely because it is considered too adversarial in nature.

¹ Australian Government Attorney-General’s Department Budget 2005-2006, “Information Sheet 1 – A New Family Law System”, p 1, www.ag.gov.au/agd/WWW/budgethome2005.

Upon close examination, the changes stem from two major factors. The first is a great concern about patterns of parenting after separation and the perception that there has been inadequate opportunity for both parents to have meaningful involvement in the lives of their children after separation. It has been pointed out that indeed, the available research on this indicates high levels of fractured co-parenting with just over one-third of children only having either weekend or alternating weekend contact with their father after separation.² The research shows that 26 per cent of children have contact with their fathers less than once a year.³ The second factor is the way in which disputes after separation are resolved.

Hence, the Government's \$397.2-million package is said to be intended to give separating parents the support they need to encourage them to "sit down across the table and agree to what is best for their children, rather than fighting in the courtroom".⁴ As some have argued,⁵ this concern is based on anecdote, not research, and also ignores the successful less adversarial procedures in family law practice that have taken place in the last couple of years.

Simultaneous to the publicity of these concerns have been cries from fathers' rights groups of bias against men in the determination of children's matters. I argue they have been very influential in the Government's proposals for reforms. One need simply to look at the advertisement for the "new family law system" that emphasises children's "right to grow up with the love, support and guidance of *both* their parents..." to hear the message from men's groups that fathers get a raw deal in residence and contact

² T Altobelli, "Parenting after separation: The Family Law Amendment (Shared Parental Responsibility) Act 2006" *Law Society Journal of New South Wales* July 2006, Vol. 44 No. 6, at p 47.

³ B Smyth, "Time to rethink time" *Family Matters* No. 71, Winter 2005, at p 4.

⁴ For example, this is the view of T Altobelli, above n 2, at p 48.

⁵ *Ibid.*

matters.⁶ The fact that this public attitude towards parenting is reserved for the separated family and not applied to the intact family at least raises doubts as to the motives behind the reforms.

The background context of the current reforms also includes the *Family Law Reform Act 1995* (Cth) (“the 1995 reforms”) that seems not to have gone far enough to achieve what the Government would have liked to achieve. What the Government sought to achieve is debatable, however, I argue that a significant goal in the implementation of the 1995 reforms was to change attitudes and social practices. The aim and impact of the 1995 reforms are discussed in the following chapter. For now, I turn to a discussion of the Federal Government’s current response to the identified problems.

2.2 Response of the Government to the perceived problems

The Federal Government’s response to the identified problems in the system was to establish an Inquiry into “child custody” arrangements in the event of family separation together with child support and grandparents’ rights of contact. This thesis does not deal with the issue of child support. On 25 June 2003 the Government announced its Inquiry, and on 29 December 2003 the House of Representatives Standing Committee on Family and Community Affairs (“the Committee”) tabled its report, *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the Event of Family Separation*⁷ (“the Report”). The Committee was asked to examine a number of issues, including whether or not there should be a presumption that children will spend equal time with each parent, and if so, in what circumstances such a presumption could be rebutted. The Report followed a thorough six-month inquiry with the Committee receiving more than

⁶ To see this advertisement and others, visit www.australia.gov.au/familyrelationships.

1,700 submissions. It took evidence in all states and territories and from the major stakeholders in family law. In addition to emphasising the importance of diminishing conflict between separating parents and of separated fathers having more involvement in their children's lives, it stressed the value of practical measures to reduce parenting disputes.

Although the Committee did not support a rebuttable presumption of equal time spent by each parent with the children, it did conclude that "the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time".⁸ It recommended that Part VII of the *Family Law Act 1975* (Cth) ("the "FLA") be amended as follows:

- by creating a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first stage in post-separation decision-making;
- by creating a presumption against shared parental responsibility for cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse;
- by providing that the object of Part VII should be to guarantee 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;
- by defining "shared parental responsibility" as containing an obligation that parents consult with one another about decisions concerning major issues; and

⁷ House of Representatives Standing Committee on Family and Community Affairs, *Every Picture tells a Story: Report of the Inquiry into child custody arrangements in the event of family separation*, Parliament of Australia, December 2003: www.aph.gov.au/house/committee/fca/childcustody/report/htm.

⁸ Ibid, at p 30.

- by clarifying that each parent may exercise parental responsibility for the day-to-day care of the child when the child is actually in his or her care subject to any contrary orders and without the duty to consult the other parent.

The Committee also recommended that the terminology of “residence”, “contact” and “specific issues orders” be replaced with more neutral language such as “parenting time”.

Furthermore, suggestions were made for a large increase in funding for primary dispute resolution and post-order counselling services, as well as radical structural changes to the family law system. In particular, it recommended that the Government ought to “review the community’s current access to services, which can assist those who cannot achieve and sustain shared parenting on their own to:

- develop the skills to communicate effectively around their children’s needs and to manage co-operative parenting;
- enable them to resolve their ongoing conflict and develop a long term ability to share their parenting responsibilities in the interest of their children; and
- include the perspective and needs of their children in their decision-making, with and without the assistance from the family law system.”⁹

Also of relevance to the discussion in this thesis is the Committee’s recommendation for mandatory counselling before an application is filed in the Family Court of Australia. Several other recommendations were made by the Committee, however, the abovementioned proposals are those I wish to critique.

⁹ Recommendation 7.

In light of the Report, the Prime Minister released a statement on 29 July 2004¹⁰ proposing a whole range of changes that would constitute the most significant changes to be made to the system since 1975. The proposals adopted the Committee's recommendations and were detailed in the Australian Government's Discussion Paper entitled *A New Approach to the Family Law System* ("the Discussion Paper") that was released on 10 November 2004. The current amendments include the majority of these proposals. Below, I discuss those that are now being implemented.

2.2.1 Family Relationship Centres¹¹

In order to achieve its aim in establishing a system that focuses "on families and their needs before, during and after separation and provide ways of resolving conflict without going down the adversarial path",¹² the Government is in the process of establishing 65 Family Relationship Centres (FRCs) over three years across Australia as a first port of call for separating parents, to assist them to resolve disputes about parenting arrangements as immediately as possible, and without resorting to litigation. Essentially, these Centres will be an entry point to the family law system, though not obligatory as yet, providing case assessment, referrals and practical assistance to parents.

The FRCs are to be run by community-based organisations and offer a range of information, advice and dispute resolution services. Although FRCs are not to provide legal advice, their free information sessions can cover topics such as the local services available, crisis counselling, the family law system, and the benefits of parenting plans.

¹⁰ Framework Statement on Reforms to the Family Law System, issued by the Prime Minister on 29 July 2004 – Appendix A to *A New Approach to the Family Law System*, 10 November 2004.

¹¹ Current information about Family Relationship Centres can be found at www.familyrelationships.gov.au. Also, Parts II, III, IIIA and IIIB of the *Family Law Act 1975* stipulate the new changes about non-court based family services, family consultants and the court's powers in relation to these services.

¹² Australian Government's Discussion Paper entitled, *A New Approach to the Family Law System*, released on 10 November 2004, p 1.

As well as group sessions, every family will be offered one-on-one interviews with a parenting advisor – either for each parent individually or for both parents jointly – to urge them to agree on how to share parental responsibility after separation without the need for lawyers. Other family members affected by the separation, such as grandparents, will be offered the same service. The first three hours of joint dispute resolution sessions will be free of charge. It is said that a total of \$188.7 million will be spent to develop these Centres.¹³

The parenting advisor will “encourage fathers to maintain a substantial role in their children’s lives immediately following a relationship breakdown”¹⁴ and assist families in developing a parenting plan. In this way, the centres will provide parents with checklists on what to consider putting in their parenting plan and templates to use as a format.

A parenting plan is a document setting out the agreement between parents as to the future care arrangements for their children.¹⁵ Parenting plans are not legally binding. The idea is to minimise misunderstandings, and clarify for the family a range of issues relating to the care of the children. The plan may cover anything the parties consider relevant, including: who a child is to live with; the time a child might spend with the other parent; the time a child might spend with grandparents; how parents will share parental responsibility; holiday arrangements; and ways of resolving any future disputes.

Although parenting plans require no legal input at all and are not legally binding, the amendments highlight their importance by stating that parenting orders are, except in

¹³ Australian Government Attorney-General’s Department Budget 2005-2006, above n 1, at p 2.

¹⁴ Australian Government’s Discussion Paper above n 12, at p 2.

¹⁵ Australian Government’s Discussion Paper above n 12, at p 3. For the definition of a parenting plan, see section 63C *Family Law Act 1975*.

exceptional circumstances, regarded as subject to later parenting plans. This means that a later parenting plan may reverse an earlier parenting order irrespective of the circumstances leading to the making of both the plan and the order, unless duress or coercion can be established. It has been noted that although the concept of the parenting plan is well-intended, there is cause for concern because of the potential primacy of the parenting plan over the parenting order, and significant worry about power imbalances between parents.¹⁶ There is especially the concern that some parents will be unable to really focus on the children's needs as opposed to their own. It seems that a significant impact of these amendments will be felt by separating parents before they get legal advice. This is arguably one of the goals of this new legislation – a determined effort to keep parents away from the legal system and legal process, even though they will enter into shared parenting arrangements that have potentially significant legal implications, as I discuss below.

Assistance will also be provided by the FRCs when parenting agreements or court orders are breached, to prevent parents from turning to the courts for enforcement orders. This new approach is being introduced because the Government is of the view that the court process exacerbates, rather than alleviates, the conflict. An additional \$23.4 million will be provided over four years to establish 15 new services under what is called the Contact Orders Programme, bringing the total number of services to 20 Australia-wide.¹⁷ This program is said to be very effective in assisting high conflict families experiencing problems with contact arrangements after separation, especially where contact orders are being breached.

¹⁶ T Altobelli, above n 2, at p 48.

¹⁷ Attorney-General's Department Budget 2005-2006, above n 1, at p 3.

In relation to the FRCs, they will also be a source of information and referral to services such as Family Relationships Skills Training that provide early intervention to prevent family breakdown.¹⁸

Although it is not compulsory to attend the FRCs, there may be cost implications for a parent who is not willing to do so.¹⁹ In addition, to encourage parents to use the centres, the Government will be asking doctors, child care centres, lawyers, schools and agencies such as Centrelink and the Child Support Agency to refer separating parents to the centres. Further, the Government has launched a massive community education campaign to promote the centres, increase the resources of existing services and establish services in new locations to meet the needs of families.

For those unable to access a centre, the Government is setting up a free national Family Relationship Advice Line and website. As well as obtaining information, callers to the advice line should be able to speak to a parenting adviser in relation to a series of issues, including developing a parenting plan.

2.2.2 Shared parenting

The changes are designed to essentially, “promote the objective of both parents having a meaningful role in their children’s lives.”²⁰ Hence, the concept that is sometimes described as “shared parenting” and at other times as “equal shared parental responsibility” has now become the starting point for most separating couples whether they reach agreement or have orders imposed upon them by a judge or magistrate.

¹⁸ Australian Government’s Discussion Paper above n 12, at p 2.

¹⁹ This is especially the case if the court specifically refers parties to non-court based family dispute resolution or counselling and one party fails to comply. The consequences for failing to comply with such an order are detailed in s. 13D *Family Law Act 1975*.

²⁰ Australian Government’s Discussion Paper above n 12, at p 1. Section 60B(1)(a) of the *Family Law Act 1975* words this objective as follows: “ensuring that children have the benefit of both of their parents

Although in legal discourse, these two terms are often used interchangeably to mean parents sharing “the key decisions in a child’s life, regardless of how much time the child spends with each parent,”²¹ it is the latter that is used in the amendments. Included in its definition is a requirement for parents to consult each other in making key decisions about their children.

Equal shared parental responsibility is now therefore the starting point under the FLA as a rebuttable presumption.²² If the matter goes to court, this means the judge or magistrate will start with the presumption that there will be equal shared parental responsibility but the parties may argue against it. The Government insists that the best interests of the child will still be the most important factor and decisions will still be made based on the circumstances of each case.²³ The presumption will be against equal shared parental responsibility where the court is satisfied that there is evidence of violence, child abuse or entrenched conflict.

Equally, when separated parties attend the FRCs, the amendments indicate that parents will be encouraged to enter into shared parenting arrangements for their children after separation, and to record this agreement in their parenting plan. The amendments contain many overt “shared parenting” messages and it would be fair to summarise them as follows: in the absence of violence, abuse or neglect, shared parenting after separation is the desired normal arrangement.

While the best interests of children is said to remain the paramount consideration in making a parenting plan or order, how exactly that is determined is expressed in the new section 60CC that replaces section 68F. This new section has a hierarchy of

having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child”.

²¹ Australian Government’s Discussion Paper above n 12, at p 10.

²² In the new section 61DA *Family Law Act 1975*.

considerations. The primary considerations are that children have the benefit of both their parents having a meaningful involvement in their lives, and that they be protected from violence, abuse or neglect. The additional considerations include the views of the child, relationship between child and parents and capacity to provide for needs.²⁴ There are some new factors that appear to focus on parents and their current and past involvement in parenting, and their willingness to facilitate a continuing relationship between the child and other parent.

When the presumption applies, the court must consider the child spending either equal time with parents or substantial and significant time with parents.²⁵ In each case, the determinant of whether equal time or substantial and significant time applies in the best interests of the child, and reasonable practicability, which takes into account a variety of practical issues, including distance between each parents' home, the parents' ability to implement these arrangements, their capacity to communicate and the impact on the child. It has been suggested that the most practical outcome of these amendments may be that more orders for "substantial and significant time" are made.²⁶

The new provisions collectively encourage greater shared parenting after separation, which is to be realised by a more even (but not necessarily equal) division of children's time between parents. However, these deceptively straightforward provisions hide significant underlying complexity, as will be discussed later in this thesis.

2.2.3 Compulsory dispute resolution

Another major change at the pre-action stage is the introduction of compulsory dispute resolution, such as counselling, mediation or conciliation, before being

²³ Australian Government's Discussion Paper above n 12, at p 10.

²⁴ These considerations reflect the existing s. 68F (2) factors of the *Family Law Act 1975*.

permitted to commence court proceedings. After 1 July 2007, to file a court application seeking the determination of a children's matter, an applicant will need to provide a certificate from a Family Relationships Centre or another approved service stating that the parents have attended a dispute resolution process. If one of the parents refuses or fails to attend, the other parent will be entitled to a certificate and to take the matter to court regardless. To discourage parents from avoiding dispute resolution, the court will be able to take into consideration the refusal or failure to attend in deciding a cost order against the other parent.

2.2.4 Changes to the court process²⁷

A related change is that once proceedings are initiated, parties will be referred to a "family consultant", who assists and advises both parents.²⁸ The family consultant replaces the court counsellor and mediator, with one fundamental distinction – family consultants perform a reporting function and so everything disclosed to a consultant is admissible in court.

The independent representation of children will remain, however, these lawyers are now called Independent Children's Lawyers.²⁹ The amendments enact and codify many of the pre-existing common law guidelines relating to the representation of children.

A statutory enactment of less adversarial procedures in the new Division 1A of Part VII of the Act codifies practices that have already been trialled by the FCA in NSW,³⁰ including: making the judge or magistrate responsible for controlling the way the case is

²⁵ Section 65DAA *Family Law Act 1975*.

²⁶ T Altobelli, above n 2, at p 49. Section 65DAA(3) *Family Law Act 1975* sets out this concept.

²⁷ Australian Government's Discussion Paper above n 12, at p 15.

²⁸ Part III of the *Family Law Act 1975* details the function, definition and role of family consultant, in ss. 11A-11G.

²⁹ Sections 68L, 68LA and 68M of the *Family Law Act 1975* detail the role of the Independent Children's Lawyer.

run; enabling a judge or magistrate to suspend the formal hearing of a case and try to mediate or help negotiate a settlement; allowing the judge to directly seek the view of a child when appropriate; empowering the judge or magistrate with the right to veto certain rules of evidence that do not apply in a particular case; giving the judge or magistrate the power to determine what witnesses will be called and what evidence will be admitted; and giving court-based counsellors a larger role in the hearing of a matter.

Clearly, these measures entail significant changes to the role of judges, magistrates and court staff. The court becomes “the interventionist manager of the dispute, not just its passive adjudicator.”³¹

2.2.5 Community education campaigns

The Government proposes to support these major changes to the system by implementing a community education campaign. It will explain the changes to the law; inform parents of their choices and responsibilities; encourage parents to seek help as early as possible when experiencing relationship difficulties; urge separating parents to use non-adversarial methods of resolving any disputes over parenting arrangements and promote the use of parenting plans; promote the use of Family Relationship Centres as a first port of call when experiencing difficulties; and stress the role of grandparents in future parenting arrangements for children.

2.2.6 Other changes

Another change is the new terminology. A child now lives with a parent rather than residing there; a child spends time with a parent as opposed to having contact with that parent; and a child communicates with another person.³²

³⁰ In the Children’s Cases Program.

New amendments have also been added to deal with the consequences of failure to comply with orders.³³

2.3 An appraisal of the reform provisions

I will identify and analyse three main problematic features of the reforms. Firstly, the Government points to the legal regime as the primary cause of the problems instead of considering that problems are caused by the disjunction between the laws and social reality. It is idealistic to make legislative changes in order to set a normative standard, when that standard may not fit the culture in which we live. The amendments change the legal framework presumably in order to make social changes. Secondly, there are problems within the changes themselves, such as practical issues and ambiguities in the terminology used – there will no doubt be confusion between shared parental responsibility and shared parenting. Thirdly, certain amendments simply repeat what already exists in the current legislation. In particular, the emphasis on alternative dispute resolution already permeates every aspect of family law practice, from the time of first taking instructions through to the adjudication stage.

Essentially, I am embarking on developing the first criticism, as it indicates that the law is being used to try to create a formal equality version of parenting.

2.3.1 Imposing standards through legislative rules

It is obvious the Government has not viewed the system until now as encouraging a formal equality model of parenting. Hence, these amendments are attempting to entrench such a model in the legal framework, regardless of whether or not it would be

³¹ As stated by T Altobelli, above n 2, at p 49.

³² Section 64B *Family Law Act 1975*.

³³ Division 13A of Part VII *Family Law Act 1975* deals with contraventions.

practicable in real life. Whether legislative provisions can succeed in imposing normative change in society is highly debatable. I wish to argue that when the law represents an ideal rather than a reality, its function becomes questionable, its goal becomes unattainable and its practical benefits become problematic.³⁴

A number of the reforms demonstrate that their goal is to set normative standards, not to reflect social reality. The most obvious one is the creation of a clear (even though rebuttable) presumption in favour of equal shared parental responsibility and substantially shared parenting time. The explicit requirement that parents consult with one another is a second example. Although this requirement already existed implicitly in case law,³⁵ this amendment is clearly being proposed to encourage certain behaviour and practices amongst separating parents, who were not necessarily consulting each other prior to separation.

The introduction of a parenting advisor to encourage fathers to maintain a substantial role in their children's lives immediately following a relationship breakdown is yet another indication of the Government's attempt to promote certain attitudes through the new laws. The fact that many fathers require encouragement to maintain a substantial role in their children's lives is in itself not encouraging. Equally, the need for services to assist those who cannot achieve and sustain shared parenting on their own post-separation, demonstrates that social reality is far removed from these proposals.

³⁴ The Family Court of Australia Submission in response to the Government's proposals for reforms, 16 August 2003, at p 22. This problem is also discussed by several commentators in the context of the impact of the 1995 reforms. See, for example, H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The first three years*, <http://www.familycourt.gov.au/presence/resources/file/eb0011059e844c8/famlaw.pdf>, December 2000; J Dewar, S Parker, B Tynan and D Cooper, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975*, Griffith University Families, Law and Social Policy Research Unit Publications, 15 June 2001 ("Dewar et al"); J Dewar and S Parker, "The impact of the new Part VII Family Law Act 1975" (1999) 13 *AJFL* 96; and R Kaspiew, "Equal Parenting or the Effacement of Mothers? *B and B* and the Family Law Reform Act 1995 (Cth)", (1998) 12 *AJFL* 69.

³⁵ See *B and B; Family Law Reform Act 1995* (1997) 21 Fam LR 676; FLC 92-755 ("*B & B*").

In addition to ignoring social reality, these proposals are flawed because they attempt to assist parents too late in the life of the family. If fathers were encouraged, for example, through cultural practices and labour laws, to maintain a substantial role in their children's lives immediately following the birth of their children, and parents were urged to achieve and sustain shared parenting on their own from an early stage in the relationship, then these reforms would be far more feasible. Rather than creating an unattainable normative standard, they would be upholding the social norm.

2.3.2 Practical considerations

The Family Law Section of the Law Council of Australia ("the FLS") responded to the changes when they were mere proposals,³⁶ pointing out its concerns. It would not significantly advance my argument to repeat all of the problems it identified, however, there are a couple that are worth mentioning.

Firstly, although it supported the establishment of the Family Relationship Centres and the increased funding for existing counselling and conflict resolution programs, it was concerned that in the beginning, there would not be enough centres to meet the potential demand and this would cause delays in the assistance provided to separating families. Another concern was that the centres would not receive sufficient funding to provide the services intended by the Government.

The FLS stressed the importance of making clear the services provided by the centres so that the community would not develop unrealistic expectations, for example, the belief that the centres would resolve all family/relationship problems, including property disputes. It was thought equally imperative that the public not assume that

³⁶ The Family Law Section's response to the Government's proposals for reforms was released in early 2005 and is posted on the website, www.familylawsection.org.au/members/content.

advice and documents from the centres be a substitute for legal advice, and that only difficult cases would require the added expense and inconvenience of legal advice. In that way, the centres will need to work hand-in-hand with other services, as a referral system. The FLS was concerned that these assumptions would cause people to avoid seeking legal advice because they would develop the view that it would render the process of resolving parenting disputes unnecessarily legalistic.

The reality is that parenting arrangements, whether imposed or made voluntarily, have widespread legal implications and in this regard, people ought not to be discouraged from seeking legal advice. The FLS gave the example of the approach taken by the courts to put emphasis on the status quo in determining parenting orders, both interim and final. Hence, the FLS offered to work with the Government in developing protocols and procedures for the centres, to encourage the resolution of parenting disputes without inappropriate legalism, but simultaneously ensure that the centres' clients comprehend that there will always be both short-term and long-term legal implications for families in whatever arrangements are put in place.³⁷

Secondly, the FLS objected to the then proposal that lawyers, counsellors and other service providers be required to raise the possibility of equal parental responsibility and parenting time as a starting point with parents. The FLS stated that the lawyer/counsellor should be the one to decide if this is a realistic option in individual cases.

Another practical problem with the changes is the confusion caused by the terminology. There are arguably conflicting views about the meaning of “shared parental responsibility” and “shared parenting time”. In Australian public discourse, the

³⁷ It is not clear whether or not the Government accepted this offer when formalising these proposals.

term “shared parenting” is used interchangeably with the terms “shared residency”, “joint custody”, and “equal shared parental responsibility”. Equally, the Government uses the terms “equal shared parental responsibility” and “shared parenting” in the same context, yet they arguably have significantly different meanings.³⁸ This has the potential to exacerbate the confusion amongst parents between shared parental responsibility and shared parenting time.³⁹

2.3.3 Law repeating itself

The amendment to introduce mandatory counselling prior to a court application being filed is repeating what is stipulated in the *Family law Rules 2004* regarding pre-action procedures. Admittedly, these pre-action procedures will now apply to all parenting matters under the FLA, irrespective of the court in which they are commenced, nonetheless, recommendations and rules to exhaust alternative forms of dispute resolution prior to commencing legal action have existed in the practice of Australian family law for a long time. Litigation can only be replaced with advice and family dispute resolution to a certain extent. Equally, family lawyers have been under pressure for some time to re-skill and develop competencies in diverse aspects of dispute resolution in family law matters. An example of this pressure is the *Family Law Advisory Code of Practice* published by the Law Society of New South Wales in December 1992.⁴⁰ The FLA has for a long time made it clear that courts and lawyers

³⁸ As pointed out by the Family Law Section of the Law Council of Australia, above n 36, at 7.

³⁹ In my view, the former means that separated or divorced parents share their parental duties and responsibilities equally by way of joint decision-making, and the latter means that parents make arrangements whereby they undertake equal physical and legal custody over their children. This will be discussed in detail later in the thesis.

⁴⁰ In defining the conduct and responsibilities of lawyers towards their clients, the code states at 2.2 that: Solicitors should: Appreciate that they have an important duty to encourage and counsel their clients and to assist them systematically to isolate the issues in dispute to develop options for their resolution and to cooperate with each other to reach an agreement which accommodates as many as possible of the interests of all parties by negotiated resolution rather than contested litigation; and, Solicitors are encouraged to discuss with their clients the advantage and merits of candid and objective discussions

have a duty to consider advising parties and clients on mediation.⁴¹ Furthermore, at almost every stage of the court process the emphasis has traditionally been placed on prospects of settlement and referral to mediation. This is not just embodied in the written rules of law firms, but clearly laid out in brochures and court-provided information. As one commentator states, “it is fully set out on the Family Court website, accessed by many clients and probably one of the best in the world”.⁴²

Lastly, the FCA had been trialling a less adversarial model for the determination of children’s matters over some time. Similarly, there arguably already existed a presumption of shared parental responsibility subject to court orders upon separation.⁴³

Therefore, if the changes are meant to respond to public dissatisfaction with family law, then many of them are arguably a waste of resources as they repeat what already existed in the system.

The real problems, however, lie in a culture that does not promote shared parenting, does not encourage a proper understanding amongst the general public of the fundamental principles of the Australian family law system, only assists dysfunctional families, allows politicians to politicise family law by using the irrational arguments of certain lobby groups in order to gain support and tries to use law as a means of social change.

between the parties in the course of confidential counselling sessions with an approved or court-appointed counsellor, or in the course of mediation sessions with an approved or court-appointed mediator. Attention should be drawn to the possible reduction in the costs of the parties consequent upon agreement, or a lessening of the issues in dispute, between the parties.

Although it could be argued that this is simply an “advisory” code, the Law Society of New South Wales warns at 1.8 that: ...solicitors should, however, realise that failure to observe certain aspects of the Code may, according to the circumstances, amount to negligence or unsatisfactory professional conduct or, in an extreme case, professional misconduct. It is believed that the Code will be of material assistance to persons involved in the training and instruction of future solicitors in the practice of family law.

⁴¹ Sections 14G and 19BA *Family Law Act 1975*.

⁴² D Hodson, “Family Mediation in Sydney: Paper success or culture vultures?” February 2005, www.davidhodson.com, at p 2.

It follows that the remedies lie in a total culture change that would entail substantial social and economic restructuring so that shared parenting becomes a possibility. Furthermore, support must be provided to families, with regards to the delegation of parental responsibilities before they reach breakdown point. It is insufficient for the Government to rely solely on the family law system to assist families when they are in a dysfunctional state. By promoting shared parenting from an early point in the life of a family, and introducing it as the norm in the wider society, it would be more logical to legislate for its implementation after separation. This would go some distance to alleviate the gender conflict associated with parenting by breaking down the dichotomy between men's and women's roles. These changes are essential before law reforms of this nature can realistically be considered. I will discuss this issue in chapters 4, 5 and 6.

For now, I will discuss the pre-reform regime with regards to children's matters, in order to contextualise the present reforms.

⁴³ See the following chapter for details.

CHAPTER 3: THE FRAMEWORK FOR CHILDREN'S MATTERS IN AUSTRALIA

3.1 The defining features of the Australian family law system

In this chapter, I examine the system relating to children's issues before the introduction of these amendments and identify the long-standing fundamental principles of the system. I briefly examine its history to see how we have arrived at the law that deals with contemporary children's matters and procedural issues concerning these matters. I then look at the existing initiatives made by the FCA to improve the system. A discussion of the results of the limited but useful research undertaken into the effects of the *Family Law Reform Act 1995* is used to determine the potential impact the Government's current reforms would have in practice. In this discussion, it becomes evident that the law has been used to push a formal equality model of parental responsibility, which is only further emphasised by the current changes. Hence, I go on to discuss various problems with the formal equality model of parental responsibility, but most significantly, that it is quite unrealistic in our culture that makes the mother the primary caregiver to the children, and allocates diminished responsibility to the father from birth.

3.1.1 History of the Australian family law system

The framework for modern Australian family law was created in the mid 1970s. The main Act is the *Family Law Act 1975* (Cth) ("the FLA"), which both reformed the substantive law and created the Family Court of Australia ("the FCA") to determine family law matters.

It has been said that the enactment of the FLA indicated an acknowledgment by legislators that: the law could have little influence over divorcing behaviour and that the most important role of the law was to set the terms of divorce; there would be public support for parties who were not in a position to afford their own legal costs; and there existed an implicit willingness to accept that the financial cost of family breakdown was properly shouldered by the public purse through the welfare system.¹ Under the FLA, the FCA was created as a specialised court and given wide discretion to set the terms of a divorce according to general standards requiring the decision-makers to achieve certain loosely defined outcomes in the individual circumstances of each case.² With regards to the determination of children's matters, the terminology used was "custody", "access" and "guardianship", which was interpreted by some as placing children in the position of assets to be won over in adversarial custody battles.³ However, from early on, case law established that there was no parental right of access to a child, nor any presumption that access was in a child's best interests.⁴ Nonetheless, the FCA generally regarded continuity of contact between both parents and their children as being beneficial to a child's development, and there had arguably been a consistent judicial tendency to place emphasis on the value of maintaining the parent-child relationship subsequent to separation.⁵

The legislation of the 1970s has been described as having been drafted during the period of "technocratic liberalism".⁶ This refers to an idea in which there was complete

¹ J Dewar, "Reducing Discretion in Family Law" (1997) 11 *AJFL* 309 at 314.

² For example, that arrangements for the children of a marriage were to be decided according to the child's welfare.

³ Cth Hansard, House of Representatives, 8 November 1994, p 2757.

⁴ *In the Marriage of Brown and Pederson* (1991) 15 Fam LR 173 at 183-4.

⁵ Examples of such cases include: *In the Marriage of Horman* (1976) 5 Fam LR 796 at 799; and *In the Marriage of Sedgley* (1995) 19 Fam LR 363 at 371. See also the comments of the High Court in *M v M* (1988) 166 CLR 69 at 76.

⁶ J Dewar, above n 1, at 315.

trust in the ability of well-informed experts to reach optimal solutions for the parties – “optimal” in the economic sense of the word, as opposed to the moral or ethical sense – and a belief in limits to the state’s role in prescribing rules for what were considered private decisions about how private lives should be lived.⁷

The FLA has been extensively modified since it was first enacted, and the current amendments continue this trend. Above all, there has been a trend to reduce or limit its discretionary characteristics. The *Family Law Reform Act 1995* (“the 1995 reforms”), which first introduced the concept of delegating parental responsibility after separation, constituted one of the most significant changes to the FLA. Many of the changes to the law that occurred with the 1995 reforms were said to have caused confusion and uncertainty as to what the FLA implied regarding children’s arrangements after separation.⁸ In particular, there were differing views about the delegation of parental responsibility and the extent to which the resident parent⁹ could act independently.

This thesis will discuss how decision-making about children after divorce has become progressively more restricted and identify some of the dangers of introducing prescriptive laws. Matters that were once dealt with in terms of children’s welfare are now being classified as children’s “rights”,¹⁰ detailed checklists control the courts’

⁷ Ibid.

⁸ See H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The first three years*, <http://www.familycourt.gov.au/presence/resources/file/eb0011059e844c8/famlaw.pdf>, December 2000, at p 8; and E Ryrstedt, “Joint decisions – A prerequisite or a drawback in joint parental responsibility?” (2003) 17 *AJFL* 155 at 169.

⁹ Now referred to as the parent with whom the child lives.

¹⁰ Section 60B *Family Law Act 1975* (Cth) (inserted by the *Family Law Reform Act 1995*); however, see *B and B* (1997) 21 Fam LR 676; FLC 92-755, where the Full Court of the Family Court held that s 60B has not changed the fact that the child’s best interests remain the primary consideration for resolving children’s cases, including relocation cases: “... any question of presumption of onus has the potential to impair the inquiry as to what is in the best interests of the children...”. For a discussion of this provision, see R Chisholm, “Assessing the Impact of the *Family Law Reform Act 1995*” (1996) 10 *AJFL* 176, at pp 180-03; and for a discussion of this case, see R Kaspiew, “Equal Parenting or the Effacement of Mothers? *B and B* and the *Family Law Reform Act 1995* (Cth)”, (1998) 12 *AJFL* 69.

approach to children's welfare¹¹ and there is an increasing use of objects or principles to aid the interpretation and application of family law legislation¹² as well as more guidelines and informal rules.¹³ The new amendments stipulate even firmer rules about post-separation arrangements, for example, that in the absence of violence, abuse or neglect, shared parenting is the desired normal arrangement.

Confusion and uncertainty created by the 1995 reforms arguably provides a backdrop to the new reforms. A brief historical account of the developments since those reforms will help me to contextualise the analysis of the most recent reforms. Given the most significant changes (from the perspective of this thesis) have occurred since the 1995 reforms, I will not be tracing the changes in the FLA prior to then.

3.1.2 The background to the law dealing with children's matters today

The FLA is the main body of legislation in Australia dealing with issues relating to children's arrangements after separation. It emphasises the obligations of parents vis-a-vis their children, and the best interests of the child. All children are covered by the FLA, regardless of whether their parents are married or not.¹⁴

A fundamental principle of the FLA continues to be the right of a child to know and be cared for by both his or her parents¹⁵ and the right of a child to spend time with both parents.¹⁶ However, the amendments appear to have introduced an even more important notion – the right of children to have the benefit of both their parents having a

¹¹ The new section 60CC *Family Law Act 1975* (Cth).

¹² See s 60B *Family Law Act 1975* (Cth), which sets out the "objects and principles" underlying Pt VII of that Act.

¹³ See P McManus, "Informal rules in family law" (2004) 18 *AJFL* 257, and P McManus, "Guidelines in family law: Rules by another name?" (2001) 15 *AJFL* 51.

¹⁴ Section 60B(2) *Family Law Act 1975* (Cth). Western Australian family law is governed by the *Family Court Act 1997*, which is similar in substance to the *Family Law Act 1975* but not dealt with in this thesis.

¹⁵ Section 60B(2) paragraph (a) *Family Law Act 1975* (Cth).

¹⁶ *Ibid*, s. 60B(2) paragraph (b).

meaningful involvement in their lives¹⁷ and the need to be protected from violence, abuse or neglect.¹⁸ To achieve these goals, the FLA stipulates that parents shall share jointly responsibility for the children upon separation¹⁹ and should also agree to their future parenting.²⁰ It has been stated that the legislation, in particular the 1995 reforms, was partially meant to change the attitudes of people, rather than change the outcome of cases tried in courts of law.²¹ This indicates to me that the 1995 reforms were intended to set norms of behaviour different from contemporary social practices. The latest reforms similarly aim to set norms of behaviour different from contemporary social practices.

The aim of encouraging joint parenting exists in Division 2 of Part VII of the FLA. The term “parental responsibility” was used in 1995 to substitute the terminology of “custody”, “access” and “guardianship” that were previously applied.²² Each parent is declared to have parental responsibility,²³ subject to any conflicting court order,²⁴ which is unaffected by any changes in the nature of the parents’ relationship.²⁵ In circumstances where the court makes a parenting order under section 65D of the FLA, parental responsibility is only affected to the extent either expressly provided for in the order²⁶ or required to give effect to the order.²⁷ Essentially, the purpose of this change in 1995 was to move away from the idea that custody resembled ownership in relation

¹⁷ Ibid, s. 60B(1) paragraph (a).

¹⁸ Ibid, s. 60B(1) paragraph (b).

¹⁹ Ibid, s. 60B(2) paragraph (c).

²⁰ Ibid, s. 60B(2) paragraph (d).

²¹ R Chisholm, *Reforming Custody Law: Recent Australian Experience*, Family Court of Australia archived papers, 3 January 2002, p 8.

²² “Parental responsibility” is defined as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”: section 61B *Family Law Act 1975* (Cth).

²³ Section 61C *Family Law Act 1975* (Cth).

²⁴ Section 61C(3) *Family Law Act 1975* (Cth).

²⁵ Section 61C(2) *Family Law Act 1975* (Cth).

²⁶ Section 61D(a) *Family Law Act 1975* (Cth).

²⁷ Section 61D(2)(b) *Family Law Act 1975* (Cth).

to the child,²⁸ and to focus on the responsibilities, as opposed to the rights, of parents in relation to their children.²⁹ Interestingly, it has been said that one aim of the 1995 reforms was to emphasise that parenthood is a status that continues even if the relationship between the parents has ended,³⁰ hence the provision stipulating that parental responsibility does not change if the parents separate, get married or remarried.³¹

In my view, since many parents actually do not even share parental responsibility throughout the intact family,³² then shared parenting arrangements upon separation are not easily attainable in practice. Moreover, it may be a child's "right" to spend time with both parents, but that may not be the best thing for the child in each particular case.

The child's best interests remain the paramount consideration when determining parenting orders³³ and a child's right to spend time with both parents only applies to the extent that it is found to be in the child's best interests.³⁴ Prior to the current amendments, the court had to consider an expanded list of factors to determine what was in the child's best interest, as set out in section 68F.³⁵ Case law has confirmed this

²⁸ See R Ingleby, "The Family Law Reform Act – a Practitioner's Perspective" (1996) 10 *AJFL* 48 at 49 for a discussion on attributing too great an importance on the use of a certain terminology.

²⁹ A Dickey, *Family Law*, LBC, Sydney, 1997, p 309 with reference to Explanatory Memorandum; Family Law Reform Bill 1994, pp 1-2, paras 1, 3; pp 26-7, para 85; H Reps Debs, 8 November 1994, pp 2758-9. See also Dewar, S Parker, B Tynan and D Cooper, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975*, Griffith University Families, Law and Social Policy Research Unit Publications, 15 June 2001 ("Dewar et al"), at p 5.

³⁰ Dewar et al, above n 29, at 5.

³¹ Section 61C(1) and (2) *Family Law Act 1975* (Cth).

³² This statement is supported by several researchers, including Janeen Baxter, who provides reasons for the lack of male input in the home in J Baxter, "Moving Towards Equality? Questions of change and equality in household work patterns" in Gatens and MacKinnon (eds), *Gender and Institutions: Welfare, Work and Citizenship*, Cambridge University Press, Melbourne, 1998, at p 69.

³³ Section 60CA *Family Law Act 1975* (Cth). Previously, the criteria was the "welfare" of the child, but this was held to be a semantic rather than a substantive move (*B v B*, Full Court judgment at Fam LR 688, FLC 84, 183).

³⁴ Section 60B(2) *Family Law Act 1975* (Cth).

³⁵ Section 68F(2) *Family Law Act 1975* (Cth) listed the relevant factors as follows: the child's relationship with both parents; the wishes of the child and factors that might affect the weight they give to those wishes, for example how old the child is; the effect on the child of any separation from a parent or other child; the practical difficulty and cost of the child having contact with a parent; the ability of each parent

principle, notably in *B and B*,³⁶ where the Full Court upheld the trial judge's decision to permit a primary caregiver mother to move interstate with her children. It was held that the reforms had not created a presumption in favour of contact, and that the child's best interests were the ultimate determinant of parenting orders.³⁷ It was also held that the child's best interests were not to be decided by assumptions about contact, but by consideration of the factors listed in s 68F(2).³⁸

One commentator has commended the Full Court's decision for placing emphasis on social reality rather than political rhetoric.³⁹ Hence, despite confusion over the intentions of the legislature, the discretion of the Full Court *in that case* remained unfettered and, as a result, the court was permitted to recognise social reality.

The 1995 reforms clearly created controversy over whether there was now a presumption in favour of contact with the non-resident parent. Some commentators have asserted, as a result of their research, that despite the decision in *B v B*, decision-makers in interim matters were often assuming that the best interests of the child would be upheld by maintaining contact rather than making that an issue for determination.⁴⁰ The confusion had manifested itself in the shift in focus from asking whether access should be ordered to how to maintain contact until the final hearing.⁴¹

to care for the child; the age, sex and cultural background of the child (including any need to maintain contact with Aboriginal or Torres Strait Islander culture); the need to protect the child from any physical or psychological harm caused by any abuse or violence; the attitude of the parents to the child and to their parenting responsibilities; any violence or violence order in the family; whether the court order will lead to further applications; and any other factors the court thinks relevant.

³⁶ (1997) 21 Fam LR 676; FLC 92-755. Full Court of the Family Court, Nicholson CJ, Fogarty and Lindenmayer JJ (Full Court judgment).

³⁷ *Ibid*, at 730.

³⁸ *Ibid*, at 735.

³⁹ R Kaspiew, above n 10, at p 70.

⁴⁰ See J Dewar and S Parker, "The impact of the new Part VII *Family Law Act 1975*" (1999) 13 *AJFL* 96, at p 116 where they discuss "the 'reverse' effect of *B and B*"; and H Rhoades, R Graycar and M Harrison, "The *Family Law Reform Act 1995*: The first three years", *Australian Family Lawyer* Autumn 2001, Volume 15 Number 1, at p 5. This article is a summary of the main findings of H Rhoades, R Graycar and M Harrison, above n 8.

⁴¹ As noted by J Dewar and S Parker, above n 40, at p 116.

The uncertainty and confusion over what the FLA implied with respect to joint parental responsibility affected the independence in decision-making authority of the parent with parental responsibility.⁴² Rather than having a clear regulation stipulating a duty to consult with the other parent, it was hinted at in various ways, for example in case law.⁴³ However, the amount of consultation required remains indeterminate.⁴⁴ It has been asserted that in the 1995 reforms, there was support for the opinion that parents have a duty to consult as well as for the view that they can act independently.⁴⁵ It has therefore been said that the duty to consult can not be regarded as especially firmly established in Australian family law.⁴⁶ There are different interpretations of the implications of this requirement.

Dewar et al conducted an investigation into the operation of the 1995 reforms, revealing that judges presented a mixture of views varying from the one that a parent could not act unilaterally without the decision of the court to the one that consultation is certainly required, but not consent.⁴⁷ Rhoades et al asserted, after the 1995 reforms, that there was no guidance for how parents should exercise their responsibility after separation – independently or in consultation with each other.⁴⁸ Dickey stated it was implicit in the law that parents shall exercise their parental responsibility jointly when reasonable to do so with consideration of the circumstances at hand, and pointed to the travaux préparatoire to the 1995 reforms to strengthen his opinion, as well as to the

⁴² As pointed out by E Ryrstedt, above n 8, at p 168.

⁴³ See *B and B* (1997) 21 Fam LR 676; FLC 92-755.

⁴⁴ Dewar et al, above n 29, at p 12 with reference to *B and B* (1997) 21 Fam LR 676; FLC 92-755 at 730.

⁴⁵ J Dewar, "The *Family Law Reform Act 1995* (Cth) and the *Children Act 1989* (UK) Compared – Twins or Distant Cousins?" (1996) 10 *AJFL* 18 at p 26.

⁴⁶ E Ryrstedt, above n 8, at p 168.

⁴⁷ Dewar et al, above n 29, at p 77.

⁴⁸ H Rhoades, R Graycar and M Harrison, above n 8, at p 52.

legislation itself.⁴⁹ Nevertheless, Dickey considered that a literal interpretation allowed each parent to exercise parental responsibility independently.⁵⁰ Interestingly, Dewar et al pointed out that the practitioners concurred that the resident parent should in practice act independently.⁵¹ As a result of this confusion and uncertainty, Australian family law was described as using a “weak” consultative model, meaning that there were certain important matters over which a resident parent should have consulted the other parent regardless of the existence of a parenting order.⁵² It will be interesting to see in time if the new reforms change this perspective.

This confusion over whether or not there existed a non-legal presumption in favour of joint parental responsibility after the 1995 reforms were introduced has arguably contributed to the making of new reforms that I have described in chapter 2. These new amendments will arguably detract from the principle that the best interests of the child are paramount. I argue that the presumption that parents should exercise joint parental responsibility – whether it is a legal or non-legal presumption – does not reflect social reality. In fact, I agree with commentators⁵³ who assert that the presumption exists to empower the parent with whom the child does not live⁵⁴ – usually the father – and that often, the best interests of the child are compromised. Displacing, in this manner, the principle that upholds the best interests of the child is undesirable for reasons that will be discussed in chapter 7 of this thesis.

⁴⁹ Dickey, above n 29, at 331 with reference to House of Representatives Debates, 8 November 1994, at p 2759.

⁵⁰ Dickey, above n 29, at p 331 with reference to s 61C(1) *Family Law Act 1975* (Cth).

⁵¹ Dewar et al, above n 29, at p 81.

⁵² E Ryrstedt, above n 8, at p 169.

⁵³ For example, R Kaspiew, above n 10; H Rhoades, R Graycar and M Harrison, above n 8; and, M Kaye and J Tolmie, “Fathers’ Rights Groups in Australia and their Engagement with Issues in Family Law” (1998) 12 *AJFL* 19.

⁵⁴ Formerly known as the contact parent.

3.1.3 Procedural issues concerning children's matters

In this section, I will show that similar changes to the new reforms had already been made in the *Family Court Rules 2004* ("the Rules"); I will assess those changes and critique the underlying assumptions as present in the current reforms.

Where separated parents are capable of complying with the injunction to reach agreements concerning the division of responsibilities and future arrangements for their children,⁵⁵ Part VII of the FLA facilitates the making of a registrable parenting plan.⁵⁶ Parents may also jointly obtain consent orders (a decision based on an agreement), which is very similar to a registered parenting plan. In matters where the parents are unable to reach agreement and resort to seeking the court's assistance, the court is authorised to make parenting orders dealing with virtually all aspects of parental responsibility.⁵⁷

Prior to the current amendments, changes had already been made to the system to require, rather than encourage, parties to attempt to reach agreement before applying to the court for a determination. In fact, the commencement of the Rules on 29 March 2004 brought about considerable change to the practice of Australian family law, including the introduction of pre-action procedures. The current amendments stipulate that these pre-action procedures will now apply to all parenting matters under the Act, irrespective of the court in which they are commenced.

The pre-action procedures require a parent to follow certain steps before he or she may file an application seeking parenting orders.⁵⁸ The Rules had been described as the

⁵⁵ Section 60B(2)(d). See also s 63B, which encourages parents to agree rather than apply for a court order as long as the agreement prioritises the best interests of the child.

⁵⁶ Sections 65DAB and 63C *Family Law Act 1975* (Cth).

⁵⁷ Section 64B *Family Law Act 1975* (Cth).

⁵⁸ The law about pre-action procedures in parenting cases is set out in Rule 1.05 and Schedule 1 Part 2 *Family Law Rules 2004*.

most “overt instrument of cultural change”⁵⁹ in the history of contemporary Australian family law, and the pre-action procedures in particular have been viewed as one of the most significant and dramatic developments in family law practice and procedure since the FLA was enacted⁶⁰ – that is, until these amendments came into force. These rules try to force people to be conciliatory at a time when the highly emotional and stressful circumstances often render parties incapable of rational thought.

Economic and managerial factors were the driving force behind the rule to introduce compulsory pre-action procedures. This change was initiated as a reaction to the increasing number of litigants passing through the FCA and other courts dealing with family law matters.⁶¹ The FCA needed to become more efficient in dealing with the load, and this could be achieved by compelling parties to make more attempts at resolving their own disputes rather than resorting to the courts to have orders imposed.⁶² It has been said that as a result of the pre-action procedures, many hopeless cases would be abandoned and many cases of merit would either be settled or reduced to a state where they could be resolved in a cheaper and quicker way if litigation were necessary.⁶³

The pre-action procedures already required all prospective parties to a children’s case to attempt to resolve their disputes by some form of primary dispute resolution such as mediation, counselling, negotiation, conciliation or arbitration.⁶⁴ It has not been

⁵⁹ T Altobelli, “*Family Law Rules 2004 – A Brave New World of Family Law Practice*”, published in NSW Young Lawyers *A Fresh Perspective*, Law Society of NSW at p 3, and presented by NSW Young Lawyers on 27 July 2004.

⁶⁰ Ibid at 15.

⁶¹ See the Explanatory Statement, *Family Law Rules 2004*, 2003 No. 375 – <http://scaleplus.law.gov.au>.

⁶² As stipulated in Schedule 1 Part 2, 1(5)(b) *Family Law Rules 2004*.

⁶³ M Hauptmann, “Pre-action procedures”, published in NSW Young Lawyers *A Fresh Perspective*, Law Society of NSW, at p 2 and presented by NSW Young Lawyers on 27 July 2004.

⁶⁴ Except in limited circumstances, for example, when there are allegations of child abuse or family violence. Other circumstances when compliance with the pre-action procedures is not necessary are set out in rule 1.05(2).

necessary for parties to attend a government-funded or approved organisation for formal mediation to comply with this rule. A demonstration of a genuine effort to resolve a dispute using informal or formal methods falling within the description of primary dispute resolution has been sufficient. However, if dispute resolution is unsuccessful, then prospective litigants have also been encouraged to write to the other party, setting out their claim or proposal and exploring options for settlement,⁶⁵ again as a measure to avoid commencing court proceedings. A duty of disclosure was also imposed on the parties in relation to matters involving their child, for example, schooling, extra-curricular activities and living arrangements.⁶⁶ If reasonable attempts had been made to follow the pre-action procedures but they were unsuccessful, then the parties were able to apply to the court. What is meant by “a genuine effort” and “a reasonable attempt” has been difficult to ascertain, and although there are examples listed in the Rules of what constitutes non-compliance,⁶⁷ it largely depends upon the discretion of the decision-maker dealing with the case. Although non-compliance with the pre-action procedures has, until now, not prevented someone from filing an application seeking parenting orders, there have been costs implications for those matters that do not fall in the exemption category.⁶⁸

⁶⁵ Schedule 1 *Family Law Rules 2004*.

⁶⁶ Schedule 1 Part 2, 4 *Family Law Rules 2004*.

⁶⁷ Schedule 1 Part 2, 2(5) *Family Law Rules 2004*.

⁶⁸ Compliance is dealt with in Schedule 1 Part 2, 1 *Family Law Rules 2004*. Cases exempt from the pre-action procedures are those involving urgency or (as mentioned) allegations of child abuse or family violence; where a person would be unduly prejudiced or adversely affected if another person became aware of the intention to commence proceedings (for example, where there is a genuine concern that the other party will attempt to defeat the claim if they have this prior knowledge); and where there has been a previous application about the same issue in the subsequent 12 months: Rule 1.05(2) *Family Law Rules 2004*. Other known acceptable circumstances in which a person may be unable to comply with a part of the pre-action procedures include, where there is no suitable primary dispute resolution service available, for example in a rural area, and no other practical way of attempting to resolve the dispute. This example is not stipulated in the Rules but is left to the discretion of the decision-maker.

The pre-action procedures are aimed at changing what is considered an adversarial culture. An examination of how the English equivalents of pre-action procedures⁶⁹ have been received is a helpful way in understanding the fate of this change in the Australian system. In their explanatory statement of the *Family Law Rules 2004*, the Judges of the FCA stated that the UK experience of implementing pre-action protocols has meant that “the culture has undoubtedly changed”.⁷⁰ They pointed out that the main objective of the protocols is being met by certain practices including, better communication between parties prior to action; better exchange of information; and improved opportunities for settlement.⁷¹ Reports from the Law Society of England and Wales have also proven an overall positive outcome, with the latest figures indicating that 80% of respondents to a survey thought the pre-action protocols encouraged pre-issue settlement.⁷²

This discourse of a litigious culture has inevitably led to finger pointing at the legal profession, especially solicitors, and the allegedly adversarial way in which they manage cases. I argue, however, that the changes have not modified the profession’s practice but that of the litigants’, especially self-represented litigants. The normative function of the rules has been to help to set expectations and control the handling of the cases in a procedural sense.⁷³ As negotiation and other forms of alternative dispute resolution are not in everyone’s interests, there was a need to change the behaviour and expectations of the litigant in terms of the function of the system.

Many argue that even with these changes, alternative forms of dispute resolution are still not in everyone’s best interests. One commentator has described the negotiation

⁶⁹ In England, there are two protocols dictating pre-action behaviour – an ancillary relief pre-action protocol endorsed by a practice direction, and a pre-action protocol issued by the Family Law Committee of the Law Society of England and Wales.

⁷⁰ Explanatory Statement, *Family Law Rules 2004*, 2003 No. 375 – <http://scaleplus.law.gov.au>.

⁷¹ Ibid.

⁷² Law Society of England and Wales, Woolf Network Questionnaire No 6 Responses, www.lawsoc.org.uk.

process as “jurisprudentially suspect”⁷⁴ because it has an inherent tendency, through its private nature, to compromise important legal or political issues of public interest to women.⁷⁵ While the FCA is compelled through the FLA to consider a number of public interest issues in deciding certain family law disputes, the parties in private negotiations are not. It has been argued that this can have detrimental consequences for women,⁷⁶ for example, by privatising issues of violence, or failing to protect the best interests of the child.⁷⁷

The counter-argument is the assertion that negotiations and mediation are party-controlled and therefore if a party is dissatisfied with the negotiations or the offers made, they may end the process and turn to litigation. This assertion does not, however, factor in the social reality that the choice lies with the party who can afford litigation, and very often, it is not the woman.⁷⁸ Field asserts that because women are more often in the financially weaker position, they can be forced into a private settlement to avoid the costs of litigation, which does not serve their interests and ignores important issues of public policy developed for their protection.⁷⁹

Perhaps partially in response to the concern that private negotiation is not in everyone’s interests, and also in an attempt to reduce the adversarial nature of the family law system, the FCA introduced the Children’s Cases Program (“the CCP”). It was being trialled before the current amendments were implemented. A new Division

⁷³ Advantages and disadvantages of rules will be discussed later in the thesis.

⁷⁴ R Field, “Participation in Pre-Trial Legal Negotiations of Family Law Disputes: Some Issues for Women” (1998) 12 AJFL 240 at p 249.

⁷⁵ For further discussion, see R Chisholm, “Paternity and Public Interests: *In the Marriage of G and H* (Full Court: Fogerty, Strauss and Wilczek JJ; 23 April 1993)” (1993) 7 AJFL 270. His article refers to the writing of R Graycar and J Morgan on the issue in *The Hidden Gender of the Law* (Federation Press, 1990), especially Chapter 3.

⁷⁶ R Field, above n 74, at p 250.

⁷⁷ C Menkel-Meadow, “Lawyer Negotiations: Theories and Realities – What We Learn From Mediation” (1993) 56 *Modern Law Review* 361, at p 368.

1A of Part VII of the Act in effect codifies the CCP, and makes participation mandatory for all cases commenced after 1 July 2006. In the following section, I will critically appraise this program.⁸⁰

3.1.4 Existing FCA initiatives to improve the system: CCP

The FCA has been concerned for some time now that the parameters of the adversarial system hinder a decision-making process that is in the best interests of the child.⁸¹ It did not require the Standing Committee's Report to realise that change was needed. The CCP is arguably an acknowledgment by the FCA that there is room to improve how a court can best serve children.⁸² It endeavours to safeguard the right of the disputants to natural justice and procedural fairness, but its aim is to concentrate more on the future proposals of the parties rather than being a forum for rehashing past events that are immaterial to deciding what should be the future arrangements for residence, contact and other parental responsibilities.

The FCA commenced this trial in its Sydney and Parramatta Registries in March 2004.⁸³ The model being trialled was devised and commenced by various stakeholders in the family law jurisdiction, including a steering committee of judges after an examination of the processes in the French and German systems, where a more inquisitorial model is used to determine children's cases. A goal of the CCP is to avoid

⁷⁸ For further discussion, see R Field, above n 74, at p 250. In my view, this article is slightly outdated, as women are increasingly in a financial position to litigate.

⁷⁹ R Field, above n 74, at p 250.

⁸⁰ The FCA Practice Direction No. 2 of 2004 establishes the Children's Cases Program. Much of the information contained in this section has been obtained from the demonstration workshop on the Children's Cases Program that was presented by the Family Court of Australia, and in particular His Honour Justice Le Poer Trench of the Sydney Registry, on Monday, 22 November 2004. For more information on this trial program, see D Sandor, "A more future-focused approach to children's hearings in the Family Court" (2004) 18 *AJFL* 5.

⁸¹ As pointed out by G Meredith, "The Children's Cases Program Pilot – Was it a Success and is it the Way of the Future?" *Australian Family Lawyer*, Volume 18 No 2, June 2005.

⁸² As Brennan J noted in *J v Leischke* (1987) 162 CLR 447 at 457.

having hearings follow a strict formula, with a great deal of flexibility as to how individual cases are heard. However, although the way the cases are heard is quite different, the substantive law is unchanged in that the best interests of the child remain the paramount consideration and the provisions of the FLA and case law remain relevant. This is important to note because it shows that many of the concerns associated with informal models of dispute-resolution are addressed.

At the start of the first day of the hearing, the Judge introduces himself or herself and the other people in the courtroom, including the Judge's Associate, the Case Coordinator and a Mediator from the court's counselling section. The parties and their lawyers are given a business card with the contact details of the Judge's Associate and the Case Coordinator. The Judge then takes the appearances of all parties and their lawyers before the parties take an oath or affirmation. Then each party has an opportunity to address the Judge on their views, what they think the case is about, or their grievances. This level of formality, or informality, continues throughout the proceedings.

A major aspect of the program is the departure from some of the traditional features of the adversarial process, particularly from the rules of evidence stipulated in section 190 of the *Evidence Act 1995* (Cth). The Judge may direct parties to give or obtain evidence on any relevant issue, and this may occur in spite of what the parties assert. The Judge determines what evidence will be given, by whom, and the method of receiving the evidence. No subpoena may be issued without leave of the Judge. Parties usually give evidence by affidavit unless otherwise directed, however evidence of other witnesses is usually given orally.

⁸³ It must be noted that the pilot has actually ended and we are currently awaiting the report, which results from the evaluation of CCP.

Interestingly, different ways of involving children were being assessed, including by direct participation. Until now, the common view has been that generally it is not in the best interests of children to be directly involved in the litigation process with their wishes usually obtained through Family Reports and/or a Child Representative.⁸⁴ However, this view is not universally held. In many countries, particularly European countries, the children have a much more direct involvement. While some commentators believe the Australian system for involving children ought to be re-appraised and open to significant change,⁸⁵ others are cautious about increasing children's direct involvement.⁸⁶

Some of the strengths of CCP are: it allocates greater management of each case to the decision-maker, with judges being required to undergo specialist training in respect of mediation techniques to equip them with skills required to meet demands of conducting hearings in a less adversarial manner; from the outset, there is a significant amount of interaction between the parties and the Judge; the process is less formal while not forgetting the substantive law and authority of the Court.⁸⁷

This indicates to me that the FCA has attempted to find a midpoint between mediation and litigation, in its attempt to improve its approach to resolving or determining cases. It is also an acknowledgment by the FCA, and now the Government,

⁸⁴ Child Representatives are now called Independent Children's Lawyers.

⁸⁵ For example, Chief Justice Bryant, who addressed this issue in her speech to family law practitioners attending the 11th National Family Law Conference on the Gold Coast, on 27 September 2004. Extracts from her speech are published in *Current Family Law*, Volume 10, December 2004, Number 6, Thomson Lawbook Co.

⁸⁶ For example, the Family Law Section of the Law Council of Australia, which airs its views in its response to the Australian Government's discussion paper, www.familylawsection.org.au/members/content. The CCP has been trialling different ways in which children may be included in the proceedings. Further discussion of this debate is beyond the scope of this thesis.

⁸⁷ For instance, whether the Judge wears a wig and robes is optional.

that parties still require a court-like set-up when they are unable to resolve their disputes through mediation.

In terms of an assessment of the CCP, the feedback received so far from parties participating in the program has generally been positive.⁸⁸ The private profession's response has been mixed.⁸⁹ Given the experience with the Judge is interactive, parties feel as though they are being heard and there is an element of empowerment for the parties in this process.⁹⁰ They are not having an edited version of their story presented for them, and hence they feel they have more control over the proceedings than in the adversarial process.

On the other hand, lawyers have been worried that advising clients to participate in the program could put them at risk of professional negligence claims, as they cannot control what matters go into evidence and hence, have a reduced capacity to determine how much preparation and detail is required for each issue.⁹¹ The waiver of the rules of evidence has been the main concern, as evidence that would be otherwise inadmissible is conditionally admissible, and there are no objections taken of any documents or statements, except on the grounds of privilege, illegality or some other serious matter. Clearly, a concern for practitioners is not being able to give a client an idea of what may occur at the hearing, given the flexibility with which cases can be run. It is much harder to predict the course of events in this process than in the usual adversarial model.⁹²

⁸⁸ As reported by P Boers, "The Less Adversarial Approach to Determining Children's Cases", written in November 2004 and published in the *Australian Family Lawyer*, Vol 18, No 1.

⁸⁹ For a detailed discussion on the feedback from the profession, see G Meredith, above n 81.

⁹⁰ This is an observation derived from my own experience in the program and from having discussed the issue with other practitioners about their clients' reactions.

⁹¹ As observed by G Meredith, above n 81.

⁹² P Boers, above n 88.

Evidence has suggested that the demeanour of the parties in the CCP has generally become more conciliatory and less adversarial than in normal trials.⁹³ In this way, it is practice and procedure that is succeeding in changing attitudes and making the family law system more accessible to the public.

This attempt at using practice and procedure in family law to change social attitudes could be made earlier in the history of the relationship. By providing assistance and support to intact families, preferably before they have children, and educating them on the fundamental principles of the system at that stage, then presumably fewer families would require a determination of their children's matters in the event of separation. Essentially, an understanding of the fundamental principles must be acquired earlier on in the life of a family than at the dispute-resolution stage, so that parents may make informed decisions about the future care arrangements for their children. I consider this to be a significant long-term remedy. I will develop this argument later in chapter 7.

In addition to the CCP, other initiatives have been taken by the FCA to improve the system for its users and increase public confidence, such as public education on the system. Despite its efforts it is continually criticised by the Government, the media and fathers' rights groups, who evidently have different expectations about its purpose.⁹⁴ Significant efforts are constantly being made to inform the public about the system, from the laws involved to the way matters are run in court. Amongst its efforts is the promotion of a comprehensive website so that all households that have access to the worldwide web may easily and painlessly seek information about the court's processes and read about the directions and orders made by judges in several cases. It provides a plethora of information including access to court forms and guidance on how to use

⁹³ The Family Lawyers Forum, Sydney Registry, Minutes of Meeting, 22 July 2004.

⁹⁴ The expectations of fathers' rights groups are discussed in chapter 7.

them, as well as links to legislation and a step-by-step guide on proceedings in the FCA. Importantly, in the step-by-step guide, the fundamental principles of the FLA are spelt out in plain language.

Some commentators believe that by offering to the public the opportunity to see how the system works, calculate how long cases take to be resolved, read what the issues and cases are said to be, and hear what a judge has to say and why, Family Courts around the world will inevitably capture public confidence.⁹⁵ They are of the view that this can be achieved through informative websites that are easy to navigate. The websites of the FCA,⁹⁶ the Family Court of Western Australia⁹⁷ and the Federal Magistrates Service⁹⁸ have been described as world leaders in providing “excellent information, ease of access and presentation.”⁹⁹

In addition to creating a comprehensive website to improve the system, the FCA also assists the public by offering a free user information service to anyone requiring guidance on the procedures of the FCA, regardless of whether or not they have already filed an application. Brochures are also available in hardcopy at the court and online with detailed descriptions of almost every aspect of the family law system including, children and separation, parental responsibilities and parenting orders and mediation services. In light of these efforts to provide information to the public on the system, there ought to be an improvement in the level of public confidence in the court and the family law system generally.

⁹⁵ Judge Peter Boshier, the Principle Judge of the New Zealand Family Court, expresses this view in his article entitled, “Family Law in New Zealand”, *Australian Family Lawyer*, Vol 17, No 4.

⁹⁶ www.familycourt.gov.au

⁹⁷ www.familycourt.wa.gov.au

⁹⁸ www.fms.gov.au

⁹⁹ D Hodson and A Harland, “Website Resources for the Family Lawyer and Client”, *Australian Family Lawyer*, Vol 17, No 2.

Essentially, the FCA and other courts with comprehensive websites have opened themselves up to public scrutiny in a bid to inform and educate the community, and increase respect for the system. The problem is that its efforts generally reach the minority of the population requiring its assistance, and this leaves the remainder of the community with misleading messages about the system. It is important, therefore, to focus on reaching a wider audience. Somehow, the entire population must benefit from an education of the system, its principles and purpose in order to hopefully eradicate the unrealistic expectations and misconceptions held by the public.

Perhaps because the Government observed that attitudes of the public were capable of being modified by changes in practice and procedure, it set about to completely change the way the system deals with parenting disputes in order to rectify the perceived problems. Hence, rather than acknowledging and encouraging these initiatives of the FCA, and looking to other possible contributory sources for what it saw as the problematic way in which parenting arrangements were being made, the Government decided to use legislation to make further social changes. My argument is that legislative reform alone cannot realistically be used as a mechanism for introducing social change and I will develop it in chapter 4.

The second issue is the substantive content of the changes. One of these changes is the introduction of a formal equality model of parental responsibility. In the following section, I discuss three problems with using such a model: that such a law can become the cause of conflict; it undermines the gendered role of the primary caregiver, which

continues in practice to remain the woman's responsibility;¹⁰⁰ and it relies on incompatible expectations from the same individuals.

A formal equality model of parental responsibility may have these results when it is not the social norm because it creates a disjuncture between the law and social reality, and makes the law itself the cause of conflict as it raises unrealistic expectations. This is supported by research showing that where the law reflects social reality, it is conducive to more workable arrangements. For example, according to Rhoades et al, in cases where each of the parents had exercised their responsibilities jointly and cooperatively before separation, it was readily agreed that those arrangements would continue.¹⁰¹

3.2 Problems with the formal equality model of parental responsibility

3.2.1 Fresh ground for disputes: "rights" of non-resident parents

It came to the attention of certain commentators shortly after the implementation of the Reform Act 1995 that the lack of clarity in the legislation led some non-resident parents to believe they had "rights" to be consulted about day-to-day decisions affecting the child.¹⁰² These so-called "rights" thus encouraged non-resident parents (mostly fathers) to seek a shift in the balance of bargaining power through increased court applications, while resident parents (mostly mothers) saw their position weakened.¹⁰³

As a result, it was reported that there had been a rise in the number and detail of specific

¹⁰⁰ Time use studies show women do more domestic work and childcare, while men spend more time in paid employment: D de Vaus, *Diversity and change in Australian families: Statistical profiles*, Australian Institute of Family Studies, 2004, web version www.aifs.gov.au/institute/pubs/diversity/main.html, p 4. Also pointed out by several commentators, including S Boyd and H Rhoades in S Boyd, H Rhoades and K Burns, "The Politics of the Primary Caregiver Presumption: A Conversation" (1999) 13 AJFL 233 at pp 236 and 244. See too J Baxter, above n 32 at p 69.

¹⁰¹ H Rhoades, R Graycar and M Harrison, above n 40, at p 1.

¹⁰² H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?: Interim Report, April 1999*, University of Sydney and Family Court of Australia, ch 1; and J Dewar and S Parker above n 40, at pp 104 and 110.

¹⁰³ Ibid.

issues orders qualifying and quantifying the resident parent's authority and responsibilities.¹⁰⁴

It has also been pointed out that the reforms had created greater opportunities for a non-resident parent to maintain a certain degree of control over the life of the resident parent regardless of whether or not it resembled actual parenting practices.¹⁰⁵ This has been particularly dangerous in cases of abusive non-resident parents, who have used these laws to harass and interfere with the life of the child's primary caregiver by challenging her decisions and choices.

What could formerly have been described as an "existing arrangements principle" – whereby there was no presumption in favour of one parent or the other but a preference for the status quo – was replaced by concerns about parental "equality". Subsequent to the 1995 reforms, decision-makers in interim matters became particularly conscious about avoiding the creation of a status quo in favour of one parent.¹⁰⁶ Findings have shown that interim residence orders have been made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than by an assessment of the child's best interests or by consideration of the "existing arrangements" principle.¹⁰⁷ Decisions have been made by taking into account the interests of the contact parent, rather than on the foundation of the child's welfare. Hence, not only have the child's best interests been compromised, but the reforms have undermined the position of the primary caregiver. In my view, the new changes will serve to reinforce these problems.

¹⁰⁴ H Rhoades, R Graycar and M Harrison, above n 40, at p 2.

¹⁰⁵ J Dewar and S Parker above n 40, at p 105.

¹⁰⁶ H Rhoades, R Graycar and M Harrison, above n 40, at p 4.

¹⁰⁷ Ibid.

3.2.2 Undermining and de-gendering the role of the primary caregiver

Although the custody provisions of the FLA have always been phrased in gender-neutral terms, it has been argued that “extreme gender neutrality” was entrenched into the legislation with the introduction of the 1995 reforms.¹⁰⁸ Since the enactment of those reforms, the statutory regime has been based on the presumption that mothers and fathers shared their parental or care-giving responsibilities while the relationship was intact. It follows that the law supports parents in the continuation of sharing the parental or care-giving responsibilities after separation, in the way they are assumed to have done before separation.¹⁰⁹ To encourage the aim of shared parental responsibility in practice, the legislation severs the link between care-giving work and parental authority.¹¹⁰ This concept came with the 1995 reforms and is strengthened now with the current changes. Both parents are thus constructed as having equal “powers, responsibilities and authority”¹¹¹ for their children regardless of which parent the children live with,¹¹² and whether or not it is true in practice.

Although the formal equality model of parenting aims to achieve increased responsibility for men as parents, it overlooks the importance of the role of the primary caregiver, de-genders it in theory and ultimately undervalues it in practice. This undervaluing occurs because the social reality continues to be that women still tend to remain the primary caregivers after separation, even if they also work and contribute economically, yet their decision-making powers are significantly limited. Essentially,

¹⁰⁸ H Rhoades in S Boyd, H Rhoades and K Burns, above n 100, at p 244.

¹⁰⁹ Sections 60B(2) (a) and (c) *Family Law Act 1975* (Cth); House of Representatives, *Family Law Reform Bill 1994*, Hansard, 21 November 1995, p 3303; Senate, *Family Law Reform Bill 1994*, Explanatory Memorandum, November 1994, para 5.

¹¹⁰ Prior to the introduction of the 1995 reforms, section 65E(2) of the *Family Law Act 1975* (Cth) provided that a person who was “granted custody of a child” had “the right to have the daily care and control of the child” and “the right and responsibility to make decisions concerning the daily care and control of the child”.

¹¹¹ Section 61B *Family Law Act 1975* (Cth).

¹¹² *Ibid*, ss 61C and 61D.

legal models which reflect an “ideal” rather than a reality fortify the legal power of men without actuating a real increase in responsibility for the day to day care of children.¹¹³

3.2.3 Incompatible expectations

It is paradoxical that the legal regime allowing two parties to separate and pursue their individual autonomy, through no-fault divorce, is the same regime that expects those parties to work together in making decisions about the future care of their children.¹¹⁴ This disjunction between the different parts of family law is, in my view, one stumbling block for the latest reforms that introduce a presumption of shared parenting.

The law acknowledges the desirability of allowing two adults to decide how they are to live – together or separately. The same individuals are, however, expected to work together for the best interests of the child. As discussed by Smart and Neale, the psychological and social factors remain the same but the behaviour is expected to be different.¹¹⁵ A presumption of shared parenting will require far more interaction between the parents, not only to make decisions about the future care of their children, but arguably about day-to-day arrangements. If this “presumption” of law is to work effectively, then the concept of individualism will ultimately have to be compromised. Alternatively, if individual autonomy remains an underlying value of the system, then maybe the whole idea of shared parenting is doomed to fail.

Moreover, the potential impact of these changes on the best interests of the child could be dangerous. A presumption of shared parenting will simply assume that shared

¹¹³ As asserted by R Kaspiew, above n 10 at p 71.

¹¹⁴ Smart and Neale examine the principle of selfhood and the need to pursue individual autonomy in their discussion of why the family has become interesting to mainstream and theoretical sociology: C Smart and B Neale, *Family Fragments*, Polity Press 1999.

¹¹⁵ Ibid, chapter 4.

care occurred during the intact family. This could be damaging for the children, as although the international trend has been to enhance the custodial rights of fathers through legislation,¹¹⁶ it is being done without sufficient regard for the real situation and the conflicting evidence concerning the benefits for children of such arrangements, some of which I discuss in chapter 7. If separated parents are assumed in theory to have equally shared the care for their children during the intact family, then the legislation will create a normative standard that will be unattainable in practice for many,¹¹⁷ and this will simply further remove the legal framework from social reality. The laws will more often than not bear little, if any, resemblance to the parenting responsibilities assumed in the intact relationship.

I am not saying that the law cannot make the normative statement that parents are expected to share responsibility for their children. Rather, I am arguing that unless significant cultural changes are made, involving economic and social restructuring then these changes to our family law system will fail. Such cultural change can in part be brought about through legal norms, as evidenced through the apparent success of the CCP in changing attitudes. In contemporary society, a norm-creating function is primarily performed by the law. However, in doing so, the law will have to encourage rather than enforce, perform an educative function rather than be prescriptive, work in conjunction with other institutions and most importantly, various areas of law should embody the same normative standards. For instance, the aspiration for joint parenting in family law will at least require a comparable change in industrial laws so that both men

¹¹⁶ As pointed out by S Boyd in S Boyd, H Rhoades and K Burns, above n 100, at p 236.

¹¹⁷ As pointed out by Rowlands J, "Recent Developments in Shared Parenting and Joint Custody – A Personal View From the Court", 10 May 2005, at p 6, with reference to The Family Court of Australia, Response to the Australian Government's Discussion Paper, "A New Approach to the Family Law System: Implementation of Reforms", January 2005.
http://www.familycourt.gov.au/presence/resources/file/eb00054114bd588/Shared_Parenting_Conference_Paper.pdf

and women are encouraged to take equal time off as parental leave; child care is the responsibility of every employer; and tax systems do not encourage women to be the primary caregivers to their children. I discuss this in more detail in the following chapter.

CHAPTER 4: FAMILIES AND FUNCTIONS – REGULATING THE AUSTRALIAN FAMILY

4.1 Definition of family

Although law can be viewed as a source of meanings either through the confirmation of established norms or the legitimization of new ones,¹ such meaning can only be created within the constraints of actual, existing social realities. Our history has seen the evolution of a particular model of the family – the nuclear family – which the majority of families today continue to uphold. In this traditional structure of the family unit, the role of the woman largely remains that of primary caregiver even if she is in the workforce, and the role of the man largely remains that of the economic provider.² Therefore, the new reforms introducing shared parenting will have the effect of creating a normative standard that will show a strong disjuncture with the actual practice for many families. In this chapter, I demonstrate that history affects our living present, in order to show that if we ignore this we underestimate the difficulty in, and efforts required for, achieving widespread cultural change.

¹ As expressed by C Smart, “Towards an Understanding of Family Change: Gender Conflict and Children’s Citizenship” (2003) 17 *AJFL* 20, at p 22.

² R Kaspiew, “Equal Parenting or the Effacement of Mothers? *B and B* and the Family Law Reform Act 1995 (Cth)”, (1998) 12 *AJFL* 69, at p 71; M Slaughter, “The Legal Construction of ‘Mother’”, in M Fineman and I Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, Routledge, New York, 1995, at p 73; H Glezer, “Juggling Work and Family Commitments” (1991) 28 *Family Matters* 7, pp 9-10; I Wolcott, “Work and Family”, in D de Vaus and I Wolcott (eds), *Australian Family Profiles: Social and Demographic Patterns*, Australian Institute of Family Studies, Melbourne, pp 81, 87. Recent statistics also suggest that Australian women do more domestic work and childcare while men spend more time in paid employment, and that mothers spend more time caring for children than fathers even when both parents are employed full time: D de Vaus, *Diversity and Change in Australian Families: Statistical Profiles*, Australian Institute of Family Studies, 2004, web version www.aifs.gov.au/institute/pubs/diversity/main.html, at p 4.

Having now said that the definition of family today is largely influenced by its history, a discussion of that history is relevant. Firstly though, it is important to note that there is no single form of the family. Historical studies demonstrate the genesis and vulnerability of the traditional notion of the nuclear family and statistics show the ever-changing trends of contemporary relationships.³ Its meaning has become increasingly hard to identify given the constantly evolving population over time, and in contemporary society there are several definitions depending on the way individuals forge relationships. We do not live in a homogenous society and as a result there cannot be a homogenised notion of the family.

However, there is one notion of the family that the Australian Government strives to protect, perhaps because of the “belief in [its] universality and/or superiority”.⁴ That ideal of the family is comprised of a mother, father and their biological or adopted children, and is known as the traditional or nuclear family. It is one definition that the law upholds, thus excluding others from regulation and the protection of rights.⁵

To understand how we arrived at the definition of the family as the nuclear family, it is worth undertaking a brief analysis of various theories on its evolution. While family traditionalists mourn the loss of what they see as the traditional family encapsulated by stability, values and morality,⁶ others conclude that the traditional family is a myth, but a myth that we have always required to make sense of the communities we live with and to

³ See D de Vaus, above n 2, at pp 1-2, where he discusses the diversity of family types and provides statistics.

⁴ L Nicholson, “The Myth of the Traditional Family” in Hilde Lindemann Nelson (ed) *Feminism and Families* (1997) New York and London: Routledge, at p 35.

⁵ An examination of the regulation of relationships between those who legally are not considered to be “family” is unfortunately beyond the scope of this thesis.

⁶ As discussed by A Diduck, *Law’s Families* (2003) LexisNexis UK, at p 21.

provide us with a basis from which to face the future.⁷ Gillis sees families as personally responsible for creating and sustaining images of themselves.⁸ Diduck, on the other hand, is of the view that these images take their shape, at least to a certain extent, from the values we feel we have lost from the “traditional family”.⁹ She believes they are both personal and universally “traditional”, as the moral attributes we ascribe to traditional families – romantic love, stability, loyalty and unity – reflect the expectations or hopes we have for our relationships and embody what we would like family life to mean in an uncertain and seemingly amoral civilization.¹⁰

Gillis states that although some of the characteristics we have attributed to traditional families – a reverence of family history and ancestors, the multi-generational household, the sanctity of marriage and the stability of home as a physical place – were the same for families of the past as they are for the present, we continue to idealise them as historical truth rather than consider that the “traditional family” never existed in reality.¹¹

Whether or not the traditional nuclear family is imaginary or real, its roots and variations of its concept arguably date back a few centuries. For the Victorians it is said to have been, “located sometime before industrialisation and urbanisation.”¹² However, “for those who came of age during the First World War, tradition was associated with the Victorians themselves”.¹³ It has been argued that modern family law in the UK was

⁷ J Gillis, *A World of Their Own Making: A History of Myth and Ritual in Family Life* (1997) Oxford and New York: Oxford University Press, at p 5.

⁸ Ibid.

⁹ A Diduck, above n 6, at p 21.

¹⁰ A Diduck, above n 6, at p 22.

¹¹ J Gillis, above n 7, at pp 1-19.

¹² J Gillis, above n 7, at pp 4-5.

¹³ J Gillis, above n 7, at pp 4-5.

established through the obligation of legal marriage in 1857.¹⁴ This ended “informal” marriage and created a framework whereby obligations between spouses, and between parents and children, could be easily regulated.¹⁵ Foundational in Victorian marriage was gender inequality, with wives and children belonging to husbands.¹⁶ Men’s legal relationship to their children occurred through marriage and it was only through marriage that women could give birth to legitimate children while at the same time losing the legal guardianship of those children. The legal status of marriage was as a result the source of a variety of legally defined and regulated relationships.¹⁷

The perception of the traditional family that we hold today is one that derives from the 1950s and early 1960s. This variation of the traditional family emerged with what Diduck describes as, “the romantic love complex and the nuclear family,”¹⁸ first among the landed class in the United Kingdom and later among the emerging middle class in the eighteenth century. Characterised by husband and wife, it was “geared to relations of affection as the household [became] less a unit focused on production and more on sexuality, intimacy and consumption”.¹⁹ Spouses were selected on the basis of love and predetermined roles within that relationship complemented each other.²⁰ The mother’s role became fixed as protector of the family’s moral welfare and the father’s as distant, but secure, provider.²¹

¹⁴ C Smart, above n 1, at p 23.

¹⁵ C Gibson, *Dissolving Wedlock*, Routledge, London, 1994.

¹⁶ C Smart, above n 1, at p 23.

¹⁷ Ibid.

¹⁸ A Diduck, above n 6, at p 22.

¹⁹ L Nicholson, above n 4.

²⁰ A Diduck, above n 6, at p 22.

²¹ M C Regan, *Family Law and the Pursuit of Intimacy* (1993) New York and London: New York University Press.

There is a subtle difference between the Victorian version of the family and the 1950s version, which is described by Nicholson as follows: “While the Victorian ideal of domesticity included wife and mother at home, it portrayed her household activities in a very different way from the ideal of the 1950s. A notion of woman as moral guardian of the hearth who left her more practical tasks to servants gave way to an ideal of woman who was morally and psychologically fulfilled through housework and child-rearing. The family became seen as the site of leisure and consumption where, ideally, leisure activities were carried out together”.²²

Diduck notes that this version of the traditional family represents it as a “classed” concept, as to sustain it would require adequate financial means.²³ For example, the working classes of the Victorian era could not afford the new bourgeois model with the employment of servants, and the poor in the 1950s could not afford the middle-class ideal of the fiscally autonomous nuclear family with the wife at home. Nicholson asserts that it has racist origins as well, and gives the example of the economic expansion of the 1950s in the United States that excluded a large number of people such as African-Americans, who were refused access to the wealth of the professional sectors of the economy and as a result, to the newly dominant middle class and its ideal of the “traditional family”.

Obviously the nuclear family is also sexed and gendered. Its heterosexual nature is seen as a given and the gender roles of the parties stringently set. In the UK this normative code was given further meaning by the creation of the modern Welfare State, which adopted wholly the male breadwinner and female housewife model of married

²² L Nicholson, above n 4, at p 33.

²³ A Diduck, above n 6, at p 23.

life.²⁴ It is vital to acknowledge the extent to which the history of family law is embedded into “cultural memory”²⁵ and as a result, into present-day expectations. In spite of the rise of the Women’s Movement in the 1960s, this deep set of expectations continued at the level of gendered understandings of marriage even after the legal regime to sustain it had been modified. Smart demonstrates this by pointing out that people continued to speak of matrimonial fault and guilty spouses long after the divorce law in the UK was changed in 1969.²⁶ Equally, people continue to use the terms “illegitimacy” and “custody and access” even though these terms are no longer used in family law.²⁷ In this way, history remains active in how we live our lives today, and it takes more than a change in legislation to remove certain normative expectations.²⁸ I argue that this identity is a clearly defined one in terms of parenting functions.

Hence, the notion of the family that continues to dominate today is one that connotes values such as loyalty, stability, cooperation, love and respect, as well as values of patriarchy, heterosexuality and fixed gender roles. It provides members with an identity that may either restrict the individual’s choice or foster a sense of self.²⁹ As Beck and Beck-Gernsheim explain, lives have been “determined by a multitude of traditional ties – from family business and village community, homeland and religion, to social status and gender role... On the one hand they rigorously restrict the individual’s choice, on the other they offer familiarity and protection, a stable footing and certain identity.”³⁰

²⁴ E Wilson, *Women and the Welfare State*, Tavistock, London, 1977.

²⁵ C Smart, above n 1, at p 23.

²⁶ Ibid.

²⁷ The 1995 reforms replaced these terms with “residence” and “contact”.

²⁸ As discussed by C Smart, above n 1, at p 23.

²⁹ M C Regan, above n 21.

³⁰ U Beck and E Beck-Gernsheim, *The Normal Chaos of Love* (1995) Cambridge: Polity Press, pp 45-46.

Some say this certainty of identity within the family is important for social, individual and psychological reasons.³¹ I argue that if the Government is changing the family law system in an attempt to alter the fixed identities of the mother as the primary caregiver and the father as breadwinner upon separation, then realistically a reconfiguration of the identities (and roles) of parents is required from a much earlier point than at separation.

We obviously do not live in a culture that upholds the notion of a family where the parents are joint caregivers to their children. The discussion below of workplace laws (notably the lack of child care facilities and equal parental leave) will demonstrate this. Therefore, it is if nothing else at least futile to make changes to the family law system, which impose these new identities upon the parties at the separation of a family. I wish to make it explicit that gender justice does demand an equitable division of domestic responsibilities in any family, but the present reforms are not designed to achieve such attitudinal and structural changes. For a genuine equitable division of labour, changes must be made to wider social structures that affect the family, directly and indirectly. A mentality that promotes the equitable division of domestic responsibilities amongst families needs to be promoted, and among other things law can help in bringing about such change. However, the reforms in their present form are ill-designed (and I suspect not even genuinely aiming) for bringing about such a change.

In the following discussion, I will demonstrate how family policy, the availability of child care and parental leave laws underwrite the gendered nature of parenting, in order to show that the introduction of a presumption of shared parenting without the making of changes to external structures to facilitate this in practice, is highly problematic.

³¹ A Diduck, above n 6, at chapter 4; W Hatten, L Vinter and R Williams, *Dads on Dads: Needs and Expectations at Home and at Work* (2002) London: Equal Opportunities Commission.

4.2 Reinforcement of the traditional notion of family in contemporary society

Most of the contemporary policies of the Australian Government maintain the primacy of the traditional nuclear family, especially in the labour market. These policies serve the ideological function of sustaining a culture that does not encourage men and women to be joint caregivers to their children and share parenting. I will use the examples of child care and parental leave to substantiate my claim.

4.2.1 Lack of availability of child care

Recent statistics suggest that Australian women do more domestic work and child care while men spend more time in paid employment, and that mothers spend more time caring for children than fathers even when both parents are employed full time.³² It would therefore appear that by and large the father's work remains undisturbed by the pressure of children. This demonstrates that equal shared parenting simply does not exist.³³

The lack of availability of child care in Australia, which generally falls on the mother's shoulders, amply demonstrates a culture that does not foster a mentality of shared parenting.³⁴ It has been said that the evolving shape of the family, the shifting role of women in society, and increased economic necessity for women to participate in paid work have meant that child care has become one of the most significant issues for

³² D de Vaus, above n 2, at p 4.

³³ This is further reinforced by the findings that in Australia, mothers in couples spend on average 5.8 hours a day undertaking childcare activities compared with 2.3 hours spent by fathers: D de Vaus, above n 2, at p 5.

³⁴ Here, child care refers to non-parental care for a dependent child either in or away from his or her home. This definition has been adopted from a paper presented by R Cassells, J McNamara, R Lloyd and A Harding from the National Centre for Social and Economic Modelling (NATSEM), called "Perceptions of Child Care Affordability and Availability in Australia: what the HILDA Survey tells us" ("R Cassells et al"). It was presented at the 9th Australian Institute of Family Studies Conference, Melbourne, 10 February 2005 (can be located at www.natsem.canberra.edu.au).

Australian families and social policy-makers today.³⁵ It is a lived reality that there is a continual upsurge in the number of women entering the workforce, and as a result, there is an increased need for non-parental child care.

In order for women to have more meaningful opportunities in the workforce, the traditional ideal of the mother who exclusively nurtures her children must give way to an acceptance that children can benefit from the care of others.³⁶ Studies have indicated that quality child care in the early years is considered to be beneficial to a child by providing a stimulating, educational and caring milieu that helps a child's social, educational and physical progress.³⁷ Furthermore, quality early childhood programs have been shown to assist in reducing future social problems such as crime, unemployment and teenage pregnancies.³⁸ If the Government's intention to promote equally shared parental responsibility and equally shared parenting upon separation is genuine, then it ought to start improving the accessibility of child care to facilitate such a division of parenting roles much earlier on in the life of the family.

Evidence has shown that thousands of Australian households are facing tremendous difficulties accessing child care due to a significant shortage.³⁹ Researchers have invited further analysis to be undertaken by social policy makers to establish the origins of the

³⁵ R Cassells et al, above n 34 at p1.

³⁶ This is, after all, the argument used by fathers' rights groups to achieve shared residence, as will be discussed further in this thesis.

³⁷ K A Anderson, J Foster and D Frisvold, *Investing in health: the long term impact of Head Start* (2004) Vanderbilt University; MR Burchinal, NE Roberts, LA Nabors and DM Bryant, "Quality of centre child care and infant cognitive and language development" (1996) *Child Development*, 67 (2), 606-20.

³⁸ D Weikart, "Changing early childhood development through educational intervention", *Preventative Medicine: An International Journal Devoted to Practice and Theory*, vol. 27, pp 233-237.

³⁹ R Cassells et al, above n 34. This study used data from the Household Income and Labour Dynamics of Australia (HILDA) survey and was presented as a first step in pinpointing the difficulties with child care affordability and availability in Australia and the possible connections between household characteristics and perceived difficulties. This is supported by researchers Regina Graycar and Jenny Morgan in R Graycar and J Morgan, *The Hidden Gender of the Law*, 2nd edn (2002) The Federation Press, at p 259.

relationship between child care difficulties.⁴⁰ Importantly, they have highlighted that relatively little research has been conducted into child care affordability and availability, and raise the question of how social policy makers have allowed this gap to emerge in information for public debate and decision-making.⁴¹

Australia is not alone in this regard as similar problems are being faced elsewhere. For example in England where, in 2004, there were almost 4.7 million under-eights and just over one million places with childminders in full-day care or out-of-school clubs. That means that there were 4 children for each place in these types of provisions.⁴² These difficulties in accessing affordable and good quality child care hinder the ability of mothers of young children, who continue to be the primary caregivers, to sustain meaningful employment.⁴³ In Australia, only 15% of mothers with pre-school children are employed full time.⁴⁴

Furthermore, the costs of child care have been said to substantially reduce the number of women who return to work after childbirth.⁴⁵ Subsidies for child care, such as the Federal Government's Child Care Benefit, have been shown to only marginally help offset the cost of child care and improve the financial benefits of paid work by women

⁴⁰ R Cassells et al, above n 34.

⁴¹ Ibid.

⁴² Ofsted (2004) *Registered childcare providers and places in England*, 30 September 2004; ONS (2004) *Mid-2003 population estimates*. These statistics have been published in the booklet "Facts about Women & Men in Great Britain" (2005) published by the Equal Opportunities Commission. It can be accessed on the website, www.eoc.org.uk.

⁴³ S Hofferth and N Collins, *Child care and employment turnover* (2000) Population Research and Policy Review, 19 (4), 357-395; EE Kisker and CM Ross, "Arranging child care" (1997) *Future Child*, 7(1), 99-109; K Dunn, "Splitting the Difference: Superannuation, Equality and Family Law" (1998) 12 AJFL 215 at 218.

⁴⁴ D de Vaus, above n 2, at p 4.

⁴⁵ M Toohey from the National Centre for Social and Economic Modelling (NATSEM), "The effectiveness of Child Care Benefit at improving returns to work for women", paper presented at the 9th Australian Institute of Family Studies conference, Melbourne, 9 February 2005 (can be located at www.natsem.canberra.edu.au), p iii.

with young children.⁴⁶ Toohey, who has researched the effectiveness of Child Care Benefit for lone and partnered mothers with different levels of income and numbers of children, points out that despite the powerful equalising effect of the Child Care Benefit, mothers with two or more children are worse off when they work full time rather than part time. He concludes that the combination of increasing child care costs and a reduction in other forms of assistance to families with children, act as a strong deterrent to full-time work for mothers with two or more young children. The fact that a large number of women are in this position means that overall, women earn less than men and run the risk of becoming financially dependent.⁴⁷

4.2.2 Poor parental leave laws

For women who do manage to retain their paid work or return to paid employment, the labour laws provide a less than optimum work environment. Of all the OECD countries, Australia and the USA do not provide a minimum guaranteed paid maternity leave. The shift to parental leave is only a marginal improvement. Our parental leave laws are therefore another illustration of how parenting is gendered in social reality.⁴⁸

In NSW, the legislation dealing with parental leave is the Industrial Relations Act 1996 (NSW) and the Industrial Relations (Amendment) Act 2000 (NSW). There are three

⁴⁶ Ibid.

⁴⁷ See K Dunn, above n 43, at p 218 for further discussion of the effect on women's paid work of the sexual division of labour. In England, the average hourly earnings for women working full-time are 18% lower than for men working full-time, and for women working part-time, hourly earnings are 40% lower: ONS (2004) Annual Survey of Hours and Earnings 2004 – www.statistics.gov.uk/genderstatistics. I have been unable to find the Australian statistics, however, there are findings that 36% of families with dependent children had only one income earner: D de Vaus, above n 2, at p 4.

⁴⁸ These laws come under state jurisdiction in Australia and every state has slightly different entitlements for employees. For NSW, see the following paragraph.

types of parental leave and all provide for a minimum entitlement of unpaid leave.⁴⁹ The only way a couple may equally share parental leave is if the father takes extended paternity leave, and in that case the 52-week leave period of the mother will be reduced by the period of time her spouse (or de facto spouse) takes. This does not apply to the one week of short paternity leave taken by the father at the time of the birth. Except for the one week of short paternity leave, a father may not take extended paternity leave if, and for the period that, the mother takes maternity leave.⁵⁰

Equally, adoption leave is taken by either the adoptive father or adoptive mother when adopting a child (under 18 years of age).⁵¹ These laws essentially assume that one parent or the other will be the primary caregiver, and they are the same in all Australian states.⁵² Hence, the reality is that we do not exist in a culture that fosters a mentality of equally shared parental responsibility or shared parenting. If we did exist in such a culture, there would not be an assumption that one parent or the other would be the primary caregiver.

⁴⁹ Unless otherwise stipulated in an award or agreement, a man or a woman who takes parental leave will not be paid during that leave. Maternity leave is taken by female employees during or after pregnancy. The period of leave available is up to 52 weeks of unbroken leave. Paternity leave is taken by male employees in connection with the birth of their child or their spouse's (including de facto spouse's) child. Short paternity leave is an unbroken period of up to one week only when the baby is born and extended paternity leave is an unbroken period of up to 51 weeks if the male employee is to be the primary caregiver of the child. At the time of writing this thesis, I am unable to locate statistics indicating the frequency of short paternity leave in NSW, let alone extended paternity leave. However, a 2002 English study of mothers who gave birth in January 2001 and their partners showed that the great majority of fathers who were working as employees took time off work only around the time their baby was born: M Hudson et al, *Maternity and paternity rights in Britain 2002: Survey of parents* (2004).

⁵⁰ This information has largely derived from the NSW Department of Commerce Office of Industrial Relations (OIR) – www.industrialrelations.nsw.gov.au and the publication entitled *Maternity at Work* March 2004, issued by the OIR at www.workandfamily.nsw.gov.au.

⁵¹ Short adoption leave is an unbroken period of up to three weeks of leave taken at the time of the child's placement. Extended adoption leave is a further unbroken period of up to 49 weeks leave to be taken by the primary caregiver of the child.

⁵² www.myfuture.edu.au/articles.

As demonstrated, more often than not, whether by choice, necessity or a combination of both, it is the woman who is allocated the role of the primary caregiver.⁵³ Therefore, the possibility of both partners working and equally sharing parenting must be backed by appropriate legislation and social policies. Specifically, a reduction in the cost and improvements in the availability of child care; paid parental leave; and shared parental leave are some policy changes that would help. The following discussion will develop these ideas.

4.3 Implementing a mentality of shared parenting

Obviously, the issue of parental leave is inextricably linked to that of the role of men in family life, since it allows for a veritable partnership in the sharing of responsibilities in both the private and the public realm.

Laws on parental leave can only assist in achieving a balance between work and family when they are appropriately implemented and supported by measures to create an environment conducive to such leave. It has been said that maternity leave was first introduced as a key element of social and employment policies for women in work at the time of childbirth.⁵⁴ Its purpose was supposedly to protect the health of mothers and to enable them to look after their children. Parental leave has since been adapted in many countries to also meet the needs of men, who wish to balance work and family life and ensure their children's wellbeing.

⁵³ As already discussed, and as pointed out by A Zwever from the Netherlands Socialist Group, who addressed these issues in her report entitled "Parental Leave" that she presented at the Parliamentary Assembly Council of Europe Committee on Equal Opportunities for Women and Men, on 15 January 2002, p 7 – <http://assembly.coe.int/documents>.

⁵⁴ Ibid.

The UK Government has recently introduced plans for reforms to give new fathers the right to six months' paternity leave and simultaneously get more women in the workforce. The reforms outlined in the Work and Families Bill "mark a growing recognition by ministers that if Britain as a society wants fathers to become more involved with their children, it has to make it easier and more acceptable for them to do so".⁵⁵

In comparison, the efforts of the Australian Federal Government seem to be inadequate. Rather than making changes in parental leave provisions, the Government has chosen to make a symbolic, or worse, an ideological change. The new reforms appear to be specifically directed at men to assist them in changing their social role. Hence, it would appear that the Australian Government is much more open to the law/society nexus when it comes to encouraging men to play a greater role in their children's lives, but only after separation, rather than when it comes to assisting women (and to some extent men) in the labour force. The Government would presumably argue that women would benefit from such changes, however, I assert that if at all, they would only benefit indirectly. In order to effectively assist both men and women in achieving shared parenting, the Australian Government could look at international examples of parental

⁵⁵ As reported in *The Times* on Thursday, 20 October 2005. *The Times* also reported, on 20 October 2005, that fathers now do a third of parental childcare in the UK, an average of two hours a day – eight times more than 30 years ago (though far less than what women are doing). The Bill offers new fathers the entitlement to six months' paternity leave, to be taken in the child's first year of life after the mother has returned to work after six months' maternity leave. Three months of paternity leave will be paid, with the payment reimbursed to companies by the Treasury. The reforms are also said to extend maternity pay and allowance from six to nine months from April 2007, with the idea of moving to 12 months by the end of the Parliament. While criticisms of the reforms have come from the Federation of Small Businesses and other groups representing companies for being family-friendly but not business friendly, I see it as a positive move. Even though the Government's predictions, as reported in *The Times*, are that just 9,000 men a year, fewer than 2% of new father, will initially take advantage of their new rights, the normative significance of this change is undeniable.

leave laws. Equal opportunity ought to become a concept relevant to both the public sphere and the private sphere.

4.3.1 Equal opportunity approach to parenting

The introduction of a rebuttable presumption of shared parenting after separation will fail in practice. Through the disjuncture between social and legal reality, the Government can only be perpetuating disadvantages for women, firstly as primary caregivers and secondly for not being recognised as primary caregivers under the presumption of joint parenting. Just as the presumption of shared parental responsibility has caused confusion, uncertainty and serious negative repercussions for women because it does not resemble social reality, so too would the implementation of a presumption of shared parenting without the abovementioned changes to the workplace. Ideally, parental leave and arrangements in the household should be structured to facilitate a balance between work and family responsibility for both men and women.

In order to achieve a balance for mothers and fathers between work and the home, and increase the involvement of fathers in their children's lives, the Australian Government policies must adopt an equal opportunity approach to parenting, through changes in the workforce.⁵⁶ Family law is directly connected to industrial laws and gender justice must be achieved in both the public and private spheres. Specific steps need to be followed for this to happen, such as introducing into legislation the principle of paid parental leave, including adoption leave, which recognises a diversity of family types; employing suitable structures for the implementation of parental leave; enacting laws encouraging parental responsibility, by means especially of part-time work and flexible working time

⁵⁶ Different theories of equal opportunity are discussed in the following chapter.

for both parents; assisting parents to return to employment after a period of parental leave; launching campaigns to raise awareness among unions, social partners and in particular employers about the need for systems to assist with child care; investigating possibilities of home-based jobs; and considering as a basic requirement the creation of child care centres.⁵⁷

I will analyse a few examples from societies where the concept of equal opportunities in family relations is culturally accepted. The governmental concern about the diminishing role of fathers in their children's lives after separation can be addressed by considering the Swedish model for equal opportunity. Introduced over 25 years ago, the Swedish system entitles parents to up to 15 months of highly paid leave. It is a flexible system with measures introduced to promote leave for men, such that in 2002 evidence showed that 75% of Swedish men chose to take parental leave, including politicians.⁵⁸ The success of its policy is said to lie in its integrated approach – alongside the introduction of parental leave are the goals of financial independence for women, greater male involvement in caring for the children and the well-being of children.⁵⁹ This is an example of a system that encourages fathers to be involved in their children's upbringing during the intact family life on the basis that it is in the interests of the children.

Similarly, Denmark's policies demonstrate a culture that fosters shared parenting. Danish women are entitled to take a minimum of 4 weeks prenatal parental leave followed by 6 months of maternity leave on full pay. Parental leave is paid at 80% of the

⁵⁷ These were proposals put forward by the European Parliamentary Assembly to member states at a conference held by the Standing Committee of the Council of Europe, on 15 January 2002: A Zwever, above n 53, at p 3.

⁵⁸ A Zwever, above n 53, at p 5.

⁵⁹ Ibid.

maximum rate of unemployment benefit and fathers are permitted to take 12 weeks off work. These laws were enacted in 1984 in response to an abrupt fall in the birth rate (1.38 children per woman).⁶⁰ The Government introduced this scheme to reverse the trend, doubling the length of maternity leave and raising the level of benefits. As a result, the birth rate increased to 1.81 children per woman, with 73% of women in employment in 2002.⁶¹

In Austria, laws were passed in 1996 to allow parental leave benefits to be paid up to the child's second birthday, if the leave is split between the two parents and if one of them, usually the father, takes at least six months over the 2 years of leave. Since January 1998, parents on parental leave have had the option of taking an additional part-time job, with the parental leave benefits continuing to be paid but at a lower rate depending on the level of earnings. The motivation is to increase the parents' chances of a successful return to work.

EU legislation⁶² acknowledges that an effective policy of equal opportunities presumes an integrated global strategy allowing for improved organisation of working hours and greater flexibility, and for a facilitated return to the workforce. This approach is also said to be influenced by socio-demographic factors such as, an aging population, the closing of the generation gap and women's employment in the labour force.⁶³ Notably, the aim is said to encourage men to assume a larger share of family responsibilities.⁶⁴ Parental leave is seen as separate from maternity leave and the

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Council Directive 96/34/EC of 3 June 1996.

⁶³ A Zwever, above n 53, at p 5.

⁶⁴ Ibid.

European Union grants male and female workers an individual right to parental leave on the grounds of the birth or adoption of a child to help them to care for that child, for at least 3 months, until the child is aged 8.

The fact that some governments are offering extended periods of highly paid leave to parents demonstrates that it is essentially a matter of priority, not feasibility. Rather than being merely idealistic theoretical proposals, they are realistic options. These examples could be useful guides to the Australian State and Federal governments to introduce the principle of paid parental leave, including adoption leave, and introduce laws promoting shared parental responsibility, by means of part-time work and flexible working time. It would enhance women's professional insertion as well as accommodate the need of children to be cared for by both parents – an argument put forward by the Australian Government to support a presumption of shared parenting after separation.⁶⁵

Joint parenting can be further facilitated by the introduction of flexible working hours. It has been suggested that a system of paid parental leave cannot function properly without some adjustment to working hours.⁶⁶ Current working hours imposed on both men and women in many professions are obviously not designed to make time for caring for children – parents cannot be at school to pick up their children at 3.30pm if they are expected to be at work until 7pm. Part-time or flexible working hours could be a solution, as long as they do not act to push only women back into unemployment or less attractive part-time work. In some countries, part-time employment tends to be concentrated in

⁶⁵ Australian Government's Discussion Paper entitled, *A New Approach to the Family Law System*, released on 10 November 2004, p 1. Importantly, these measures would have to be developed with caution as parental leave that is too short or long and/or badly paid only serves to perpetuate a situation where parents are forced to choose between work and caring for their children.

⁶⁶ A Zwever, above n 53, at p 9.

insecure jobs that are not family-friendly and therefore women either resort to staying at home or opt for leaving their children in full-time child care. For example, in Finland, only 10% of working women in 2002 were employed part-time,⁶⁷ whereas in Norway in the same year, part-time workers accounted for 46% of the female labour force, and in England, 44% of working women in 2004 were employed part-time.⁶⁸ In contrast, only one in 10 English male employees in 2004 worked part-time.⁶⁹ Just like in the Scandinavian countries, parental leave in Australia must be made an equal opportunity issue in order to properly address the roles of men and women in family and work life and share functions more evenly.

If men and women could be in economically comparable positions, then hopefully there would be a change in attitudes towards the sharing of housework and childcare in the heterosexual family. I state this in response to the observation that although the rise in numbers of women in the workforce has led to a decrease in time women spend caring for children, there has been little change in the amount of time men devote to childcare.⁷⁰ Until housework and childcare are shared amongst men and women in the intact family, it is unrealistic to expect that a rule stipulating shared parenting upon separation will be a lived reality.⁷¹

⁶⁷ A Zwever, above n 53, at p 10. Scandinavians apparently believe that granting women a formal right to gainful employment is not sufficient in itself to assure equality of opportunity for women and men. To facilitate women to exercise this right, the public sector in Finland has taken over many of the duties traditionally performed by women, and implemented an extensive network of social and public services. There, pre-school child care is an individual right with virtually all children of pre-school age receiving some form of government support.

⁶⁸ ONS (2004) Labour Force Survey Spring 2004 dataset.

⁶⁹ Ibid.

⁷⁰ R Graycar and J Morgan, above n 39, at p 88.

⁷¹ Janeen Baxter has investigated the lack of change in the division of household labour and explanations for the ongoing gendered differences in J Baxter, "Moving Towards Equality? Questions of change and equality in household work patterns" in Gatens and MacKinnon (eds), *Gender and Institutions: Welfare, Work and Citizenship*, Cambridge University Press, Melbourne, 1998, at p 55. She asserts that "sex role

The two aspects of the work women do – unpaid work in the home and paid work – are intimately connected and complex.⁷² Some countries have successfully addressed equal opportunities for men and women in the home and work. For example, in Portugal, steps have been taken to regulate housework and treat it as a waged activity. The logic behind this is that domestic responsibilities and the work they entail can be incorporated into the national economy, as they create value.⁷³ In Austria, a campaign was launched in 1996 by the Ministry in charge of women's rights to promote a fairer division of household tasks and to underline the relationship between this problem and the exclusion of women in the workforce. The campaign was also intended to encourage men to take on more responsibilities as husbands and fathers.

Baxter argues that “policies aimed at integrating work and family demands, such as the provision of extensive child care facilities, parental leave rights and a progressive taxation system, have little impact on the gender division of labour in the home.”⁷⁴ She further asserts that “social democratic policies may have made it easier for women to combine paid and unpaid work, but they have done little to reshape gender relations in the home. It may well be easier to develop strategies that enable women to carry out both kinds of work, rather than strategies which will encourage men to do more domestic

theory” – the idea that women and men are socialised into different household roles – has proven insufficient as a theory for several reasons. Given the enormity of the topic of housework and labour, a detailed discussion is beyond the scope of this thesis.

⁷² See, for example, M A Glucksman, “Why ‘Work’? Gender and the ‘Total Social Organization of Labour’” (1995) 2 *Gender, Work and Organization* 63, who suggests that a useful way to examine both paid and unpaid work is to view them as encompassed within a “total social organization of labour”. This would permit the analysis of links between the domestic and market economy: “Inequalities in the market and domestic economies are incommensurable in the sense that one cannot be translated into or added on to the other; they are not reducible to each other but nevertheless they compound each other and are structurally connected... Inequalities are not generated solely within each sphere but are rather an effect of the connection between the two”, at p 68.

⁷³ A Zwever, above n 53, at p 11.

⁷⁴ J Baxter, above n 71, at p 69.

labour”.⁷⁵ Perhaps it is more a case of not enough effort being made to find out if such strategies would successfully reshape family relations.

Mitchell asserts that the design of our welfare state institutions is the reason men do not share housework and childcare. She says it is much harder for men to leave the labour force to become full-time carers because firstly, the administration of benefits in relation to the *work test* presumes a primary breadwinner role, and secondly, most husbands earn around 15 to 20 per cent more than their wives (on an hourly basis), which makes couples rethink the decision to share child care at home. Her argument is that the Government must remove these sorts of penalties on care participation and rethink the institutional design of the welfare state.⁷⁶ Cases have also demonstrated that we live in a society not conducive to making the father the primary caregiver to the child(ren). For example, in *Macmillan and Jackson*,⁷⁷ Rourke J had made an order awarding custody of a young boy to his maternal grandparents, rather than to the applicant father, because the judge was critical of the father’s plan to return to work outside the home only when the child reached school age. In the trial judge’s opinion, such a period outside the workforce would lead to “entrenched welfare dependency” and represented a “poor role model” for the child. Although the Full Court set aside the decision, the decision at the first instance does show the presence of gendered thinking.

In conclusion, I have argued that in order for the current reforms introducing shared parenting upon separation to be a lived reality, changes must be made not only to the legislation, but to external structures that indirectly affect the family. I also assert that a

⁷⁵ Ibid, at p 71.

⁷⁶ D Mitchell, “Life-course and Labour Market Transitions: Alternatives to the breadwinner welfare state” in Gatens and MacKinnon (eds), *Gender and Institutions*, at pp 19-37.

⁷⁷ (1995) FLC 92-610.

shift in attitude towards housework and childcare is required within the private realm of the family, in order to achieve a fairer division of labour within the intact household. However, this argument is subject to the criticism that the law should not regulate all aspects of our lives, and in particular, the private sphere should be left free of state control. This very common objection invokes the public/private conceptual divide and needs to be addressed. I will address it in the following chapter.

CHAPTER 5: REORGANISING THE GENDER HIERARCHY

In this chapter, I analyse the implications of the public/private sphere philosophy and the theories of equality in order to assess the best way in which to achieve gender justice in both public and private spheres. I will discuss the formal equality or gender-neutral approach, the differences approach and the subordination approach to gender justice, and demonstrate that without completely rethinking the public and private division, none of these theories of equality alone are really sufficient in making the necessary changes to achieve gender justice.¹

Historically, an exploration of the public/private dichotomy has focused on women being identified with the private sphere and men with the public sphere,² and the contribution of legal discourses in maintaining the separation of a public and private sphere.³ Feminist critiques of this division have exposed a society permeated by gender bias, in which women's role, work and contributions are not accorded their full value, and a legal system that incorporates this bias and helps to perpetuate it.⁴ Furthermore, critiques of the public/private dichotomy have concentrated on seeking equality in the public domain, and various theories of equality have been discussed and debated in a search for the "right" one. Consequently, the public domain has been further elevated to a

¹ The most recent Australian source on the gendered division of labour is the 2005 HREOC Discussion Paper entitled *Striking the Balance – Women, Men, Work and Family*, http://www.hreoc.gov.au/sex_discrimination/strikingbalance/docs/Striking_the_balance.doc.

² K O'Donovan, *Sexual Division of Law*, Weidenfeld and Nicholson, London, 1985, at p 12. In this thesis, "private sphere" denotes family, the personal life and the home, and "public sphere" is used to denote the workplace (outside the home), market-place and state activity. I use the words "sphere" and "domain" interchangeably.

³ In addition to my definition of the private and public, as noted in the previous footnote, in legal discourses "public sphere" signifies state activity or that sphere of activity which is regulated by law, and "private sphere" may stand for civil society or behaviour unregulated by law.

⁴ For example, Regina Graycar and Jenny Morgan in *The Hidden Gender of the Law*, 2nd edn (2002) The Federation Press.

superior position to the private domain. Rarely, if ever, has political discourse centred on achieving equality in the private sphere, so that mothers and fathers (in heterosexual families) would equally share the domestic and parental duties. In reality, the private domain has not been a realm in which men have ever sought formal (or even informal) equality.⁵ This could be due to a political reluctance to interfere in the private sphere, but more likely, it is because the homemaker role has traditionally not been regarded as work, and certainly not as work with any fiscal benefits, which, in our capitalist society, is considered the “be all and end all”. The questions therefore are: why can such a change be made now; in whose interest is it to make such a change; and by whom should the change be made?

With the introduction of a rebuttable presumption of shared parenting upon separation (spurred on by fathers’ rights lobby groups⁶), it would appear that at least a very minute and superficial attempt is being made to achieve some sort of sameness amongst mothers and fathers, albeit after the breakdown of the family. Although I question how genuine these proposals for reforms are in achieving equality in the private sphere, given the intention is only to introduce them to separated families, their mere existence suggests that against all odds, a change towards equality in the private sphere seems to be happening in the new reforms. Whilst this supposed turn in attitude towards the private sphere is a good thing (within limits), it is difficult to find a genuine reason for it. Although I would like to take a positive interpretation and believe that the reforms

⁵ Even in the public sphere, men have been reluctant to move into traditional female areas, such as teaching, nursing, numerical clerking, sales, receptionist and telephonist jobs. Although women’s entry to male dominated occupations has been increasing, the shift of men into a number of female dominated work has been slow: B Pocock, “All Change, Still Gendered: The Australian Labour Market in the 1990s” (1998) 40 *Journal of Industrial Relations* 580 at 593.

⁶ A discussion of men’s movements and their views is developed in the following chapter.

indicate a gradual change in the image of the homemaker role, I fear it is perhaps no more than a development at the behest of fathers' groups. If the former interpretation is to be accepted, then this may be an avenue for using the potential of law to set norms, change societal behaviour and aspire to gender justice. The cultural change through law involves these and similar factors. However, the question remains: will the law be too intrusive if it regulates the private sphere? In my view, it would be a necessary element to bringing about equality amongst parents in the intact family.

In addition to the regulation of the private sphere, the eradication of the entrenched bias identified by women's movements amongst society as a whole would be required, and with special attention paid to the workplace⁷. This is needed if a genuine attempt is to be made to bring about as fundamental a change as shared parenting, and to accord the private sphere a significantly higher value than it has historically held. Essentially, my proposal is to remake our political, legal and social institutions in a way that gives full value to the parental roles in the life of the intact family, and hence brings the private sphere to an equal footing to the public sphere. In making this argument, I am challenging the neat division of the public and private spheres, masculine and feminine, which some state is the product of modern history.⁸

Another way of challenging this neat division is provided by Carole Pateman. She argues that couples should enter into a "marriage contract" that sets out the terms and conditions of the relationship, just as there are contracts with regards to all other mutual

⁷ Here, I refer to the workplace outside the home, as the home is also a place of work. I use this term interchangeably with "labour force", "market-place" and "workforce".

⁸ R Poole, "Public and Private – masculine and feminine", *Morality and Modernity*, London, Routledge, 1991. Poole argues that unless we redefine the public and private spheres, there will be no change. He says it is insufficient to simply extend the values of the public sphere, such as equality, into the private sphere.

arrangements, particularly business transactions.⁹ Pateman has stated that, “the popularity of what is called ‘contract marriage’ in which the couple freely negotiates the terms of the written contract that will regulate the lives of the parties for the duration of the marriage is a good example of the contract ideal”.¹⁰ In Australia, increasing attention has been paid to the notion of private arrangements (or “contracts”) in the areas of law governing financial arrangements before, during and after the breakdown of the relationship.¹¹ However, no such contracts have been formally legalised in relation to dividing up domestic and parental responsibilities.

Several concerns have been raised about the dangers for women in the increasing trend toward private ordering, details of which are beyond the scope of this thesis.¹² I argue that just as people’s notions of their entitlements are moulded by social contexts, so too would their expectations of how parental responsibility ought to be delegated. If contracts stipulating the delegation of parental responsibilities were to be legalised before or during the intact relationship, then we would most certainly require significant changes to be

⁹ C Pateman, “The Marriage Contract” in N Grieve and A Burns (eds), *Australian Women: New Feminist Perspectives*, Oxford University Press, Melbourne, 1986. See also C Pateman, *The Sexual Contract*, Polity Press, Cambridge, 1988; and “The Shame of the Marriage Contract” in Judith Stiehm (ed), *Women’s Views of the Political World of Men*, Transnational Publishers, New York, 1984; “Women and Consent” (1980) 8 *Political Theory* 149.

¹⁰ C Pateman in N Grieve and A Burns (eds), *ibid*, at p 181.

¹¹ For marriages, these contracts are called “binding financial agreements” and they are governed by the *Family Law Act 1975*. For de facto relationships (heterosexual and same-sex relationships), they are called “relationship agreements” or “cohabitation agreements” and “separation agreements”, and in NSW these are governed by the *Property (Relationship) Act 1984* (NSW).

¹² M Neave, “Private Ordering in Family Law: Will Women Benefit?” in M Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995. See also H Astor, “The Weight of Silence: Talking about Violence in Family Mediation” in M Thornton (ed). In brief, there is a concern that women’s bargaining power is affected by men’s violence against women, and that women with violent partners are considered especially vulnerable to being pressured to make agreements to put an end to the violence. Another concern about private ordering stems from studies showing that both women and men tend to undervalue non-financial contributions: M Neave, “Private Ordering”, at p 170. Neave points to research demonstrating that people express their preferences in terms of what they perceive to be their entitlements.

made to our culture that continues to hold very traditional perceptions of men's and women's roles.

In the following section, I discuss different theories of equality used in the public sphere, in order to demonstrate that no sufficient change would be made by simply adopting one particular theory in the private sphere.

5.1 Different theories of equality

Even though mainstream philosophy or political theory does not discuss what genuine equality would look like in the private sphere, feminists have argued that it is both possible and desirable that gender equality informs the private sphere.¹³ I will examine some of the attempts made to reach gender equality in institutions outside the home. Equality is a contentious concept and in legal decision-making, the most common approaches have been to either treat men and women identically or treat them differently.¹⁴

As I have argued, in order to realise shared parenting, a feasible solution would be to restructure the public and private spheres so that men and women can share more in the domestic and childrearing responsibilities. The mere adoption of a particular theory of equality in the private sphere would not go far enough.

¹³ For example, C Pateman, above n 9.

¹⁴ The following descriptions of the various understandings of gender equality are drawn from both the Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II, Commonwealth of Australia, 1994, and E A Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women, Background Paper, Canadian Advisory Council on the Status of Women*, Ottawa, September, 1987.

5.1.1 The formal equality or gender-neutral approach

As its name suggests, this approach views equality as a matter of gender-neutral treatment. It requires that women and men be treated identically in all circumstances, which consequently denies that there are any fundamental or significant differences between the sexes. It assumes that equality will be achieved by creating a level playing field and that a level playing field is always possible to achieve, and the application of this concept of equality dictates that no law may validly distinguish between men and women.

While the notion of a gender-neutral law in both the public and private spheres has its benefits and seems very attractive, there are significant aspects of life, such as conception and childbirth, in which women's experiences are very different to that of men and must be taken into consideration. Moreover, to assume legally that men and women are the same is to deny the social reality of gender differences, or more accurately, gender hierarchy.¹⁵

Gender neutrality as equality has not worked in the public sphere and is likely to be as unworkable in the private sphere, because women and men have traditionally played different roles in the private sphere in relation to childrearing. It is therefore not feasible to expect that upon separation, the mother and father will suddenly equally share the roles of parenting. It has been said that unequal gender relations thrive when the rhetoric of

¹⁵ Catharine MacKinnon has been one of the strongest critics of equality models that support identical treatment. Here, I summarise some of the problems she has identified with the formal equality model: C A MacKinnon, "Difference and Dominance" in *Feminism Unmodified*, Harvard University Press, 1987, at p 34. See also C A MacKinnon, *Sexual Harassment of Working Women*, Yale University Press, New Haven, 1979, at pp 4-5 and 101-41; and C A MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, 1989, at pp 215-34.

gender neutrality denies their existence.¹⁶ For these reasons, it would be preferable to restructure the private and public spheres to realistically attempt to achieve shared parenting.

5.1.2 The differences approach

This standpoint appreciates that women do not necessarily have the same experiences as men and acknowledges women's differences. It proposes that men and women not be treated in the same way in all circumstances, and women's differences from men need special recognition. It advocates laws and policies, which apply specifically to women because of biological or socially constructed differences. Recognising these differences, such as childbearing, is considered as sometimes promoting women's equality, for example, by assisting in the provision of employment-related benefits such as maternity leave.

While this theory of equality has been of benefit to women in some areas, it has also had the effect of entrenching their inequality. In my view, such an approach would operate in the same way in the private realm. It is a double-edged strategy and can use differences between women and men to justify less favourable treatment for women, as it appears to assume that differences between the sexes will always justify different rules and practices. Historically, women's differences from men have justified discriminatory practices.

Moreover, this approach still uses men as the benchmark. Just as the formal equality or gender-neutral approach does not challenge the male experience or perspective as the

¹⁶ Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II, Commonwealth of Australia, 1994.

criterion from which women are measured, neither does this theory. It has also been said that it detracts attention from the major issue of systemic inequality between the sexes.¹⁷ It could be argued that such an approach would always justify different rules in the home, for example, that women remain the primary caregivers to the children even after the breakdown of the family.¹⁸

Although adopting the domination approach to equality could produce legislation that unequivocally recognises that the central issue in gender inequality is the power imbalance between men and women, rather than merely acknowledging differences between them, other characteristics that manifest disadvantages in our society must be tackled.¹⁹ The masculine construction of the worker in labour law must be reconfigured,²⁰ just as the feminine construction of the homemaker must be deconstructed to the extent that men may play a greater role in parenting in both the intact and separated family. By restructuring the public and private spheres without adhering to one particular model of equality, men and women could share more in the domestic and parenting roles, and the law could reflect the transformative conception of equality in the private (and public) sphere.

5.2 Radical potential of the current reforms

While the reforms only seek to make changes to the behaviour and practices of separated parents, they are also an intervention in the private realm of the intact family.

¹⁷ Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, above n 16.

¹⁸ Some classify this as a distinct theory of equality: the subordination or dominance approach, which views gender as a question of dominance and identifies the subordinating effect of legal policy. It states that men are seen as the standard for women whether women are made to be equal or different: Catharine A MacKinnon, above n 15.

¹⁹ For example, the stigma attached to paternity leave and shared parental leave, and the lack of child care facilities.

²⁰ Carole Pateman describes the stereotypical worker in labour law as a man with a wife who takes care of his daily needs, in C Pateman, *The Sexual Contract*, Polity Press, Cambridge, 1988, at 131.

Inevitably, they raise consciousness about the need to alter practices and behaviour in relation to the allocation of parental responsibility in the intact family, and this is a potentially radical change that law can indirectly help to bring about. However, as I have argued, it is not through legislation alone that such radical changes will be achieved in practice. Law can serve a useful role in the regulation of subsisting domestic arrangements if it is supplemented inter alia with assistance to families through counselling and education programs.

Intervening in the intact family is necessary in many circumstances. In fact, the construction of family law as the law that deals with the breakdown of family relationships only, rather than with the regulation of subsisting domestic arrangements, has been the subject of several powerful critiques.²¹ This is particularly so with regards to law's response to the occurrence of marital rape, domestic assault and battering. The underlying idea behind these instances is that the so-called public/private divide is not in fact a reality. The same idea can also be used to support the argument that the law should not only be called upon to intervene in the intact family for the purposes of punishing culprits and rectifying situations, in a retrospective sense, but also to help couples before problems arise. I argue that the law ought to assume a preventative function as well.²²

²¹ For some American examples, see F E Olsen, "The Myth of State Intervention in the Family" (1985) 18 *Journal of Law Reform* 835; F E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harvard Law Review* 1497. See also K O'Donovan, *Sexual Division of Law*, Weidenfeld and Nicholson, London, 1985.

²² The view that the law is reserved for when things go wrong has been described by Michael Freeman as "pathological" and common: M D A Freeman, "Family Values and Family Justice" (1997) 50 *Current Legal Problems* 315. In his essay, "Towards a Critical Theory of Family Law", he referred to the statement of Otto Kahn-Freund that "the normal behaviour of husband and wife or parents and children towards each other is beyond the law as long as the family is healthy. The law comes in when things go wrong": O Kahn-Freund, preface to John Eekelaar, *Family Security and Family Breakdown*, Penguin, Harmondsworth, 1971, at p 7; cited by Freeman, at p 158. See also F Olsen, "The Myth of State Intervention in the Family" above n 21 at p 841.

In any case, the idea that family relations are unregulated has been credibly deconstructed. In her critique of the public/private distinction, O'Donovan suggests that the construction of the family as a private sphere, unregulated by law, is a false analysis.²³ Although the standard liberal view has been to avoid direct state intervention in family life if possible, O'Donovan demonstrates that there has historically been much indirect intervention in the institution of the family. She points out that structures external to the family have a major effect on it and that state policy on employment, taxation and social security impacts on the family. In addition, she notes that informal methods of intervention through education, medicine, psychiatry and welfare policies have existed since Tudor times. Therefore, despite the State's professed reluctance to intervene directly, policies in areas which relate to the family and which are expressed in legislative, judicial and administrative provisions construct a specific family form. O'Donovan states that the nuclear family, in which there exists a division of labour between wife and husband, is a manifestation of these policies.

Olsen similarly argues that "non-intervention is a false idea because it has no coherent meaning".²⁴ She demonstrates how the notions of intervention and non-intervention in the family are largely meaningless as the state constantly defines and redefines the family and adjusts and readjusts family roles. As a result of this false analysis of the private as free, the gendered structures of power in the traditional heterosexual nuclear family unit are concealed. Given this existing intervention in the family unit, it is not such a big step to introduce the shared parenting requirement in intact families. Rather than using family law only to make changes to patterns of behaviour upon separation, the Government

²³ K O'Donovan, above n 2, at p 15.

²⁴ F E Olsen, "The Myth of State Intervention in the Family" (1985) above n 21, at p 842.

ought to intervene more directly in the intact family for its goals of shared parenting to be successful. That way, it would not only be the separated heterosexual nuclear families benefiting from an attempt to break down traditional gendered roles and to divide parental functions, but all heterosexual families.²⁵ This, of course, would be problematic if heterosexual families do not wish to break down traditional gendered roles and share parenting. We cannot assume that all fathers and mothers desire this change. I argue that the choice must, however, be available to those who do.

Although the Government declares itself committed to introducing shared parenting upon separation, and I have hope that this could indirectly affect behaviour in the intact family, this would happen much more effectively if law intervenes before the breakdown. Otherwise, the law's apparent disregard for what transpires during the course of a marriage is simply being reinforced by the reforms. It is unrealistic to believe that families will suddenly be able to adopt a completely new arrangement for parenting upon separation – shared parenting – without first establishing that arrangement in the intact family.

5.3 Gender essentialism

I am fully aware that my proposal to intervene in the intact family can be seen as an objectionable imposition of a uniform pattern or perpetuating a definition of the ideal family. However, I argue that my insistence upon changes to affect the intact family leaves open the possibility of pluralism, whereas the current reforms do not.

²⁵ It is interesting to note here a United States study that found that the majority of lesbian couples who had jointly planned and conceived their child(ren) equally shared the parenting and domestic work between the partners: M Sullivan, "Rozzie and Harriet: Gender and Family Patterns of Lesbian Co-Parents" (1996) 10 *Gender and Society* 747, at p 756. Though there is no comparable Australian study, it has been cautiously speculated that the lack of balance in the distribution of unpaid work in the home is a function of the nature of heterosexual (particularly marital) relationships: R Graycar and J Morgan, above n 4, at p 89.

The term “gender essentialism” has been used by Harris to describe a “notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation and other realities of experience.”²⁶ Grillo has referred to it as an outlook that “assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.”²⁷

Just as there are several significant differences amongst women in their experiences of achieving equality due to their diversity, so too are there differences amongst men in relation to their experiences and roles in the family. Moreover, not all men and women join in the “struggle” for an equal division of parenting and a presumption of shared parenting upon separation. Many are happy with the traditional gender roles assumed in the family and choose to adopt those roles. A context-sensitive decision by the court is more likely to allow a diversity of familial arrangements to exist. While governmental guidance for “an intact family” is assuming that an intact family is a father/mother/child unit, it need not be so exclusive. The same guidance would be available to any arrangement of childrearing in an affective relationship. The crucial point is that the law is used to educate people that childrearing responsibilities continue even after the affective relationships may break down. The parties must make their arrangements with a full awareness of the financial, as well as psychological and emotional, aspects of the task. By replacing discretion with fixed rules stipulating one particular parenting arrangement upon separation, it is assumed that all families will want and suit those

²⁶ A Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford Law Review* 581, at p 585.

²⁷ T Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 *Berkeley Women’s Law Journal* 16, at p 19.

arrangements. Since not all families have the same backgrounds and experiences, this is a false assumption.

It could be said that fathers' rights lobby groups have pushed the Government to introduce these reforms, which essentially force one particular arrangement for parenting on all families at the point of separation, without leaving open the possibility that many families do not suit or desire it. This leads me to a discussion of the agenda of fathers' rights movements, which I pursue in the following chapter.

CHAPTER 6: MEN'S MOVEMENTS, MISCONCEPTIONS AND MISIDENTIFYING THE REAL ISSUES

Although it is not stated explicitly, one of the major driving forces behind the Government's reforms is the Fathers' Movement, which accuses the family law system of bias against men in the determination of children's matters.¹ The views of fathers' rights groups are a result of misconceptions about the nature of the system, anxiety over a changing social reality concerning the relationships between men and women, and a lack of understanding of feminism. I therefore will discuss these misconceptions and views, and argue that the Government's attempt to appease the fathers' groups is equally flawed.

The Government is creating more problems than it is solving with the current reforms. In order to substantiate my argument, this chapter will analyse the rise of men's movements; their approach to the demise of the marriage regime and growing emphasis on parenthood; the use of the rhetoric of fathers' rights groups by politicians as the impetus for change; and common misconceptions held by men's movements. I will attempt to demonstrate why it is dangerous for the Government to allow these misconceived complaints to drive the current reforms, in particular, because the most fundamental change is a move to replace judicial discretion with strict rules. I argue that such a change will not allow the individual circumstances of each case to be considered and, therefore, could be detrimental to the interests of the children involved.

¹ In the introduction to the Australian Government's Discussion Paper entitled, *A New Approach to the Family Law System*, released on 10 November 2004, it states that the reforms "also recognise that the earlier an agreement can be reached that includes both parents in the lives of their children, the more likely it is that the children will continue to have a meaningful relationship with both parents, particularly their fathers." I understand this to be a criticism of the way the system dealt with children's matters before the reforms – it suggests that previously, fathers were categorically not given the opportunity to have a meaningful relationship with their children.

6.1 The rise of men's movements

It was second-wave feminism that condemned the fixed identity of primary caregiver imposed on women, and which began to make demands on fathers to become more involved in childrearing. By the 1990s the Fathers' Movement started to demand something rather similar.² The difference in the two positions, however, is that fathers' rights groups have only been concerned about assuming a caregiver role upon separation, not during the intact family. The Fathers' Movement has come mistakenly to identify feminism as the cause of what they say is the marginalisation of fathers. Smart argues that it is in this misreading of history that some of the seeds of the current gender conflict are based.³ Essentially, these men's movements have responded to various aspects of social reality, such as impermanent marriage, by identifying feminism as the culprit. I argue that this misunderstanding is one of the factors that influenced the reforms in Australia.⁴

Traditionally, fathers' rights groups have lamented the erosion of the family unit, notably the traditional nuclear family unit headed by the father.⁵ Not only is there resentment towards single motherhood, but also towards "alternative" family forms,

² As pointed out by C Smart, "Towards an understanding of family change: Gender conflict and children's citizenship" (2003) 17 *AJFL* 20, at p 26.

³ Ibid.

⁴ I acknowledge that there is growing literature on the psychology behind these groups, and a push to understand and support what fathers are going through. For example, Smyth and Weston observe the importance of the justice and identity literature in their work on attitudes to child support: B Smyth and R Weston, "A snapshot of contemporary attitudes to child support", <http://www.aifs.gov.au/institute/pubs/resreport13/conclusion.html>. See also M Flood, "Men's Collective Struggles for Gender Justice: The Case of Anti-Violence Activism", (2003) in *The Handbook of Studies on Men and Masculinities*, eds. M Kimmel, J Hearn and R W Connell, Thousand Oaks, CA: Sage. However, in my view, these works demonstrate how organised these groups are, and as a result, how influential they are on policy changes. In this thesis, I am attempting to bring out the voice of the primary caregivers – generally the mothers, who are not as organised a group as the fathers for reasons discussed in this chapter.

⁵ For a detailed discussion of the concern of fathers' rights movements over the erosion of the family unit, see M Kaye and J Tolmie, "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law" (1998) 12 *AJFL* 19, at p 28.

notably lesbian motherhood.⁶ Fathers' rights groups see various features of the family law system as threatening the traditional family and consequently society, in particular no-fault divorce, spousal maintenance and child support. It would appear then that even though the family law system no longer fully supports the "marriage regime" (given the existence of no-fault divorce),⁷ there are groups who do uphold the idea of marriage and associated cultural expectations. Aptly, the adherence to the outmoded "marriage regime" has been described as gendered, with men generally more attached to it than women.⁸

Fathers' rights groups also blame the welfare system for the erosion of the family unit as they believe it makes it too easy for women to walk out of their marriages and become dependent on the State.⁹ The solution offered by fathers' rights groups to prevent the intrusion of the welfare system into family life is to withdraw welfare benefits from mothers whose children live with them.¹⁰ A second solution offered is to favour the parent not on welfare when making decisions about where a child will live after separation. One men's group has reportedly suggested that the parent who can work and care for the child should be favoured in residence disputes because they are "a positive role model".¹¹

This group is clinging to an idealised patriarchal society in which divorce is fault-based and women do not have the freedom to leave unhappy relationships. On the one

⁶ Ibid.

⁷ This is a term used by C Smart, above n 2, at p 24.

⁸ This argument resembles the one put forward by A Giddens, *The Transformation of Intimacy* Polity Press, Cambridge, 1992, where he argues that men and women now have very different expectations of marriage and relationships. He sees men as still being attached to the patriarchal model.

⁹ Discussed by M Kaye and J Tolmie, above n 5, at p 30.

¹⁰ M Kaye and J Tolmie, above n 5, at p 32, point out that some groups have proposed that the sole parent pension be available for one year only and then clients should revert to unemployment benefits. Others reportedly suggest that the sole parent pension should be withdrawn when the youngest child reaches 12 in order to encourage the resident parent to re-enter the workforce.

¹¹ Ibid.

hand, they see the choices women increasingly have as a threat to their ideal society, and they refuse to accept that social reality is changing. On the other hand, they seek change by demanding more time with their children after the relationship has broken down than they spent with them before separation. Rather than focussing on the actual reasons for the number of judicial determinations that uphold mothers' roles as primary caregivers after separation, notably that they reflect the reality of the situation, they look for a scapegoat to divert attention away.

As a consequence of not facing the issue of social reality, this standpoint ignores the difficulties in working full time and simultaneously providing constant care for pre-school children. Moreover, it seeks to take punitive action against mothers because it generally sees them as the cause for the breakdown of relationships. This "revenge" approach is self-gratifying and clearly not in the best interests of the child. It seems this group would rather see the parent in the workforce having the child(ren) live with them and paying for substitute care, than granting residence to the parent who has sacrificed work opportunities to undertake the role of primary caregiver prior to separation.

One commentator asserts that a key instigator for the rise of men's movements was the change in emphasis in family law away from the "marriage regime" towards a greater emphasis on parenthood.¹² Today, it is this emphasis on parenthood that is largely driving these movements.

Over the past few years, fathers' rights groups have attempted to bring an end to the "raw deal" they argue men receive in the FCA regarding contact and residence

¹² C Smart, above n 2, at p 24.

disputes.¹³ They have been particularly vocal since the Full Court of the Family Court's decision in *B and B*, which many would argue proved that the 1995 reforms were not as far-reaching as some fathers' rights groups had hoped them to be.¹⁴ Given the Full Court in that case placed emphasis on social reality rather than political rhetoric,¹⁵ it would appear that fathers' rights groups are rejecting social reality and instead claiming the system is biased against them. Although these groups had hoped the gender-neutral model of parenting that was created by the 1995 reforms would achieve enfranchisement of men as responsible parents,¹⁶ guarantee equal rights for fathers and shared parental responsibility, *B and B* proved to be a major set-back for them. They felt that the 1995 reforms simply provided a forum for rhetorical equality claims to be made about parenting, that were not guaranteed of being accepted in individual cases unless they matched reality. On the other hand, women viewed them as undervaluing the role of the primary caregiver that they generally assumed on their own.¹⁷

The reaction of men's groups to the result of *B and B* and other cases has been to make allegations that they are discriminated against in children's matters. Not only have these groups gathered momentum of late, but they have drawn credibility and popular support as a political and media force. It is, of course, easy to establish that their claims are factually incorrect. Literature and available studies indicate that when cases go to the

¹³ Until the current reforms, the term "contact and residence disputes" was commonly used to refer to children's matters. Now, the terminology has changed, as discussed in chapter 2.

¹⁴ R Kaspiew, "Equal Parenting or the Effacement of Mothers? *B and B* and the *Family Law Reform Act 1995* (Cth)", (1998) 12 *AJFL* 69, at p 70; C Milburn, "Fathers Seek Action on Court Decision", *The Age*, 11 July 1997.

¹⁵ R Kaspiew, above n 14, at p 70.

¹⁶ As expressed by R Kaspiew, above n 14, at p 70. It had been argued that legal concepts of custody and access disenfranchised fathers by minimising their fathering roles: *Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975*, AGPS, 1992, pp 106-112.

¹⁷ See M Slaughter, "The Legal Construction of 'Mother'", in M Fineman and I Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, Routledge, New York, 1995, at p 73.

FCA for a decision in a disputed case, the court makes orders in favour of fathers at double the rate of those made by consent.¹⁸ Just as fathers' rights groups have misread history and the cause of the alleged marginalisation of fathers, they have also misread the law and misidentified the issues.

It concerns me that the misconceptions that fathers' rights groups have of the family law system are often incorrectly accepted as fact. The influence of fathers' rights groups appears to be a phenomenon common to the impetus for changes in most countries. Australia is also, as a result, seeing a politicisation of family law through politicians' support for fathers' rights groups and their plight. The success of the fathers' rights groups in gaining the support of politicians is apparent from the Government's Second Reading speech and the Parliamentary Debates where several references were made in the hope that a shared parenting law would relieve the distress of non-custodial parents, the majority of whom are fathers.¹⁹ The reliance by fathers' rights groups on the discourse of "victimhood" and "formal equality" has been particularly effective with

¹⁸ For some examples, see S Bordow, "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" (1994) 8 *AJFL* 252; F Horwill and S Bordow, *The Outcome of Defended Custody Cases in the Family Court of Australia*, Research Report No 4, Family Court of Australia, 1983; M Harrison, "Family Law, Recent Issues and Initiatives" (1999) 52 *Family Matters* 61. See also chapter 5 of this thesis; S Boyd in S Boyd, H Rhoades and K Burns, "The Politics of the Primary Caregiver Presumption: A Conversation" (1999) 13 *AJFL* 233, at pp 236 and 244. See too J Baxter, "Moving Towards Equality? Questions of change and equality in household work patterns" in Gatens and MacKinnon (eds), *Gender and Institutions: Welfare, Work and Citizenship*, Cambridge University Press, Melbourne, 1998, at p 236. M Eichler, "Family Shifts: Families, Policies, and Gender Equality" Oxford University Press, Toronto, 1997, at pp 59-63, pp 75-76; E E Maccoby and R H Mnookin, "Dividing the Child: Social and Legal Dilemmas of Custody" Harvard University Press, Cambridge, 1992, at pp 25-26, pp 63-65, pp 212-214. Not only do fathers' rights groups ignore the reality that more women than men are the primary caregivers, but their claims of bias have no empirical support.

¹⁹ See House of Representatives, Family Law Reform Bill 1994, *Hansard*, 21 November 1995, at 3303; and Senate, Family Law Reform Bill, *Explanatory Memorandum*, November 1994, at para 5. The proliferation of fathers' rights groups and branches is also discussed by M Abernethy, "Paternity Wars: In Australia, Divorce is a Battle Men can't Win", *Australian Penthouse*, April 1993.

Australian politicians.²⁰ This is presumably how the current reforms, which collectively aspire to a presumption of shared parenting, originated. In my opinion, it is in the interests of governments to accept the arguments of men's groups in order to uphold a highly patriarchal society where gender justice is more a theory than reality.

6.2 Common misconceptions held by men's movements of the system

The motivation of fathers' rights groups has less to do with upholding the best interests of the child than with exercising their rights over their children, and it is therefore problematic if these groups are the driving force for the reforms. In this part of the chapter, I discuss the most recent allegations made by fathers' rights groups against the system and attempt to demonstrate the illogical reasoning behind those allegations, as well as the direction in which the system is now heading as a result. My aim in doing this is to generate a discourse that challenges the current reforms because while they attempt to resolve the identified problems, they really create other, more serious, issues.

6.2.1 Chief misconception: the system is biased against fathers

It is a common response to the family law system that the parties that come in contact with it feel aggrieved, misunderstood and generally emotional.²¹ However, this does not prove that the system is biased. It is important to clarify the terminology at this point. A definition of bias includes partiality and prejudice.²² I understand the word to connote preconceived notions, forgone conclusions and predispositions.²³ A research project

²⁰ M Kaye and J Tolmie, "Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups" (1998) 22 *Melbourne University Law Review* 162.

²¹ I base this assertion on my own personal observations of clients' responses to the legal processes involved in a family breakdown.

²² Webster's Reference Library, Concise Edition Dictionary and Thesaurus, 2002 Geddes & Grosset.

²³ From the Cambridge Advanced Learner's Dictionary Second Edition, 2005 Cambridge University Press.

undertaken by Hunter to assess clients' perceptions and experiences of family law litigation, shows that allegations of bias against men in the determination of children's matters must be treated with caution.²⁴ This is because a client's animosity towards the system often derives from a disjunction between what the client subjectively wants and what may be the most desirable outcome when the best interests of the child are considered.²⁵ The client does not always understand, or chooses not to understand (perhaps because of the high levels of emotions involved), that what they subjectively want and what is in the best interests of the child can be different, and that in the law the best interests of the child are paramount. Hunter points out that allegations of bias against men in the FCA need to be understood in the context of a legal regime, which in emphasising the best interests of the child, inevitably deprives some fathers of their usual and expected level of control over family arrangements.²⁶ Interestingly, she does not mention that they are deprived of exercising their parental responsibility. Control and responsibility are not the same thing. The findings of this project show that clients tend to project their dissatisfaction with outcomes back on to the process, for example, in allegations that the FCA is biased against men.²⁷

The belief that biases in the system are a result of judicial discretion is an easy misconception but dangerous nonetheless. Fathers' rights groups resent the fact that the courts are given authority (in fact, they are bound) to prioritise the best interests of the

²⁴ R Hunter, "Through the looking glass: Clients' perceptions and experiences of Family Law litigation" (2002) 16 *AJFL* 7 at p 14.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, at p 15. It is interesting to note the findings in Hunter's study that female clients were more likely than male clients to believe that the legal system treated them fairly. Also, while the outcomes of cases may not have satisfied the male clients involved, there was little indication that the other party had gained any particular advantage.

child, and also to use their discretion when determining matters such as making or altering parenting orders; making orders requiring a child's location to be revealed or a child to be returned to a parent; and making orders relating to the general welfare of the child. Herein lies the problem – fathers' rights groups tend to ignore the merits of judicial discretion and opt instead for prescribed rules, such as a presumption of equal parental responsibility and shared parenting, in order to secure their rights regardless of whether or not they are in the best interests of the child in each individual case.

Before entering into a detailed discussion of the dangers of such misconceptions, it is important to elaborate on the point that men tend to think in terms of their rights and not the best interests of the child. This point is relevant to my argument that they misunderstand their legal position. Although they feel they lack legal rights, it is more often than not the demands of living in separate households that cause the problems, rather than being a case of bias against men in the system. There are findings, such as those of Gilligan, on the role of gender in negotiations, which focus on gendered responses to moral issues. Gilligan's study identified gendered responses to moral issues, which were considered to be based on the fact that women are more concerned with care issues while men are preoccupied with ideas of justice.²⁸ Although there have been criticisms of the associated assertion that there is an essential feminine way of reasoning,²⁹ other commentators have also noted the impact of a woman's ethic of care in

²⁸ C Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, Cambridge, Mass, 1982.

²⁹ For example, Carol Smart criticises this assertion: C Smart, *Losing the Struggle for Another Voice: The Case of Family Law*, University of Leeds, United Kingdom, 1994. See also J Tronto, "Beyond Gender Difference to a Theory of Care" in M J Larrabee (ed), *An Ethic of Care*, Routledge, London, 1993 at pp 240-257.

dispute resolution processes,³⁰ and identified specific patterns of behaviour amongst men and women.³¹

A study conducted by Maclean and Eekelaar aimed to identify patterns of behaviour, so that the extent to which parental obligations exist as social practices could be more accurately ascertained.³² It is interesting to note their findings that men and women generally believe they have different familial obligations. For example, the data showed that there is a gendered difference in perceptions of the sources of social obligations of support of children, with men more likely to view it as resting on “social” parenthood and women more likely to see it as stemming from “natural” parenthood. An implication of the male perspective in relation to child support payments, for instance, is that a support obligation arises to the former household only where contact occurs, and should be reduced by any new social obligations undertaken to a new household.³³

A cynical, yet not always unreasonable, argument used by Smart and Neale to demonstrate that men tend to think in terms of their rights and not the best interests of the child, is that men tend to become interested in their children only upon separation.³⁴ While I acknowledge that this is a crude generalisation, I have seen this behaviour in

³⁰ For example, R Field, “Participation in Pre-Trial Legal Negotiations of Family Law Disputes: Some Issues for Women” (1998) 12 *AJFL* 240, at p 241, and Trina Grillo, who specifically notes the impact of a woman’s ethic of care in mediation: T Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 *Yale Law Journal* 1545 at p 1601.

³¹ M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood across Households*, Hart Publishing, Oxford, 1997.

³² *Ibid*, at pp 7-8.

³³ The most recent research on attitudes to child support is Bruce Smyth et al’s research for the Parkinson inquiry – see www.aph.gov.au/SEnate/committee/clac_ctte/child_support/submissions/sublist.htm, the article in the *SMH* on 15 June 2005 detailing these attitudes at www.smh.com.au/news/National/Many-fathers-to-pay-less-child-support/2005/06/14/1118645811287.html and www.facs.gov.au/internet/minister2.nsf/content/child_suppt_taskforce.htm for the stated aims of the inquiry.

³⁴ As discussed in C Smart and B Neale, *Family Fragments*, Cambridge, Polity Press, 1999, p 50.

practice.³⁵ The increased interest in children by their fathers upon separation is possibly a means of exercising power over the mother and creating a bargaining tool, or perhaps to gain a tactical advantage in subsequent proceedings relating to the determination of contact and residence. Some would say it is a method of reducing child support payments.³⁶ Whatever the motive, the reality is that upon separation there are suddenly logistical difficulties in making workable living arrangements over two households. These difficulties are further exacerbated when parental responsibility has not been shared during the life of the intact family. It is when these complicated factors prevent fathers from obtaining the contact they believe they are entitled to simply because they are a parent that they begin to assert that the system is biased against them,³⁷ rather than acknowledge the difficulties associated with making parenting arrangements after separation.

Unfortunately, fathers' rights groups often depict the situation as a battle between the sexes caused by an irresponsible use of power. This narrow perception of the system has been said to rob the conflict of its cultural and historical roots, portray it in terms of a simple, universal gender conflict, and often generates a punitive response (towards mothers) on the part of policy makers and legislators.³⁸ In order to undo this depiction, fathers' rights groups must come to appreciate that the system promotes first and foremost the child's best interests, and that it reflects social reality. Fathers' rights groups must stop trying to divert the attention away from these real issues. I argue that this would be possible by educating them on the system when they are not aggrieved by it,

³⁵ While my experiences are not statistically significant, I find it relevant that they are in accord with the literature.

³⁶ M Kaye and J Tolmie, above n 5, at p 34.

³⁷ Ibid.

³⁸ C Smart, above n 2, at p 30.

hence my proposal for education campaigns and counselling of couples prior to the birth of any children.

In contrast to the view held by fathers' rights groups that a presumption of shared parenting will rectify the bias, is the opinion that there should be a presumption in favour of the primary caregiver.³⁹ Advocates of this type of system argue that this is appropriate given the discourse of shared parenting undervalues and ignores the importance of the primary caregiver role that is still primarily that of the mother. Although an emphasis on primary care-giving is recognised as being highly problematic in terms of hindering a move away from a nuclear family model and towards a wider sharing of parental responsibilities in real life, it is said that such an emphasis is preferable to a legal system that ignores contemporary social reality.⁴⁰ Despite its flaws, this presumption has been viewed as our best hope of recognising continuing gendered practices in the division of labour in heterosexual households, while also empowering women after separation.⁴¹ Others have argued that it is not necessary to implement such a presumption in the legislation as primary care-giving is the norm for women in society, and therefore already operates as the starting point.⁴²

Although I do not agree with the implementation of such a presumption in the law, as any presumption wrongly identifies all families as the same and can have the potential to engage in problematic ideological assumptions, I do believe that men's movements ought

³⁹ S Boyd in S Boyd, H Rhoades and K Burns, above n 18, at p 235.

⁴⁰ S B Boyd, "Potentialities and Perils of the Primary Caregiver Presumption", *Canadian Family Law Quarterly*, vol 7, 1990, p 1.

⁴¹ S Boyd in S Boyd, H Rhoades and K Burns, above n 17, at p 243. I wish to note here that other commentators have reservations about the primary caregiver presumption as a strategy for empowering women after family breakdown especially as it relies on an "approved" version of motherhood: H Rhoades in *ibid*, above n 17, at p 246.

⁴² C Smart, above n 2.

to rectify their “conspiracy theory” viewpoint of the system in order to focus on the real issues. At the risk of being accused of using the “conspiracy theory” argument myself, I assert that women are the ones disadvantaged by the fact that fathers’ rights groups are often considered unbiased by the media, and that frequently a counter perspective to their concerns is not provided.⁴³

Because fathers’ rights groups are generally more organised and vociferous than women’s groups, public submissions in relation to family law reform risk presenting an inaccurate picture of the current operation of the family law system.⁴⁴ Hence the residence mother’s side of the story is often not articulated, which disadvantages her as the public submissions process favourably reflects organised, self-interested and more vociferous groups.⁴⁵

In my view, it is the force and volume of the fathers’ rights groups that attract a prompt response from politicians, despite the obvious lack of logic and substance in their argument.

6.2.2 Why fathers’ groups should be challenged

Not only should fathers’ rights groups be challenged because their allegations generally lack substance, but because they are a loud minority whose perspective is not the only perspective. Although their misconceptions and allegations of bias in the system are often presented as the male perspective on family law, they are not the viewpoint held

⁴³ As pointed out by M Kaye and J Tolmie, above n 5, at p 23.

⁴⁴ As put forward by R Graycar, *Submissions to the Joint Select Committee on Certain Aspects of the Operation of the Family Law Act*, Part Two, National Committee on Violence Against Women, 1991 at p 71.

⁴⁵ As pointed out by Kaye and Tolmie above n 5, at p 26.

by all fathers. They constitute one highly politicised perspective.⁴⁶ It is the ferocity and far-reaching impact of these groups that are of major concern. Not only do they misrepresent fathers generally through their loud allegations and misperceptions of the system, but also through the physical battles engaged in by the more extreme members of fathers' rights groups that cause harm (to judges, mothers and children).⁴⁷ Furthermore, they completely disregard the ramifications of their actions on their children, who as a result become increasingly victimised.

To argue that a presumption of shared parenting upon separation is the necessary solution to the alleged bias in the family law system, despite the potential ramifications of this arrangement on the children involved, is indicative of this disregard.

6.2.3 Children relegated to the background

The notion that the solution to parenting disputes upon separation should be a presumption of shared parenting shows how little children really matter in the submissions of fathers' rights groups and policy discussions. Although fathers' rights groups feel cheated and unfairly treated, it seems dangerous for legal policy merely to respond to their cries without due thought about their potential impact on the children involved. I discuss this in the following chapter. One commentator recommends focussing on historical and cultural processes in order to firstly understand the

⁴⁶ As termed by M Kaye and J Tolmie, above n 5, at p 67.

⁴⁷ This is pointed out by C Smart, "Children's Voices", 25th Anniversary Conference, Family Court of Australia, Sydney, 26-29 July 2001, archived papers, at p 35. I also wish to cite a documentary I viewed on British television channel ITV 1, on Friday, 11 November 2005, entitled *Dad's Army: Inside Fathers 4 Justice*, which investigated the allegations of harassment and violence among members of the controversial fathers' rights organisation. It followed a series of organised assaults on various targets undertaken by this group.

predicament that parents find themselves in.⁴⁸ This would presumably assist law reformers to make legislative changes that reflect social reality.

6.3 Misdiagnosing the problem and doing away with judicial discretion

In addition to being irrational and neglectful of the best interests of the child, the allegations of fathers' rights groups against the system suggest that judicial discretion is at the root of the problem. This is a false diagnosis and therefore by allowing the fathers' rights groups to set the agenda of change, we are essentially redressing the problems wrongly. To view judicial discretion as the root of the problem is a dangerous misconception, and to do away with it through the introduction of explicitly prescriptive rules would completely transform the system in an unsatisfactory way.⁴⁹ The current reforms consequently make the paramount consideration the rights of the parents, thus in my view jeopardising the best interests of the child. I suggest they therefore throw into question the whole purpose of the family law system.

6.3.1 A trend away from discretion

The tendency to uphold formal equality as the basis of legal relations between parents is significant in driving the move towards a rule-based system. So too is the concern that individuals are not protected from arbitrary decisions under a discretionary regime. However, before prescribed rules replace judicial discretion, we need to ask what rights should be conferred or guarded. Is equality a suitable basis for family law? If so, which model of equality is appropriate, if any? When is difference or equality of treatment to be

⁴⁸ C Smart, "Children's Voices", above n 47, at p 36.

⁴⁹ I acknowledge that there have also been pro-feminist arguments for moves away from discretion, but for very different reasons that I do not detail in this thesis. For example, see J Behrens, "The Form and Substance of Australian Legislation on Parenting Orders: a case for the principles of care and diversity and presumptions based upon them", (2002) 24(2) *Journal of Social Welfare and Family Law*, 1-21.

preferred?⁵⁰ Making parents formally equal does not make them more agreeable. The 1995 reforms demonstrate that a move to equality of rights between parents, regardless of the specific circumstances of each case, only serves to increase disagreement over their exercise.

The presumption of shared parenting offers evidence of a trend away from discretion towards a more rule-based system and this is problematic for many reasons. Discretion in law refers to a person with legal authority making a decision by choosing between several outcomes.⁵¹ That power to choose may have derived explicitly from legislation, been assumed by the decision-maker, or may simply be a natural feature of making a decision at all.⁵² Judicial discretion is important in family law because all families are different and therefore require decisions to be made based on the particular circumstances of the case.

The subjective nature of the discretionary regime is not only criticised by fathers' rights groups, but also by others who assert that it leads to uncertainty in the law, and that this uncertainty can encourage risk-averse women into premature and sometimes disadvantageous settlement.⁵³ Hence, there has been a general growing dissatisfaction with discretionary regimes.⁵⁴

Dewar asserts the reasons for this growing dissatisfaction are in fact twofold: the discretionary regime is proving costly as it takes a long time to resolve cases; and it is not providing enough of a justificatory framework to govern the rights and obligations of

⁵⁰ J Dewar, "Reducing Discretion in Family Law" (1997) 11 *AJFL* 309, at p 322.

⁵¹ *Ibid*, at p 311.

⁵² K Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in K Hawkins (ed), *The Uses of Discretion*, OUP, New York, 1992 at p 11.

⁵³ R Field, above n 30, at p 245.

⁵⁴ Also recognised by J Dewar, above n 50, at p 310.

family members to one another.⁵⁵ I gain support for my argument from this second reason that prescribed rules are being proposed in response to the politicisation of family law, and as a way of instilling family values back into the population to establish a certain vision of family relations.⁵⁶

6.3.2 Dangers of prescriptive laws

The effect of the new reforms on children's matters has been to remove legally authorised choice from decision-makers and replace it by specifying more precise outcomes in advance. This is dangerous because a rigid rules-based system leads to inappropriate rulings that fail to bear in mind the particular circumstances of particular parties. It is true that rules and discretion could work together, rather than being portrayed as polar opposites.⁵⁷ While the family law system as it was prior to the current reforms was largely discretionary,⁵⁸ there were many examples in the legislation where rules and discretion worked hand in hand.

For example, the provision stipulating that the decision-maker was to regard the best interests of the child as paramount when making a parenting order⁵⁹ was a rule of thumb, which was complemented by the provision setting out the factors for the decision-maker to take into account when determining what was in the best interests of the child. This was a rule being applied in a discretionary manner.⁶⁰ Although this provision was wide and required value judgments to be made to give effect to it, the decision-maker was still

⁵⁵ Ibid.

⁵⁶ Ibid, at pp 310-311.

⁵⁷ The way in which this is suggested possible is by rules being applied in a discretionary manner and choice being restricted through rules of thumb or interpretive practice: Ibid, at pp 312-313.

⁵⁸ This assertion is supported by P McManus, "Informal rules in family law" (2004) 18 *AJFL* 257, at p 257.

⁵⁹ The old section 65E *Family Law Act 1975* (Cth).

⁶⁰ The old section 68F(2) *Family Law Act 1975* (Cth).

guided by certain factors that were to be taken into account. This flexible system was criticised by some for lacking clear principles and guidance, however, I argue it really was far more rule-oriented than it appeared upon first glance,⁶¹ and the discretion was subject to the boundaries set by these rules.

The exercise of discretion has further been constrained by the existence of procedural rules. Examples include presumptions, checklists, guidelines,⁶² factors and principles. McManus asserts that informal rules have also been an essential feature of the family law system because they promote the resolution of issues and help to control the workload of the FCA, without which the FCA could not function effectively.⁶³ Informal rules have evolved in response to the dissatisfaction that discretion makes proceedings costly and lengthy. They are described as propositions or understandings about law that are intended to shape dealings about legal issues. They have been said to differ from social rules or etiquette, which connote expectations about behaviour generally accepted by the population.⁶⁴

To demonstrate the impact of informal rules on family law, we need simply to look at the fact that although we know that women are more often the ones with whom the children will live, there is a lack of understanding (whether voluntary or not) as to why

⁶¹ As asserted by P McManus, "Informal rules in family law" above n 58, at p 258.

⁶² P McManus discusses the true effect of guidelines in "Guidelines in family law: Rules by another name?", (2001) 15 *AJFL* 51. He says that some guidelines have become rules that are binding and therefore the belief that the FCA is a discretionary jurisdiction unaffected by notions of binding authority is qualified.

⁶³ P McManus, "Informal rules in family law", above n 58, at p 258.

⁶⁴ *Ibid*, at p 260. An example of an informal rule provided by McManus is the statement that fathers are less likely to be successful than mothers in applications for residence. He describes this as an informal "community rule" that is basically an understanding about the system generally believed to be true. It is often stated by alleging that the FCA is biased against men: See M Kaye and J Tolmie, "Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups" above n 20, at pp 164-5 and Kaye and Tolmie, above n 5, at pp 34-35.

this is the case.⁶⁵ McManus points out that while there is some proof of judicial preference for mothers, especially those with younger children,⁶⁶ those fathers who have had substantial involvement in the care of the child both during the intact family and after separation do continue that level of involvement.⁶⁷ Despite the evidence that pre-separation involvement of fathers in their children's lives impacts on post-separation involvement, the generally held belief that fathers will automatically be unsuccessful in residence applications survives.

This indicates to me that wide-spread education campaigns and compulsory counselling for couples from an early point in the life of the family are required in order to educate people on the way the system functions, and accordingly assist them in structuring their united family life.

It is when these misconceptions lead to a deliberate attempt to shift family law towards a rule-dominated regime, and so reduce choice almost altogether at the point of application or adjudication, that there is a veritable problem. Discretion arguably maximises the chance of doing justice in each individual case by taking the specific facts of the case into account.⁶⁸ Sensitivity to the facts of each case is especially required in family law when determining children's matters. Flexibility is also needed to produce optimal outcomes. It has been said that discretion grants a judge authority to respond to the full variety of circumstances a case presents and therefore to do justice in each

⁶⁵ P McManus, "Informal rules in family law", above n 58, at p 261.

⁶⁶ Ibid; see also S Bordow, "Defended Custody Cases in the Family Court of Australia: Factors influencing the Outcome", above n 18, at p 258.

⁶⁷ S Bordow, above n 18, at p 261. McManus points out that the study undertaken by Bordow could now be considered outdated, especially as other judicial reasons are now given for awarding residence to a father.

⁶⁸ R Field, above n 30, at p 244.

individual matter.⁶⁹ An appreciation of these features of judicial discretion amongst the community must be encouraged, not shunned. More importantly, we need to create a discourse of the importance of flexible decision-making to achieve justice.

Therefore, I argue that no prescriptive rule could possibly do more justice to the best interests of the child than a discretionary regime. The conceptualisation of family law as a way to give effect to rights irrespective of consequences, or to specific models of family relations rather than searching for the most appropriate or beneficial outcome, risks jeopardising the best interests of the child.⁷⁰

A solution to the tension between a rule-based system and a discretionary system has been proposed by Dewar – to draw the best features from both and avoid the worst.⁷¹ He proposes to do this by leaving wide discretions to the judges, so they can fine tune outcomes in the small minority of cases that end up before them, while enforcing a more rule-like framework on those negotiating in private, in order to promote the efficiency rules are said to promote.⁷² He does acknowledge, however, that such a solution may simplify the dilemma and be insufficient to solve such a complex problem when so many

⁶⁹ C E Schneider, “The Tension Between Rules and Discretion in Family Law: A Report and Reflection”(1993) 27 *Family Law Quarterly* 229 at p 234.

⁷⁰ Rowlands J, “Recent Developments in Shared Parenting and Joint Custody – A Personal View From the Court”, 10 May 2005, at p 6, with reference to The Family Court of Australia, Response to the Australian Government’s Discussion Paper, “A New Approach to the Family Law System: Implementation of Reforms”, January 2005.

http://www.familycourt.gov.au/presence/resources/file/eb00054114bd588/Shared_Parenting_Conference_Paper.pdf. The problems with introducing a presumption in favour of shared parenting will be analysed in detail in the following chapter.

⁷¹ J Dewar, above n 50, at pp 325-326.

⁷² Dewar says this solution has been termed “acoustic separation”, and refers to Sunstein’s explanation that “legislatures should lay down the rigid rules for public – ‘conduct rules’ – but that... [o]fficials might follow more flexible ‘decision rules’ that deviate from conduct rules and indeed that work as standards”: C Sunstein, “Problems with Rules” (1995) 83 *California Law Review* 953, at p 1007. Dewar also points out that something like this already operates in Australia under the child support scheme, where liability is calculated in accordance with a fixed formula, but where there is the opportunity for departures from the formula result through an appeal system, being ordered by a Review Officer or by a court: above n 49, at p 326.

other issues must be taken into account. For a start, it is not easy to agree as to what the rules should be. Furthermore, the question of the appropriate balance between rules and discretion must be considered in the light of whether or not family law should be seen in terms of rights or utility, of fairness or efficiency, as well as in view of the material conditions under which the system operates.⁷³

Clearly, there are conflicting views about the values of codification⁷⁴ and increasing tension between arguments based on consistency and others based on a “muddling through” approach to problem-solving.⁷⁵ Those in support of the latter approach argue that although it appears to be an incoherent approach, in reality it produces the best results. It justifies the practicality of the common law by an appeal to such aspects as the way in which decisions come to be made by judges on the basis of discrete and individual sets of facts whose material similarity to other sets of facts has yet to be determined. It also highlights the difficulty of translating a single decision into a rule of law to govern all future similar sets of facts.

Therefore, I argue that leaving judges free to exercise discretion safeguards children’s interests better than imposing strict rules. That there has been a converging shift by the FCA and Parliament towards a more settled and less flexible family law is not particularly desirable. The introduction of certain rules to deal in the same way with all families would inevitably raise the question of whether or not judges could and should mitigate the rigours of the law where Parliament has been unwilling or unable to make

⁷³ By “material conditions” Dewar means internal and external costs, the judicial or bureaucratic nature of family justice and the evolving relationship between the family and state: *Ibid.*

⁷⁴ For more discussion on this debate, see the preface to H L A Hart, *The Concept of Law*, 2nd edn, 1994; the introduction to R Dworkin, *Law’s Empire*, 1986; and S Guest, *Ronald Dworkin*, (2nd ed), 1997.

⁷⁵ P S Atiyah concludes that a good deal of alleged pragmatism is based on implicit theory and may not be as unsystematic as it claims – P S Atiyah, *Pragmatism and Theory in English Law*, 1987, chapters 2 and 3.

exceptions in special circumstances. Decision-makers would constantly be put in the position of challenging the laws when faced with the individual circumstances of a case that may not fit the mould catered to by the rules.⁷⁶ Surely with the introduction of specific rules to deal in the same way with all children and families despite their variations, there would inevitably be several opportunities for decision-makers to override the new laws because they would simply not constitute appropriate problem-solving devices for all cases.

In conclusion, I have critiqued the arguments of the fathers' rights groups that the family law system is biased against fathers. I have argued that these misconceived complaints are driving the changes, and I have demonstrated why this is dangerous. In particular, I have pointed out that the change in question is replacing judicial discretion with strict rules, and I have indicated that this is a highly problematic approach because a system without judicial discretion cannot possibly uphold the best interests of the child in each individual case.

In the following chapter, I discuss in greater detail the problems with shared parenting as a rebuttable presumption, from the point of view of the children involved.

⁷⁶ This issue is analysed by W Twining and D Miers, *How to do things with rules* (2nd ed), 1999 Butterworths, at p 4.

CHAPTER 7: PROBLEMS WITH “SHARED PARENTING”: AN IDEAL OR A (REBUTTABLE) PRESUMPTION?

As I discussed in chapter 6, the introduction of a presumption in favour of shared parenting is justified by fathers’ rights groups (and the Government) with the help of two ideas: the family law system in general discriminates against men; and fathers are engaging in a battle to uphold the child’s rights to contact with both parents.¹

In this chapter, I develop the critique of the introduction of the rebuttable presumption of shared parenting.² I essentially look at two issues. On the one hand, I deal with the implications and impracticalities of the rebuttable presumption of shared parenting in most families, as I believe it is driven neither by the best interests of the child nor a desire to have the law reflect social reality. On the other hand, I propose that if social and economic changes were made before legislative changes, to encourage the practice of shared parenting from the start of the intact family, there may be possibilities, conditional on strong corroborative evidence, for such arrangements to be implemented post separation.

Before proceeding, I should clarify that although the term “shared parenting” is commonly used to mean the sharing of parental duties and responsibilities, in this chapter it refers specifically to parents making arrangements whereby they undertake equal physical and legal custody over their children (I also refer to it as “shared residence”), and “shared parental responsibility” means that separated or divorced parents share their

¹ P McManus, “Informal rules in family law”, (2004) 18 *AJFL* 257, at p 261.

² As discussed in chapter 2, the amendments indicate that, in general terms, parents will be urged to enter into shared parenting arrangements in relation to their children after separation, and to enter into parenting plans as one of the preferred ways of recording their agreements.

parental duties and responsibilities equally by way of joint decision-making. As I have explained in chapter 2, it is this latter notion that has been formalised in the FLA with the new amendments. However, all of the provisions collectively aspire to greater shared parenting after separation. I believe that the term “shared parenting” should incorporate in its meaning more than a division of decision-making responsibilities, as this could occur without any physical contact with the child. It should also connote significant in-person contact with the child. That is why I equate shared parenting with shared residence.

Although perhaps theoretically ideal, I argue that shared parenting is not in the best interests of all children upon the separation of their parents. I plan to develop this argument by referring to research and judicial opinion on the effect of such an arrangement. In addition, I discuss the child’s perspective. Research on the benefits of shared parenting for children, though still at a preliminary stage,³ does not paint it in a positive light for all children. Perhaps the findings of its advantages have not developed because not many have been discovered. On the face of it, no one would deny its positive benefits for the children and both parents – the facilitation of an ongoing relationship without either parent bearing the sole responsibility of residence.⁴ However, evidence shows that unless the circumstances, comprised of many factors, are conducive to such an arrangement, it will not work. Preliminary research tends to suggest that where a high level of conflict exists between the parents, the children will be much worse off than

³ This assertion is supported by M Kaye and J Tolmie, “Fathers’ Rights Groups in Australia and their Engagement with Issues in Family Law” (1998) 12 *AJFL* 19, at p 33.

⁴ As pointed out by M Kaye and J Tolmie, *ibid*.

under a sole residence arrangement.⁵ I isolate this point because it best illustrates how illogical it is for shared parenting to become automatically court-ordered,⁶ keeping in view the fact that parents seek the court's assistance once all other methods of resolving their disputes have failed due to the high level of conflict. Many scholars believe that court-ordered shared parenting is never suitable because it should only be promoted in those cases where both parents willingly agree to it and their relationship is harmonious.⁷ Obviously in those cases, a court order is unlikely to be necessary anyway. This is reinforced by the point made by the former Chief Justice Nicholson that the disputes the FCA is called upon to adjudicate very often involve a parent (sometimes two parents) incapable of caring for a child due to reasons of violence, addiction or temperament.⁸

One idea that has not been closely analysed and does not appear too often in related literature is that where shared parenting has been practised during the intact family, the circumstances in the separated family might naturally have an increased chance of being more conducive to such arrangements. While it appears obvious that "equal shared parenting time" or "substantially shared parenting time" arrangements would be less inappropriate in situations where both parents have been substantially involved in raising

⁵ J B Kelly, "Current Research on Children's Post Divorce Adjustment: no Simple Answers" (1993) 31 *Family and Conciliation Courts Review* 29; B Rodgers and J Pryor, "Divorce and Separation: The Outcomes for Children", *Joseph Rowntree Foundation*, York 1998; H Rhoades, "Posing as Reform – the Case of the Family Law Reform Act" (2000) 14 *AJFL* 142; J Wallerstein and S Blakeslee, *Second Chances – Men, Women and Children a Decade after Divorce*, Ticknor & Fields, New York, 1989; F Furstenburg and A Cherlin, *Divided Families: What Happens to Children When Parents Part*, Harvard UP, Cambridge, Massachusetts, 1991; J Behrens, "Shared Parenting: Possibilities... and Realities" (1996) 21 *Alternative Law Journal* 213; P Durst, N Wedemeyer and L Zurcher, "Parenting Relationships After Divorce: Implications for Practice" (Sept-Oct 1985) 30 *Social Work* 426. These authors also suggest that flexible work hours and adequate income may also be required to make shared parenting work. For an opposing view see W Bender, "Joint Custody: The Option of Choice" (1994) 21 (3/4) *Journal of Divorce and Remarriage* 115.

⁶ Admittedly subject to the possibility of being rebutted.

⁷ B Smyth, G Sheehan and B Fehlberg, "Patterns of parenting after divorce: A pre-Reform Act benchmark study" (2001) 15 *AJFL* 114 at p 124 (hereafter "Smyth et al").

⁸ Nicholson CJ, "Children and Children's Rights in the Context of Family Law", paper presented at the LAWASIA Conference in Brisbane on 21 June 2003, at p 11.

their children prior to separation, the actual benefits to children of such arrangements have not been the subject of any published research. Perhaps no research has yet been undertaken to confirm this proposal because there are not enough families practising equal parental responsibility and shared parenting for such a study to be possible, or maybe such families do not come to the official agencies and are therefore not recorded. I certainly have found no such findings but such research needs to happen urgently.

7.1 Introducing shared parenting at what expense?

The Government's supposed purpose in changing the Australian family law system in order for the responsibility of all children to automatically be "shared" between the two parents upon separation is said to be to "promote the objective of both parents having a meaningful role in their children's lives."⁹ As I have argued in chapter 6, this discourse stems from men's expectations that the law should be "fair" as defined by fathers' rights groups. Although I acknowledge that legal norms are used to set trends and standards to be followed by the community,¹⁰ and that the law embodies value preferences, it is the society in which those norms are set that I question. I do not assert that the law should not embody the shared parenting preference. My discomfort comes from a lack of fit between the existing social reality and the new amendments, as I argue that the lack of fit is damaging to both women and children.

The law should be "fair", though not as defined by fathers' rights groups, who rely on an ideological and abstract idea of formal equality. The FLA relies on the idea that it is

⁹ Page 1 of the Australian Government's Discussion Paper entitled, *A New Approach to the Family Law System*, released on 10 November 2004

¹⁰ For example, with regards to domestic violence the argument is that the law is in contrast to the social practices but such a law sets a standard to be followed by the community. This is the case too with anti-discrimination laws.

“fair” by claiming to be gender neutral, however, as argued above this can contribute to the problem of injustice for mothers. Shared parenting in itself is a good aim for family law but in the contemporary social reality it works to disadvantage mothers. Fathers’ groups are disingenuous in their claim that they want a fair system or a system that serves the best interests of the child – they are really trying to assert what they see as their own rights. Because these reforms are parent-focussed and not child-focussed, and have been introduced to placate fathers’ rights groups, they will also work to the detriment of many children for whom such an arrangement is inappropriate or impractical.¹¹

7.2 Why shared parenting is mostly inappropriate and impractical

In this section, I will discuss research on the effects of shared parenting upon separation and cases in which the judiciary has considered such an arrangement. I also demonstrate why the presumption of shared parenting is problematic from the child’s perspective.

Firstly, I will further clarify the terminology. It has been said that parental responsibility is generally thought to include a duty to provide a home; a duty to educate; a right to determine religion and religious education; the duty to obtain essential medical assistance; the duty to maintain; the right to name; the right to domestic service; consent to marriage where the child is under 18; agreement to be sought before adoption; the right to prevent passports being issued in certain circumstances; the appointment of a guardian by will; and the rights and duties over a child’s property.¹² Hence, most characteristics of parental responsibility are all about decision-making and not about spending time with

¹¹ Nicholson CJ, above n 8, at p 9.

¹² D Hodson, “Arrangements For Children: The Legal Context”, April 2003, www.davidhodson.com.

the child. Prior to the reforms, it was already stipulated in the FLA that parents shared these responsibilities, unless the FCA made an order varying the situation.¹³

As for equal shared parenting time, arrangements may vary with children alternating between their two parents' homes on a day-to-day, week-to-week, month-to-month or six-monthly basis. In my experience, most arrangements seem to be based on a weekly or fortnightly basis. As Neale, Flowerdew and Smart note, from the child's perspective this arrangement is more accurately described as "dual residence".¹⁴ They suggest that by using the term "shared residence" we are adopting a strictly adult perspective and this may, in itself, be problematic because it treats the children as part of the matrimonial asset pool. Further, they contend that shared residence is by no means synonymous with shared parenting because while shared residence refers to children spending equal time with each parent, shared parenting is defined by degrees of emotional bonding and closeness, not by hours and days.¹⁵ In their studies, Neale, Flowerdew and Smart have found that children who have one "home" can easily feel that they enjoy "shared parenting".¹⁶ I, however, still believe the term "shared parenting" should connote some level of shared parenting time, otherwise the term could completely ignore the need for any in-person contact.

Although equal shared parenting time has been considered for many years by the judiciary when exercising its discretion, more often than not it is achieved by a private

¹³ Sections 61B and 61C *Family Law Act 1975* (Cth). Moreover, it was already stipulated in the FCA that each child has a right of contact to each parent: s 60B(2)(b) *Family Law Act 1975* (Cth).

¹⁴ B Neale, J Flowerdew and C Smart, "Drifting Towards Shared Residence?" *Australian Family Lawyer*, Autumn 2004, Vol 17, No 2.

¹⁵ Ibid.

¹⁶ Dr Bren Neale, Dr Jennifer Flowerdew and Professor Carol Smart are from Centre for Research on Family, Kinship & Childhood, England. In 2001, they published the results of two linked research projects on children's experiences of post-divorce family life – *The Changing Experience of Childhood: Families and Divorce*, Polity Press.

agreement between parents and is not regularly the result of judicial decision because of the basic logistical prerequisites for making these arrangements work successfully. They include geographical proximity between two households; effective communication between the parents on matters relevant to the care of the child; enough money to run two separate households; compatible parenting values in order to make decisions together; commitment by both parents to a shared-residence arrangement; and a willing child, who will have to adapt to living in different households where inevitably rules and habits will differ.¹⁷ Below, I elaborate on the judicial perspective in relation to the making of such arrangements.

The effect of the changes, even if rebuttable, will be to displace the present emphasis on the best interests of the child with a presumption. The history of the FLA is that the courts have not allowed the paramountcy of the best interests of the child to be curtailed in any way. These changes are therefore quite radical. The establishment of a rebuttable presumption of equal shared parental responsibility automatically assumes that such arrangements are in the child's best interests. Hence, the discretion previously accorded to the decision-maker is now significantly restricted. Although the Government insists that the best interests of the child will still be the paramount factor, and decisions will still be made based on the circumstances of each case, I believe that such a presumption will inevitably obstruct the making of a determination in the best interests of the child. This is regardless of the fact that the presumption will be against equal parental responsibility where the court is satisfied that there is evidence of violence, child abuse or

¹⁷ As expounded by Federal Magistrate Ryan in *T v N* [2001] FMCA FAM222 (30 November 2001). See also Nicholson CJ, above n 8, at p 12.

entrenched conflict. It is not possible to introduce such a presumption without taking away the court's power to safeguard the best interests of the child.

The different points of view of various commentators and relevant parties, including those of the judiciary and children, with regard to shared parenting will demonstrate that such arrangements are generally inappropriate and unrealistic under the current social and economic structures. This analysis will assist me in making an argument that unless changes are made to the community at large, the law will only be further removed from social reality and inevitably the best interests of the child will be jeopardised.

7.2.1 The judicial perspective

The new amendments have faced serious judicial resistance in light of expert evidence provided by child psychiatrists, psychologists, social workers and FCA counsellors that shows that shared parenting is not necessarily in the best interests of the child.¹⁸ That, however, does not indicate that the judiciary is opposed to the idea of shared parenting for all families. The judiciary had already previously considered the wide choice of arrangements that constitute shared parenting when it made a decision suitable to the family in question. I will illustrate this with the help of decided cases before and after the 1995 reforms, but only as an illustration, rather than attempt a survey of the Family Court's decisions on this issue.

¹⁸ Rowlands J states that the FCA rarely makes orders for children to be physically shared by their parents and that reasons for this reluctance may be found in a number of decisions, some of which he cites: Rowlands J, "Recent Developments in Shared Parenting and Joint Custody – A Personal View From the Court", 10 May 2005, at pp 2-5, with reference to The Family Court of Australia, Response to the Australian Government's Discussion Paper, "A New Approach to the Family Law System: Implementation of Reforms", January 2005.
http://www.familycourt.gov.au/presence/resources/file/eb00054114bd588/Shared_Parenting_Conference_Paper.pdf.

An important case on shared parenting arrangements prior to the 1995 reforms was that of *Forck v Thomas*,¹⁹ decided by Nicholson CJ. It dealt with the custody of child K, born in 1984. Shared residence orders stipulating a week-about arrangement had been made by consent in 1990, but in early 1992 the father claimed that it was unsettling for K. In making a custody order in favour of the mother, Nicholson CJ acknowledged the difficulty in maintaining joint-custody arrangements in circumstances where the parties were no longer communicating. He referred to the findings of American researcher Steinman²⁰ to point out that the most significant components of such arrangements lay in the attitudes, values and behaviour of the parents. The more cooperative and respectful the relationship between the parents, the more likely such arrangements would work. Because these factors were lacking, he therefore decided such arrangements were unsuitable in this case.

In the earlier case of *Pagden and Padgen*,²¹ Rowlands J refused to make orders for joint custody. It concerned a father's proposal that his 13-year-old child reside with each parent for a block period of either six months or alternate school terms. The father contended that the existence of certain preconditions meant that joint custody was appropriate, those preconditions being the parents' geographical proximity, compatible parenting values, the child's adaptability, an ability of both parents to properly supervise the child, mutual trust, cooperation and good communication. Rowlands J deemed these factors a useful starting point, however, stated that they could not replace the factors listed in the legislation in search of where the child's best interests lay.

¹⁹*Forck v Thomas* (1993) FLC 92-372.

²⁰ At 79,868. Steinman, "The Experience of Children in Joint Custody Arrangements", 1981, *American Journal of Orthopsychiatry*, Vol 51, No 3.

²¹ *Pagden v Pagden* (1991) FLC 92-231.

He also acknowledged the smooth functioning of the existing arrangements and noted there was no apparent advantages to altering it, given the child's welfare would be better advanced by the maintaining of the status quo than embarking upon significant change. However, he noted the deficit in mutual trust, cooperation and good communications, which he believed to be desirable elements in a shared custody arrangement. Rowlands J cited *Hall v Fordyce*,²² where Kay J stated, "I think it is fair to say that judges of this court have not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties".

In *H v H*,²³ which was also decided before the 1995 reforms, Nicholson CJ remained consistent with his approach in *Forck v Thomas* by referring to the need for compatible parenting values and declaring that the idea of shared residence was "doomed" due to poor relations between the parents. Conversely, in *Halfinger v Halfinger-Knoll*,²⁴ orders were made for the child to spend alternate weeks with each parent. Kay J simply changed the existing arrangements from two days on and two days off to alternate weeks because he felt the case presented one of those rare occasions when a shared-parenting order was more appropriate than a sole-custody order. He did, however, propose a counsellor act as a conduit between the parents, to facilitate their ongoing communication.

It is clear from the above discussion, even though it is not a complete survey of the decisions of the FCA, that the trend prior to the 1995 reforms was for the judiciary to oppose such an arrangement in the absence of all the factors required to make it work. Such a decision plainly required, then as now, an enormous amount of consideration to

²² *Hall v Fordyce* (Kay J, unreported).

²³ *H v H* (1995) FLC 92-599.

²⁴ *Halfinger v Halfinger-Knoll* (1990) 13 Fam LR 786.

ensure that the best interests of the child remained the paramount determinant. It is for this reason that even a rebuttable presumption can not be in the best interests of the child.

There has been significantly more consideration by the judiciary of shared parenting arrangements since the 1995 reforms, perhaps partly due to the increasing politicisation of these issues. Nonetheless, when subject to judicial discretion, which takes into account the facts of each individual case, the status quo and the dynamics between the parents has largely continued to dictate whether such an arrangement is viable and in the best interests of the child.

For example, in *Bartholomew v Kelly*,²⁵ the Full Court dismissed an appeal against orders providing that the parties' children reside with each of the parents on a fortnightly basis. In this case, there were serious communication problems between the parents. The Full Court decided that the principles put forward in *Forck v Thomas* and *H v H* did not bind the trial Judge. The Full Court held that the trial Judge had considered the problems of a shared residence order that divided the children's time equally between their parents, but felt the children's relationship with their father and the success of the shared arrangement to date weighed in favour of an order that this arrangement continue.

The case of *T v N*²⁶ concerned the residence of two boys, aged 9 and 11. When the father applied for the eldest son to be allowed to travel to Lebanon during his school holidays, the mother in turn sought shared residence orders providing for both children to live with her each alternate week during the school terms and for half of all school holidays. Both parties were Muslim and of Lebanese background, and they lived 5-10

²⁵ *Bartholomew v Kelly*. Unreported, Full Court of the Family Court of Australia (Finn, Coleman & O'Ryan JJ), 14 August 2001.

²⁶ *T v N* [2001] FMCA FAM222 (30 November 2001).

minutes from one another. Initially, following separation, the children resided with their mother and exercised almost daily contact with their father. However, the wife's parents disapproved of her decision to separate, consequently forbidding her to have contact with her family and evicting her from the unit they owned. The mother took the children to live with their father and his mother as she had confidence in the paternal grandmother's capacity to care for them.

In making a determination, Federal Magistrate Ryan reviewed the case law in Canada and England, and listed the factors that a court should examine when a party seeks orders that share a child's time equally between its parents. They were: the parties' ability to communicate on matters relating to the child's welfare; the proximity of the two households; whether the homes are sufficiently proximate that the child can maintain their friendships in both homes; the prior history of caring for the child; whether the parties agree or disagree on matters relevant to the child's day-to-day life (for example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping patterns); where they disagree on these matters, the chance they will be able to achieve a reasonable compromise; whether they share similar aspirations for the child (for example, religious adherence, cultural identity and extra-curricular activities); whether they can address on a continuing basis the practical issues that arise when a child lives in two homes, for example, if the child leaves necessary school work or equipment at the other home, the parents willingness to remedy the problem; whether or not the parties respect one another as a parent; the child's wishes and the factors that influence those wishes; and where siblings live.

The more recent decision of *C v O'N*²⁷ is also relevant. This case concerned two children, an 11-year-old girl and an 8-year-old boy. The father insisted that during the marriage, he had been the primary caregiver to the children, and the mother had been the breadwinner. The parties separated in June 2002 but continued to cohabit under the one roof with the children. The father sought residence of the children with the mother to have contact each weekend. The mother proposed a shared-residence week-about arrangement, which she described as shared parenting. Her Honour, Chief Federal Magistrate Bryant made an order for shared residence on a weekly basis and for equal shared parental responsibility, and noted that if the children only had weekend contact with their mother, then she would have to compete for time with them given that, at their age, they had several weekend activities. She also noted the importance of the children having a working parent as a role model, and further expressed concern that if the father's proposals were accepted, he may fail to promote the children's relationship with their mother. Her Honour also considered the children's excellent relationship with both parents and their wish to be cared for by both of them.

This is an example of the importance of judicial discretion. Although not all the elements listed by Federal Magistrate Ryan in *T v N* were present in this case, after much necessary consideration the Judge still decided that a shared-residence arrangement was appropriate.

I had a similar case in the Sydney registry of the Family Court in August 2004 before Judicial Registrar Loughnan where during the marriage the mother had been the "breadwinner" while having significant input in the children's lives, and the father

²⁷ *C v O'N* [2003] FMCA Fam 154.

remained in the home. The only difference in outcome, though this was an interim decision, was that the children remained in the home while the parents rotated on a three-and-a-half day cycle.²⁸

In other cases where shared parenting was sought, it has not been granted because the elements necessary to make it work have not existed. For example, the case of *U v U*²⁹ demonstrates that often cases are simply too complicated for a presumption of equal shared parental responsibility and shared parenting time. It involved a mother's wish to relocate from Australia to Mumbai, India, with her daughter. The daughter had been born in Australia in 1994 and was an Australian citizen. Both parents had been born in Mumbai, where they married, however the father was an Australian citizen and resident at the time of the marriage. After the marriage, the father returned to Australia and the mother followed a few months later. The mother was not an Australian citizen but had permanent resident status. In July 1995, the mother left the family home, taking the daughter to Mumbai without the consent of the father. The father took court action to gain residence of the daughter. An attempt was made to reconcile and the family returned to Australia. The reconciliation failed and the mother wished to return to Mumbai with the daughter but the father wished to have the daughter live with him in Australia.

This was an appeal against the decision of the FCA, which made orders that the daughter reside with her, but that they remain in Australia. The High Court rejected the appeal and confirmed that the mother was required to live in Australia in order for her daughter to reside with her. It was acknowledged that the mother would suffer as a consequence of remaining in Australia, as she had diminished employment prospects and

²⁸ *Haddad v Carpenter*, interim hearing decided in August 2004.

²⁹ *U v U* [2002] HCA 36.

lacked the support of her family. However, the Court's priority was the best interests of the child, and it did not believe that it would be possible for the daughter to have a close ongoing relationship with her father if she relocated with her mother to Mumbai. The court ordered this alternative to the proposals put forward by each party. This case emphasises the merits in judicial discretion when determining the care and living arrangement of a child post-separation and divorce. It also demonstrates that the courts are keen to promote the objective of both parents having a meaningful role in their children's lives.

In the very recent case of *C v B*,³⁰ there were not in fact the necessary elements said to make a shared parenting arrangement work, however, it was granted nonetheless because in that particular case it was still considered to be in the best interests of the child. It involved a 13-year-old boy who had been living with his mother, and had hit her. The Family Court counsellor recommended 50% shared parenting so that his medical practitioner father could offer a greater exposure to male company and a more relaxed atmosphere. The boy had no opinion either way. Despite the tension between the parents, Bryant CJ relied on the "best interests of the child" principle and granted shared residence on a week-about basis. She said, "Notwithstanding the hostility between the parties and their lack of communication, which might in many cases mitigate against a shared arrangement, there are overriding benefits for Adrian in spending more time at his father's home, and in the circumstances I am satisfied that it is in his best interests to

³⁰ *C v B* [2005] FamCA 94.

grant the application of the husband and order that he live with the husband and wife and share any school holidays between them.”³¹

This very cursory survey of some of the FCA decisions emphasises that several factors are required to be taken into account when considering shared parenting. It also shows that historically the judiciary’s approach towards shared parenting has been one of caution, notably due to the legislative requirements with the “best interests” principle at the core. For this reason, such a decision ought to have remained within the discretion of the judiciary rather than becoming a presumption, rebuttable or not, in order to ensure that the best interests of the child are considered in each individual case rather than assume the way those interests will be met.

It is worth emphasising that the normative function of a presumption is that the exercise of judicial discretion becomes that much harder. The new rebuttable presumption will displace all other relevant factors in making shared parenting arrangements and shift the burden of proof to the party who wishes to challenge the presumption and claim that shared parenting arrangements are not suitable. It is likely that this burden of rebuttal will more often fall on the parent who is the primary caregiver. As I have established in this thesis, generally, this is the mother.

Consequently, these provisions imply that in every case dealing with children’s matters, in addition to calling evidence about the suitability or unsuitability of each parent’s proposals for living arrangements, each side will have to prepare evidence for and against the third option before the court – that of shared parenting – no matter how inappropriate this option may be in the circumstances of the particular case. This will no

³¹ [2005] FamCA 94 at para 68.

doubt distract the parents and the court from addressing the best interests of the child and could further complicate and prolong litigation and court hearings.

Prior to the current changes, the system did not favour one parent over another, but focused on the circumstances and the best interests of the child in each case. The question is therefore, what benefits will there be in a presumption of shared parenting, and for whom? The problem is really that the Government believes the child's best interests will automatically be upheld through shared parenting. Although the Government claims that the reforms will uphold the best interests of the child, maybe its aim is more to prioritise the relationship between the child and both parents. Hence, by introducing provisions that collectively aspire to shared parenting, the Government has shifted the emphasis from the courts taking a diverse number of factors into account in order to determine its suitability to an assumption that it is suitable. This has, in turn, taken the focus away from the best interests of the child. Below, I discuss this change from the child's point of view.

7.2.2 The child's perspective

I argue that the reforms introducing shared parenting as a starting point is detrimental from the child's point of view as it conveys the impression that parents have rights that override the best interests of the child. I find support for this argument in the reported repercussions of the 1995 reforms. Although the 1995 changes were not intended to introduce any presumptions as to who would parent children after separation, but to encourage joint parental responsibility and urge both mothers and fathers to focus on their children's future wellbeing rather than their own grief and anger, the opposite in fact

happened.³² As a direct result of these changes, the focus was moved away from the best interests of the child and towards the rights of the parents in relation to the child.

It is clearly not in the best interests of the child for his or her parents to litigate against one another. However, one of the reported repercussions of the 1995 reforms, which led to an increase in court applications by non-residence parents, was the rise in unrealistic expectations amongst fathers, who suddenly assumed their right was to automatically share their children on an equal basis.³³ The new reforms will similarly raise false hopes and unrealistic expectations of fathers and thus result in increased litigation.

Given shared parenting is rarely practised in any case in the intact family, it is not in the child's best interests to make this a rebuttable rule upon separation. Parkinson also admits that equal participation in parenting is rare in the majority of intact families.³⁴ This highlights the difficulties in, and questions the practicality of, suddenly changing the patterns of parenting after separation, especially from the point of view of the child. Surely, if the child is adequately and satisfactorily accommodated and cared for in an arrangement that the child is used to and has long been in, that is a great advantage over any possible arrangement, which would involve the child establishing a new set of relationships in a new home. Writers on child psychology and child rearing tend to agree about the value of stability and continuity in the child's upbringing.³⁵ Until now, the maintenance of the status quo has been one of the factors considered relevant when

³² Nicholson CJ, above n 8, at p 10. See also J Dewar and S Parker, "The impact of the new Part VII *Family Law Act 1975*" (1999) 13 *AJFL* 96, at p 111.

³³ H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The first three years*, <http://www.familycourt.gov.au/presence/resources/file/eb0011059e844c8/famlaw.pdf>, December 2000.

³⁴ P Parkinson, "Child Custody Arrangements on Family Separation", *Australian Family Lawyer*, Winter 2004, Vol 17, No 3.

³⁵ CCH Australia online, *Australian Family Law & Practice*, at 17-074. See also N Lowe and G Douglas, *Bromley's Family Law*, 9th ed, London, 1998, at p 414.

making a determination in relation to a child's residence. Parkinson emphasises that the critical issue *should* be whether a presumption of a shared parenting arrangement is in the best interests of the child. He says that while older children vary in their reactions to such arrangements, very young children need a stable environment in order to ensure secure attachments and that this usually means having a primary home and caregiver.³⁶ He fears that the pressure for reform of laws regarding parenting after separation will lead to changes that will aim at achieving fairness between parents rather than fairness to the children. I agree that a consideration of the best interests of the child ought to remain the priority.

A research project undertaken in 2001 by Neale, Flowerdew and Smart,³⁷ into children's experiences of shared-residence arrangements in England revealed that a presumption of such an arrangement may be very problematic for some children. The study involved 30 children (12 boys and 18 girls), who were predominantly from white, middle class families, and aged from 11 to 21. After approximately four years of residing in a shared-residence arrangement, 21 of the 30 children were still in this arrangement, four had left home and the remaining five had reverted to living predominantly with their mothers and were seeing their fathers occasionally or not at all. Given most of the children had sustained the arrangements, at first glance it might appear that they were working well for both the parents and the children. However, the study showed that in fact, it was often the case that from the child's perspective, the arrangements became increasingly unsatisfactory over time. They simply found it incredibly difficult to change them once they were in place, either because they felt it would cause an angry response

³⁶ P Parkinson, above n 34.

³⁷ B Neale, J Flowerdew and C Smart, above n 14.

from a parent, reignite conflict between their parents, or because they felt too guilty or responsible for their parents' feelings to broach the topic.³⁸

The researchers attempted to extract the key elements that made for successful shared-residence arrangements and those that made for unsatisfactory arrangements.³⁹ Essentially, elements that some children found positive – including “regular routine”, a feeling of being wanted by both parents and a sense of fairness – could be a source of great unhappiness to others.⁴⁰ For instance, a regular routine for some meant an unbearably inflexible regime for others. While some of the children enjoyed the feeling of being loved by both parents and saw shared residence as a demonstration of this, others felt they became responsible for the emotional well-being of both their parents.

Lastly, while some children found the arrangement worked well because it was fair for their parents, others thought it was dreadfully unfair on them. This was particularly so if the children felt they were living in two households simply because their parents could not reach an amicable agreement. They reported feeling like pawns in an ongoing battle.⁴¹ For example, if the children realised that each parent wanted equal time with them because they could not tolerate the idea of the other parent having more, the children did not feel loved, but rather like an asset being fought over. Teenagers found this mindset especially difficult as they felt their parents tried to “own” their allocated time and would not allow any flexibility.⁴² Neale, Flowerdew and Smart have observed

³⁸ Ibid.

³⁹ Ibid, at pp 13-14.

⁴⁰ Ibid, at pp 15-16.

⁴¹ Ibid, at page 14.

⁴² Ibid.

that, “to some extent it merely stretches an existing problem across years and it can be the children who have to absorb the pressures”.⁴³

The objective of the study was not to try to establish whether or not shared residence works in an absolute sense, but to show that legislating for a particular arrangement or assuming that substantially shared residence is the solution, is a very simplistic way of thinking. Although ideal in theory in order to provide a child with the continual involvement of both parents, and of both a male and female role-model (in the case of heterosexual parents), as well as to allow a family to move on, the longer term impact and effectiveness of these arrangements is often unknown. This is because there is hardly ever any feedback on decisions, save for those difficult cases that may return to court. Also, we know little about the effectiveness of these arrangements that have been privately agreed. In fact, it is pertinent to note the point made by Nicholson CJ that privately negotiated consent orders filed over a period of time with the FCA have been far more likely to confirm that children will remain in the primary care of their mother than they are to suggest any other arrangement.⁴⁴ Hence, a decision relating to the living arrangements of a child needs to be based on the individual circumstances of each family, rather than on the adherence to a single principle or rule. This is substantiating my argument that the best interests of the child are served when the court’s discretion is not curtailed by introducing “presumptions”.

Smart was also involved in research for another project⁴⁵ whereby two studies were combined on children’s experiences of post-divorce family life. One study interviewed 65

⁴³ Ibid.

⁴⁴ Nicholson CJ, above n 8, at p 12.

⁴⁵ See C Smart, B Neale and A Wade, *The Changing Experience of Childhood: Families and Divorce*, Polity Press, Cambridge, 2001.

children aged 5-16, who were experiencing shared residence after divorce. The other study interviewed 52 children who had much more varied arrangements. Three areas through which children constructed the meaning of their relationships with parents after separation and divorce were identified. They were: the quality of relationships prior to separation; the way in which relationships are conducted during the transition phase; and the ability of the parents to forge new relationships with children based on the new circumstances of living apart, re-partnering and the introduction of step-siblings.

Her conclusion was essentially that no generalisations should be made where intimate relationships are concerned. Where parents expected the children to just accept and adapt to new situations, they felt treated like objects and mere observers rather than participants.⁴⁶ Smart asserts that just as women became reflexive long ago about the plight of womanhood, and as men have more recently become more reflexive about fatherhood and manhood, so too are children becoming more reflexive about childhood.⁴⁷ She says it is the rising numbers of divorces that are pushing this process because children appear to be experiencing changing relationships with their parents earlier than might have previously done.⁴⁸ As not all relationships between children and their parents are synonymous, the differences must be accommodated by a consideration of the circumstances of the particular case. This is arguably the only way the best interests of the child can be prioritised.

⁴⁶ Ibid.

⁴⁷ C Smart, "Towards an understanding of family change: Gender conflict and children's citizenship" (2003) 17 *AJFL* 20, at p 35. See also B Mayall, (ed) *Children's Childhoods Observed and Experienced*, Falmer Press, London, 1994; and B Mayall, *Towards a Sociology for Childhood*, Open University Press, Buckingham, 2002.

⁴⁸ Ibid, at p 35.

In light of the abovementioned studies, the Government's introduction of a rebuttable presumption of shared parenting is obviously problematic. Prior to making these amendments, the law reformers ought to have been informed by relevant empirical evidence of children's experiences of shared parenting.

7.3 Genuinely promoting joint parenting

In principle, I do believe that joint parenting is a good idea because it allows children the opportunity to have a meaningful relationship with both parents, and it allows both parents to equally participate in the public and private spheres. However, the methods used, and the times when such expectations surface in the current proposals, are flawed. Instead, I propose an alternative way of introducing the very same ideas: by assisting fathers to become involved in their child's life before separation – ideally, before conception or at least before the birth of a child. Such a campaign would encourage fathers to take an active role in their child's life and equally assume parental responsibility from the beginning of the united family life. Admittedly, for an increase in paternal involvement to be a realistic option, we would need to create a culture that promotes shared parenting.

By combining the current family law system with education campaigns, pre-conception or pre-birth counselling and a more equal division of employment amongst men and women – there would arguably be a wider understanding of the fundamental principles underlying the family law system and therefore fewer criticisms of it.

7.4 Feasible proposals

One of my criticisms of the current changes is that the two main ideas of shared parenting and mandatory ADR stand apart when they really could work together. I argue that these two changes are in fact linked. In this section, I describe how they are linked and how this link can work well for families, and in the following chapter, I critique the new amendments introducing compulsory family dispute resolution.

In my proposal, the implementation of education campaigns and counselling would require the same resources that the Government intends to use in implementing the Family Relationship Centres.⁴⁹ It would not be dissimilar to the counselling sessions that are imposed on many couples intending to marry in a church, synagogue, mosque or other institution, where, with the assistance of a counsellor, the couple would communicate their views on family life. This would bring to the surface any differences the parties have with regards to the allocation of parental responsibility and parenting time prior to conception, and would allow the future parents to resolve such differences at an early stage.

Essentially, the future parents would be obliged to cover many issues relating to their future children that a separating couple must deal with upon separation, such as, whether the parties agree or disagree on matters relevant to the child's day-to-day life (for example, methods of discipline, attitudes to homework, education, health and dental care, diet and sleeping patterns); where they disagree on these matters, the chance they will be able to achieve a reasonable compromise; and, whether they share similar long-term

⁴⁹ I acknowledge that although I make this proposal, I do not discuss its practical feasibility in detail, for example, the number of FRCs that would be required to meet the demand for pre-family services. I believe that such a discussion would turn this thesis into a PhD, or would alternatively be suitable for a reform commission to take on board should my proposal be considered.

aspirations for the child (for example religious adherence, cultural identity and extra-curricular activities).

The counsellor's duty would also be to inform, or perhaps forewarn, the couple that the way they structure their united family life could impact on the way a decision-maker may structure their separated family life, if a separation were to later occur. The couple would have to demonstrate an understanding that if they arrange their family life so that the parents exercise joint parental responsibility and shared parenting throughout the relationship, then the FCA could make orders to uphold those arrangements in the event of a breakdown in the relationship between the parents. Likewise, the parties would have to demonstrate an understanding that if one party relinquishes parental responsibility or does not exercise a shared parenting arrangement throughout the relationship, the court could decide it is not in the child's best interests to suddenly change those arrangements to one of shared parenting upon separation.

I believe my proposals would be feasible, especially in light of the Government's establishment of 65 Family Relationship Centres. The range of information, advice and dispute resolution services they are aimed to provide could benefit couples before they have a family, and would in fact be more useful for future parents than for separating couples. If couples are forced to communicate the ways in which they anticipate to structure their future family life, and learn about the legal implications of their decisions from the beginning, then hopefully fewer complications for their children would arise should separation ever occur. It would make sense to offer the free information sessions covering topics such as the local services available, crisis counselling, the family law system, and the benefits of parenting plans to future parents, who are planning their

united family life. In fact, it is nonsensical and possibly counter-productive to only provide this service to separating parents, who are exiting their united family life.

I do not suggest that the introduction of mandatory education and counselling before birth be used to place legal limitations on a couple's rights to have a family, though I do recommend that there should be some pressure on any couple that does not attend. Rather, the focus should be on assisting people to make educated choices with regards to their parenting roles and the structure of their family, and educating them on the impact those choices could subsequently have on a separated version of the same family. Such a program would primarily serve the interests of children, but also those of their parents, and as I have argued, would alleviate the pressure on the system. The pressure on the system would hopefully be alleviated because all couples would have the opportunity to make their own arrangements regarding the future care of their children from a very early point and therefore it would simply be called upon to deal with the minority of the population unable to adhere to those arrangements.

Several American long-term and short-term studies on the effectiveness of mandated and non-mandated divorce education programs have shown that participating in such programs early in the legal process is more effective than doing so later, and that high-conflict parents appear to benefit the most.⁵⁰ Admittedly, none of these studies involved

⁵⁰ J Arbuthnot and D A Gordon, "Does mandatory divorce education for parents work? A six month outcome evaluation", 1996 *Fam Conciliation Courts Rev* 34:60-81; M J Geasler and K R Blaisure, "A review of divorce education materials", 1998 *Fam Relat* 47:167-175; J Arbuthnot, K Kramer and D A Gordon, "Patterns of relitigation following divorce education", 1997 *Fam Conciliation Courts Rev* 35:269-279; L Kramer and A Kowal, "Long-term follow-up of a court-based intervention for divorcing parents", 1998 *Fam Conciliation Courts Rev* 36:452-465; N Thoennes and J Pearson, "Parent education in the domestic relations court: a multi-site assessment", 1999 *Fam Conciliation Courts Rev* 37:195-218.

future parents, but rather newly separated parents or those on the verge of separation.⁵¹

The most common goals of divorce education programs for parents are said to be to report to parents about how children typically respond to separation and divorce, alert parents to the potential effects of ongoing high conflict and other harmful behaviours on their children's adjustment, explain positive parenting responses that facilitate children's adjustment to divorce, discuss adult adjustment to divorce, focus parents on their children's need for a continuing relationship with both parents independent of their own feelings and attitudes towards the other party and describe court processes likely to be experienced by the parents.⁵²

If early participation in these education programs is as beneficial as these studies have shown, then surely there is a strong argument in introducing them to parents as early as possible.⁵³ Equally, the three free hours of group sessions and one-on-one interviews with a parenting advisor, offered by the centres to urge families to agree on how to share parental responsibility, must be imposed upon couples pre-parenthood. It would be far more logical to require a couple to agree on how to share parental responsibility and parenting time prior to becoming parents, or at least, at a much earlier stage than at separation. By compelling future parents to communicate their views on parental responsibility prior to having children, arguably many issues could be raised and

⁵¹ I acknowledge that Susan Okin has made references to gender justice within families, and to arguments for the state to promote shared parenting before separation in, S M Okin, *Justice, Gender and the Family*, (1989) Copyright by Basic Books Inc. However, this is the only piece of literature I have come across where such a reference is made, and Okin does not discuss promoting shared parenting before the children are born into the family. In addition, I have not seen this discussion in the context of the Australian family law system.

⁵² SL Braver et al, "The content of divorce education programs: results of a survey", 1996 *Fam Conciliation Courts Rev* 34:41-59; M J Geasler and K R Blaisure, above n 47; K Shifflett and E M Cummings, "A program for educating parents about the effects of divorce and conflict on children: an initial evaluation", 1999 *Fam Relat* 48: 79-89; N Thoennes and J Pearson, above n 49.

⁵³ As a start, studies ought to be undertaken to determine whether or not such a proposal would have a positive effect on families.

resolved, in particular whether or not a couple share the same views about child-rearing and how their family would be structured.

If both future parents are encouraged, prior to conception, to maintain a substantial role in their children's lives, then involvement post-separation would presumably not be an issue. Evidence has shown that when mothers are the non-residence parents, they visit more frequently, assume more parenting functions with their children and are less likely to discontinue seeing their children over time, compared with non-residence fathers.⁵⁴ Clearly there is more confusion amongst fathers than mothers about their parenting role once the family has broken down. Perhaps it could be said that many of those fathers who do eventually lose contact with their children after separation never assumed equal parental responsibility throughout the intact family. I have already argued that higher levels of paternal involvement in the married family lead to divorcing fathers seeking more time with their children after separation.⁵⁵

The angry alienation of a child from a parent following separation and divorce has been a driving factor for the Government in devising its reforms. My proposal can address this issue. An alienated child is defined by Kelly and Johnston as one who freely and persistently expresses unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent, which are considerably disproportionate to

⁵⁴ C E Depner, "Parental role reversal: mothers as nonresidential parents" in *Nonresidential Parenting*, C E Depner, J H Bray, eds. 1993 Newbury Park, CA: Sage.

⁵⁵ This is supported by studies of social trends undertaken in America in the 1990s that showed that higher levels of paternal involvement in the married family led divorcing fathers to seek more time with their children after separation: see M E Lamb, *The Role of the Father in Child Development*, 3rd ed. 1997 New York: Wiley; J H Pleck, "Paternal involvement: levels, sources and consequences" in *The Role of the Father in Child Development*, 3rd ed. 1997 ME Lamb, ed. New York: Wiley.

the child's actual experience with that parent.⁵⁶ Parental alienation syndrome (PAS) was a label coined by Gardner to describe a diagnosable disorder in the child, occurring in the context of a custody dispute.⁵⁷ He has described PAS as a child's crusade of unjustifiable denigration against a parent that results from the combination of two factors: the indoctrinating behaviours of one parent and the child's own vilification of the target parent.⁵⁸ He asserts that the programming or brainwashing parent is usually the mother and that false allegations of sexual abuse are common.

The term PAS has produced both enthusiastic acceptance and strong negative response. It is especially criticised for focussing almost exclusively on the alienating parent as the causal agent of the child's alienation.⁵⁹ The theory of the alienated child focuses first and foremost on the child, his or her behaviours and the parent-child relationship, whereas the theory of the alienated parent automatically turns the spotlight to the destructive behaviours on the part of the programming or alienating parent. Discourse on the alienated parent is obviously more popular amongst fathers' rights groups because it confirms that more fathers than mothers are losing contact with their children after the relationship between the parents has broken down, and it points a finger at a particular parent for the loss of contact.

Kelly and Johnston observe that in many cases of alienated children, parents who are rejected have contributed to the alienation in one or more significant ways.⁶⁰ They point

⁵⁶ J B Kelly and J R Johnston in "The Alienated Child – A Reformulation of Parental Alienation Syndrome", *Family Court Review*, Vol. 39 No.3, July 2001, Sage Publications, at p 251.

⁵⁷ R A Gardner, *Parental Alienation Syndrome and the differentiation between fabricated and genuine child sex abuse allegations*, Creskill, 1987 NJ: Creative Therapeutics; RA Gardner, *The Parental Alienation Syndrome*, 1992 Creskill, NJ: Creative Therapeutics.

⁵⁸ R A Gardner, *The Parental Alienation Syndrome*, 2nd ed. 1998 Creskill, NJ: Creative Therapeutics.

⁵⁹ Kelly and Johnston, above n 56, at p 249.

⁶⁰ *Ibid*, at 258.

to a number of behaviours on the part of the rejected parent that demonstrate a contribution to the alienation,⁶¹ however, they qualify this observation by also pointing out that these rejected parents' behaviours do not by themselves warrant the disproportionately angry response of the child, nor the refusal to have contact. They note that most often, rejected parents have had at least an adequate relationship with these children. I argue that an adequate relationship between a father and his child is not enough to warrant a change in the law for a presumption of shared parenting.

Future parents therefore ought to be encouraged to establish a status quo of equal parental responsibility and shared parenting from day one of planning a family, not from day one of separation, if such a culture is realistically to be introduced. They must be made to comprehend the legal implications of the way they allocate parental responsibility and parenting time. In this way, the centres ought to provide future parents with checklists to guide them with regards to what to consider putting in their parenting plan and templates to use as a format. All of this simply reinforces that assistance in developing a parenting plan must not only be offered to separating families, but to future parents as well, to prevent subsequent confusion over their parenting roles in their children's lives.

It would make far more sense to introduce a parenting plan to future parents who have not yet established a status quo, than to separating parents, whose children have already become accustomed to a specific allocation of parental responsibilities amongst their parents. In other words, it would not necessarily be in the best interests of a child to

⁶¹ These include passivity and withdrawal in the face of high conflict; counter-rejection of the alienated child; harsh and rigid parenting style; rejected parent is self-centred and immature; rejected parent has critical and demanding traits; diminished empathy for the aligned child; child feels abandoned by the rejected parent – Ibid, at 259-261.

introduce a parenting plan that would stipulate shared parenting when the child's parents never before shared parenting. This could cause unnecessary confusion to the child, and further contribute to the upheaval in the child's life. Needless to say, if such an arrangement was not feasible during the intact family due to work commitments, then it is unlikely to be feasible after separation. By using the law as a norm setter from early on in the life of the family, rather than from the point of separation, a message is sent to the entire community of what is expected.

The plan could cover anything the parties consider relevant, including: whether the parents will share equal parenting time; if not, who will be the primary caregiver to the children; the time a child might spend with the other parent; the time a child might spend with grandparents; how parents will share parental responsibility; as well as who will drop off and pick up the children from school.

Another reason counselling and education campaigns should occur earlier in the life of the family than at the point of separation is to show parents that the quality of paternal involvement is more important than quantity. Feelings of closeness with the child and active parenting of the father is said to be more strongly associated with positive child outcomes than frequency of contact.⁶² Further, it has been proven that when fathers help children with homework and other projects, listen to the children's problems, provide emotional support and set limits authoritatively, children have more positive academic achievement and fewer externalising and internalising problems than children whose fathers less actively parent.⁶³ Based on these findings, if arrangements for quality time

⁶² P R Amato and J G Gilbreth, "Nonresident fathers and children's wellbeing: a mega analysis", 1999 *J Marriage Fam* 61:557-573.

⁶³ Ibid.

spent between fathers and children were encouraged from the birth of each child, and not only from after separation, then children would benefit greatly.

Qualitative studies have indicated that many visiting fathers engage in weekend entertainment as the main activity with their children, which diminishes the long-term significance of the father's role in the child's life.⁶⁴ I argue that if fathers were encouraged from the start of the child's life to actively share parental responsibility, then the risk of erosion of the father-child relationship would be greatly reduced. Also, if a breakdown of the family were to occur, then contact arrangements would automatically be established that would permit both school week and leisure time involvement, including overnight visits, to enable adequate time for real parenting activities that preserve meaning and attachment in the parent-child relationship.⁶⁵

In terms of how to implement my proposal, the attendance at a centre should be compulsory for all couples prior to the conception of a child.⁶⁶ This is because having a child is such an enormous commitment that undeniably requires preparation and a great deal of discussion of what it entails. If a couple wishes to have more than one child, then attendance should be compulsory prior to the birth of each child in order to work through the parenting arrangements and allocation of parental responsibility for each child.

The Government intends to encourage separating parents to use the centres by asking doctors, child care centres, lawyers, schools and agencies such as Centrelink and the

⁶⁴ M E Lamb, "Non-custodial fathers and their impact on the children of divorce", in *The Post-Divorce Family: Research and Policy Issues*, 1999 R A Thompson, P R Amato, eds. Thousand Oaks, CA: Sage.

⁶⁵ J B Kelly and M E Lamb, "Using child development research to make appropriate custody and access decisions for young children", 2000 *Fam Conciliation Courts Rev* 38:279-311; R A Thompson and D Laible, "Noncustodial Parents", in *Parenting and Child Development in Nontraditional Families*, 1999 M E Lamb, ed. Mahway, NJ: Erlbaum.

⁶⁶ The Government has not made attendance at a centre compulsory for separating parents, even though there could be cost implications for a parent who is not willing to attend.

Child Support Agency to refer separating parents to the centres. All of these bodies could also be sources of referral for couples prior to birth, and the Government would need to be far more active in introducing compulsory attendance at these centres. In addition to a referral system, the Government would need to introduce a community education campaign with much advertising to promote the centres, and make it known that a fine would be incurred for any parent who has not attended a compulsory three-hour session at a centre prior to the birth of a child. Essentially, the consequences of not attending should be similar to those for not voting. Further, the Government would be required to increase the resources of existing services and establish services in new locations to meet the needs of families.

For those unable to access a centre, the Government should set up a free national Family Relationship Advice Line and website, just as it is doing for separating parents. It would be obligatory for those who cannot physically access a centre to attend the information and counselling session by telephone link-up, to speak to a parenting adviser in relation to a series of issues concerning their future family, including developing a parenting plan. Separating parents are generally in a highly emotional frame of mind and may not focus on the best interests of their children. They would benefit from such an opportunity at a much earlier stage.

Although my proposals are for a highly interventionist and prescriptive role of family law that is not usually considered acceptable, I have argued⁶⁷ that they are justified given Government policies relating to the public sphere have historically impacted indirectly on the family, its form and functions. The family became a public concern long ago and the

⁶⁷ In chapter 5.

new reforms indicate that it is already deeply implicated in the formation and functioning of families⁶⁸ as well as the protection of children involved in battles over their future care arrangements upon the separation of their parents.

Therefore, the services offered by the Government to families should range from the voluntary and least coercive to those processes that are very much controlling and coercive. The most effective variety would include parent education and self-help legal information and processes for future and existing parents, mediation specialising in children's issues, lawyer representation, arbitration, settlement conferences and judicial determination. Importantly, these services should address the particular needs and conditions of the children and each set of parents in each individual family.

In conclusion, rather than setting apart the two ideas of shared parenting and compulsory ADR, as the new reforms do, they should be linked (and I argue they are connected) in order to properly assist families in making long-term care arrangements for their children. In the following chapter, I analyse the introduction of compulsory ADR in order to propose an effective way of using mandatory counselling in the life of the family.

⁶⁸ This assertion is supported by F E Olsen, "The Myth of State Intervention in the Family" (1985) 18 *Journal of Law Reform* 835; and F E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harvard Law Review* 1497.

CHAPTER 8: MEDIATION NOT LITIGATION

8.1 Compulsory alternative dispute resolution

Compulsory alternative dispute resolution is the other major change brought in by the new amendments, which is the subject of this thesis. Although the two major ideas of shared parenting and compulsory ADR stand apart in the current amendments, in my view they are linked, as argued in the previous chapter. In this chapter, I continue my assessment of the Government's attempt to achieve a cultural change through legal norms, specifically through the introduction of compulsory alternative dispute resolution for separating parents.

There are two problems the Government seeks to resolve with this change – the adversarial nature of the system that does not facilitate the making of parenting arrangements upon separation, and the number of arrangements that allegedly prevent fathers from having a meaningful relationship with their children after the breakdown of the family. It appears that the Government is of the opinion that by making the system “less adversarial”, it will encourage more parties to make shared parenting arrangements. In this chapter, I look at various forms of alternative dispute resolution, study the variety of reasons for this drive,¹ critique the way in which the law has been given this norm-creating function and propose a way to make mandatory mediation even more effective upon separation.

¹ In addition to the desire to increase settlements, there are certain other contributing factors motivating the thrust to resolve disputes other than by way of formal court-based adjudication, for example, to improve case load management, free up court resources and perhaps create a culture of law as a means of dispute resolution and not protecting rights. Although I suggest the Government's motives in introducing compulsory alternative dispute resolution are suspect, I do concede that the concept is still a good one to facilitate the making of parenting arrangements post-separation.

The rationale for this chapter is that the Government's desire to create a less adversarial system that maintains a child's right to have a meaningful relationship with both parents after separation, will only be possible by linking the two main reforms of shared parenting and compulsory counselling, and introducing this connection at the beginning of the life of the family. Furthermore, many of the problems identified with mandatory mediation at the point of separation that are identified in this chapter, may be overcome by introducing a similar program before the children are born.

I basically agree with the assumption underlying the reforms that ADR can change people's expectations and behaviours, however, compulsory mediation alone will not lead to the willing entry into joint parenting arrangements upon separation. I argue that the time at which compulsory ADR should be introduced to the family should be different. If it were combined with a program of early intervention and support in the life of the family, whereby couples are encouraged to share parenting from the commencement of the family, then perhaps it would have a greater chance of improving the way in which parenting arrangements are resolved upon separation, and changing the type of arrangements made. Yet, as I argue in the previous chapters, the realising of these norms would be more feasible with changes to other institutions and various areas of law to embody the same normative standards.

A general mandate of mediation for all families upon separation, without factoring in the suitability of it for each case, overlooks the protection of rights that an individual party may require. Furthermore, the reforms indicate that the Government considers the role of "family law" is to deal only with the breakdown of family relationships, rather than with

the regulation of subsisting domestic arrangements.² I argue that it could play a greater role in the intact family.

8.1.1 A brief background to the introduction of mandatory mediation

It has been observed that since the introduction of family mediation in the early 1980s, there have been revolutionary changes in the legal and cultural contexts within which it operates.³ The FLA has been adjusted to swing the focus from parental rights to parental responsibilities. Mediation has been promoted from an “alternate” form of dispute resolution (“ADR”) to a “primary” form of dispute resolution (“PDR”), with a move from encouraging its use to now mandating separating parents to utilise it prior to, or instead of, legal processes. The 1995 reforms, the introduction of pre-action procedures with the *Family Law Rules 2004* and the current amendments are examples of the increasing emphasis placed upon community-sector based PDR to resolve family law disputes.

If the previous emphasis on alternative dispute resolution had not brought upon a less adversarial model, then it is hard to envisage that the new changes alone will make such a difference. So far, it has been difficult to assess the success of the changes as, until now, mediation has taken place in a confidential and privileged setting. As many agreements are not legalised, they have remained private and inaccessible.⁴ It is therefore hard to ascertain

² Problems with this view are discussed in chapter 5.

³ A Bickerdike, *Mediated post-separation parenting arrangements: A context analysis of two decades of file records*, presented at the 9th Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/bickerdike1.html>.

⁴ In his paper, Bickerdike (ibid) reports on a review of 20 years of mediation cases undertaken at Relationships Australia. Over 1,000 cases were examined to provide a detailed insight into the nature of mediated parenting outcomes, and how they may have evolved over time. Questions addressed include: Do mediated parenting outcomes reflect the so-called 80/20 standard? Or are shared parenting arrangements more common? Has the role of fathers, as measured by mediation outcomes changed over the past 20 years? Have some of the legal and cultural shifts been reflected in the outcomes of mediation? Naturally, the outcome has

what post-separation parenting arrangements are being made by separating parents who use mediation.⁵ Research weighing up results of mediation has typically concentrated on agreement rates and client satisfaction levels.

8.2 Types of alternative forms of dispute resolution

The term alternative (or “primary”) dispute resolution does not have a single meaning. Below, I begin by discussing the background literature to see how the term is used in the reforms.

8.2.1 What is ADR?

ADR refers to processes, other than judicial determination, in which a neutral person (an ADR practitioner) helps those in dispute to resolve issues between them.⁶ There appears to have been a general shift from the traditional adversarial method for dispute resolution to the greater use of ADR not only in the family law realm, but also in the context of a legal system that is by and large moving towards a greater and increasingly flexible control over court and tribunal proceedings and the conduct of Ombudsman investigations.⁷ Australia has developed an array of ADR practices across its institutions of administrative justice – the courts, tribunals and the Ombudsman schemes. It has established a strong and varied infrastructure of ADR practice. In family law, the term PDR has more frequently been

a number of significant implications for family law practice given the strong policy imperative towards mediation before resorting to litigation.

⁵ A Bickerdike, above n 3.

⁶ National Alternative Dispute Resolution Advisory Council – Brochure (2002):

http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Brochure. The NADRAC brochure states that although ADR is most commonly used as an abbreviation for “alternative dispute resolution”, it can also be used to mean “assisted” or “appropriate” dispute resolution.

⁷ T Buck, *Administrative justice and alternative dispute resolution: the Australian experience*, www.nadrac.gov.au, at p 5.

used, again demonstrating the push for parties to seek to resolve their disputes through these processes before resorting to litigation.⁸

There are various types of ADR processes. They may be facilitative, advisory, determinative, or a combination of these.⁹ In facilitative processes an ADR practitioner helps the parties in dispute to identify the issues, work out options, contemplate alternatives and attempt to reach an agreement about certain issues or the whole dispute. Examples of these processes are mediation, facilitation and facilitated negotiation.

Advisory processes involve an ADR practitioner who evaluates the dispute and gives advice as to the facts of the dispute, the law and, in certain circumstances, possible or desirable outcomes, and how these may be reached. Examples of advisory processes are expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

In determinative processes an ADR practitioner takes a more dominant role by assessing the dispute and making a determination. It may involve the hearing of formal evidence from the parties. These processes include arbitration, expert determination and private judging. There are also combined processes whereby the ADR practitioner plays many roles. For instance, in conciliation and in conferencing, the ADR practitioner may facilitate discussions, and provide advice on the merits of the dispute.¹⁰

⁸ In this thesis, the terms ADR and PDR are used interchangeably as they refer to the same processes.

⁹ National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6. See also National Alternative Dispute Resolution Advisory Council (NADRAC) (2001) *A Framework for ADR Standards* Canberra: Attorney-General's Department, at pp 7-10.

¹⁰ In other circumstances, a practitioner may first use one process, such as mediation, and then a different one, such as arbitration. In addition, there are various forms of one type of ADR process, for example, in transformative mediation the mediator endeavours to improve relationships and understanding between the parties, while in evaluative mediation the mediator may propose solutions: National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6.

ADR may be used for different categories of disputes. Since this thesis is about the family law system, the discussion will focus on family mediation. Until the introduction of the current changes to the family law system, ADR had been conducted by court staff, judicial registrars, judges and magistrates themselves or by external ADR providers approved by the court and/or chosen by the parties. It could be free, partly subsidised or completely at parties' expense, and expenses incurred on ADR could or could not be recoverable as costs. Since the introduction of the *Family Law Rules 2004*, court referral to ADR has occurred before an application is filed with the court, and also at any stage of the litigation process.¹¹ The only difference now is that no proceedings may be commenced without a certificate issued by a family dispute resolution practitioner specifically.

Although an ideal method of dispute resolution in theory, there are various concerns about mandating ADR. They include the conflict in the mediator's roles, the insincerity of the drive to settle disputes, the concealing of legal principle, the risk of compromising the best interests of the child, the prescriptive nature of mandatory mediation and concerns over the types of processes used. I discuss these issues to demonstrate that mandatory mediation at the point of separation is not ideal and will not necessarily produce the desired outcome of two happy parties who have amicably sorted out the future (shared) care arrangements for their children.

¹¹ K Mack, *Court Referral to ADR: Criteria and Research*, 2003, Australian Institute of Judicial administration Incorporated and the National Dispute Resolution Advisory Council: [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/personal/4DC4C646C9E10D27CA256E49007C5EB0/\\$FILE/0+Court+Referral+to+ADR.pdf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/personal/4DC4C646C9E10D27CA256E49007C5EB0/$FILE/0+Court+Referral+to+ADR.pdf), at p 69.

8.2.2 Conflict in mediator's role

When the Government's recommendations for the current reforms were released, there was great concern about the proposal to require mediators to consider a starting point of equal time where practicable¹² when assisting parents in developing a parenting plan. This is because essentially such a change would set new statutory obligations for mediators that would possibly conflict with established standards of mediation practice.¹³ The approach of most mediators is to cater to the needs of the parties and features of each individual matter.¹⁴ Although parenting plans may suit some parents, others may prefer alternative outcomes, for example, informal arrangements or consent orders. Likewise, equal time arrangements may suit some families, but may not be suitable for others.

8.2.3 Insincerity

The general sentiment about ADR in all contexts seems to be that if it is successful and cases are settled appropriately at an early stage, judicial resources may be freed up to deal with cases that contain strong public interest points that require an authoritative determination in a court or tribunal forum.¹⁵ I argue that when relationships reach breakdown point, what is required is a system that is sensitive to identifying appropriate routes of dispute resolution for cases in their individual contexts. By mandating the use of

¹² Recommendation 5 of the Government's Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation stipulated the timing of mediation. Now section 65DAA *Family Law Act 1975* requires the FCA to consider this when making parenting orders.

¹³ Various institutions including NADRAC had provided feedback to the Attorney-General in relation to the recommendations for reforms. NADRAC's comments were published in a document entitled "Report on the Inquiry into Child Custody Arrangements" and released on March 2004: http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Report_on_the_inquiry_into_child_custody_arrangements.

¹⁴ National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6.

¹⁵ I have already discussed this goal in relation to the motivations behind the introduction of compulsory pre-action procedures with the *Family Law Rules 2004*.

mediation specifically at the point of separation, the referral process may be too prescriptive to adequately cater to all families. Although the Government has stressed its concerns about the effect of the adversarial nature of formal court-based adjudication on separating couples, it is plain to see that other factors, such as limited court resources, are also significantly motivating the push. Hence, the Government must ensure that in its drive to mandate alternative forms of dispute resolution, it puts in place sufficient safeguards to ensure that legal rights are not jeopardised for the sake of expedition and cost saving associated with ADR.

8.2.4 Risk of compromising rights

One way for the Government to justify the suitability of ADR in the context of family law is to overcome the tension between law as a means of protecting rights and law as a means of settling disputes. It must prove that the protection of children's rights will not be hindered, and show that the move away from a rights discourse for the purpose of settling disputes is an appropriate move in the short and long term. Unless this is done, legal rights will be undermined and children in particular will become more vulnerable.

Before entering into a discussion about the importance of the need to make proper assessments of the appropriateness of dispute resolution processes for different cases and client groups, it is necessary to examine a little more closely the reasons behind the increased Government push for the use of alternative forms of dispute resolution.

8.2.5 Reasons for the push for alternative forms of dispute resolution

In addition to the perception of the growing litigiousness in the courts, it has been noted that the need to account more for the use of judicial and other resources and an

increase in the number of self-represented litigants are factors in the development of ADR in Australia.¹⁶ Hence, the expansion of ADR in Australia has occurred partly against a background of concern about a perceived “crisis” in civil justice with difficulties experienced by heavier caseloads and the escalating costs and general inaccessibility of court litigation. As a result, there has been an obvious shift towards more active case management in the courts and an attempt by the Government to foster a culture change from the use of adversarial to enabling methods with the development of a robust infrastructure supporting ADR. The Government’s establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995 is indicative of an attempt to create cultural change.

As noted in chapter 3, the procedures of the FCA were already being transformed to encourage such developments. In addition, rules and regulations had already been introduced to compel parties to exhaust pre-action procedures.¹⁷ It has been reported that the FCA was already aiming to have 90% of cases resolved through mediated agreements within six months of filing.¹⁸

There is scepticism about the relentless drive for alternative dispute resolution because although it is always presented as being beneficial to the parties, the hidden agendas, such as the aim to control judicial workload, are really viewed as the driving forces.¹⁹ Also, it has been said that emphasis on the settlement of a matter helps deliver the message about

¹⁶ T Buck, above n 7, at p 1.

¹⁷ The 1996 reforms to the Australian *Family Law Act 1975* emphasise family and child mediation as a method of primary dispute resolution in family law disputes. Also, the Family Court Rules 2004 stipulate that pre-action procedures must be exhausted before an application is filed, except in specific circumstances.

¹⁸ Family Court of Australia 2004-2005 Annual Report, at p 21:
http://www.familycourt.gov.au/presence/resources/file/eb000a4925e651b/annual_report_2004_2005.pdf.

¹⁹ P McManus, “Informal rules in family law”, (2004) 18 *AJFL* 257, at p 267.

what it is to be a “good” or “bad” separating parent.²⁰ Accordingly, cooperation and a willingness to mediate are considered characteristics of child-friendly behaviour, whereas a reluctance to participate is viewed as child-unfriendly behaviour. Hence, the unwillingness of a victim of domestic violence to participate in negotiations risks appearing obstructive, unreasonable and selfish. Although the Rules provide victims of domestic violence with an exemption from pre-action procedures, there is still an informal expectation that efforts be made to settle in practice.

In deciding whether or not there are valid reasons for pushing the use of alternative forms of dispute resolution, there are key matters of principle to take into account, for example, the extent of the mediator’s duty of confidentiality, the level of judicial participation in ADR methods, and the suitability of mandatory mediation. It has been noted that mediation is a valuable legal tool when mediators adopt an adjudicative role that might lead to settlement or a narrowing of the issues by placing pressure on parties in suitable cases.²¹ It could then follow from this argument that a court-like set-up, whereby the judge adopts some functions of a mediator, could also be a valuable legal tool in suitable cases. This is what the Children’s Cases Program does.

An assessment of the introduction of mandatory mediation specifically is crucial given its inherent implications of undermining the rights discourse for the sake of settling disputes. Buck states that the fact that different solutions to these problems are found in

²⁰ Ibid, at p 269.

²¹ Ibid.

different contexts means that ADR processes must essentially be assessed in their individual contexts to produce meaningful reflection on their “success”.²²

8.3 Is the Government pushing the family law system in the right direction?

Clearly, the questions of whether ADR has a valid purpose and whether the new reforms will result in successful outcomes are difficult to ascertain because measuring success and identifying purposes are far from straightforward. Research seems to suggest that ADR is suitable if it works, and the Government is pushing the system in the right direction if ADR works better than litigation.²³ However, as already pointed out, assessing the success and suitability of such processes is a difficult task and ideally it requires looking at cases in their individual contexts. It is not always possible to link disputes and disputants with an ADR process, as though all elements in all those types of disputes are the same.²⁴ This is because in each case there are many factors and variables involved in a dispute that exert mutual influence on each other.²⁵ Equally, the timing of a referral to ADR can factor into how successful it is in resolving a matter²⁶ – not all matters may be suitable for ADR from the point of separation.

Although one of the major areas of empirical research involving court-sponsored ADR in Australia is divorce and family mediation, much of the discussion often assumes that fixed criteria can be used to identify disputes that are suitable for ADR or to match a

²² Ibid. Buck also points out that the context-dependency of ADR has meant that the empirical research can often seem ambiguous at first instance, above n 7.

²³ Mack observes that much of the empirical research on ADR appears to consistently ask two questions about it – does ADR work? And, does it work better than litigation. K Mack, above n 11, at p 25.

²⁴ F E A Sander and S B Golberg, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure”, (1994) 10 *Negotiation Journal* 49.

²⁵ H Astor and C Chinkin, *Dispute Resolution in Australia*, 2nd ed 2002, Sydney: LexisNexis Butterworths, at pp 277-279; T Sourdin, “Educating Judges about ADR” (1997) 7 *Journal of Judicial Administration* 22, at p 24.

²⁶ K Mack, above n 11, at p 5.

particular dispute to a specific ADR process,²⁷ for example family law matters to mediation. The Government appears to make the assumption that all family law matters, and specifically children's matters, can be referred to alternative forms of dispute resolution, with the exception of a few types of cases.²⁸

8.3.1 Definitions: success, goals and effectiveness

In light of the Government's reform to mandate mediation before the use of litigation, it must have resolved that there is a reasonable prospect of success. How the Government measures success is therefore an important question. Developing a way to identify whether an ADR process is successful is necessarily very subjective.²⁹ The success of ADR in the context of family law matters really depends on the goals these processes are intended to achieve. Naturally, there are different goals depending on the different stakeholders.³⁰ Commentators have differentiated judicial preference for settlement from party preferences.³¹ While a court may want to reduce a crowded list to save public costs, the parties may be more concerned about saving their own money by avoiding litigation.³² If a matter remains out of the court's caseload, this may be viewed by the Government and the

²⁷ K Mack, above n 11, at p 1.

²⁸ This is apparent in recommendation 9 of its Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation, "...that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunals."

²⁹ For this reason, some analysts prefer the word "effective" as they see it as more accurately reflecting the range of possible positive results from ADR: L Boule, *Mediation: Skills and Techniques* 1996a Sydney: Butterworths, at p 11; L Boule, *Mediation: Principles, Process, Practice* 1996b Sydney: Butterworths, at pp 12-14.

³⁰ K Mack, above n 11, at p 15. Mack points out that these goals may be complementary or they may conflict.

³¹ D R Hensler, "Suppose It's Not True: Challenging Mediation Ideology" (2002) *Journal of Dispute Resolution* 81 at p 82-86; J Resnik, "Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement" (2002) *Journal of Dispute Resolution* 155.

³² D W Nelson, "ADR in the Federal Courts – One Judge's Perspective" (2002) 17 *Ohio State Journal on Dispute Resolution* 1, at p 10; D W Brazil, "Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns" (1999) 14 *Ohio State Journal on Dispute Resolution* 715.

court as a successful referral, even if the parties and the ADR practitioner are dissatisfied with the ADR process and outcome. This goal can backfire on itself given that speedier settlements may not save much money if it means greater costs are incurred earlier in the litigation process, or if it means the parties come back to court after unsuccessful mediation. Such a situation may also demonstrate the failure of ADR to protect rights. This does not in any way justify the Government's introduction of compulsory alternative dispute resolution.

Astor provides many examples of goals, which a court-connected ADR referral might include, such as: to reduce delay, clear lists, reduce the backlog of the FCA; reduce cost to parties, the court, the Government and the taxpayer; preserve ongoing relationships between the parties; achieve moral education and transformation; and to change the legal culture.³³ Other commentators give examples of various other goals, some of which emphasise the values that ADR can promote.³⁴ Although I believe increasing settlement rates is a genuine goal, it is not the only goal. More importantly, the Government should not lose sight of the goal to protect the rights of children.

It is easier to determine whether or not ADR has been successful if the goals are clearly identified and it is possible to assess whether those goals are met. It has been noted that the notions of "success" used in much of the empirical research are quite narrow.³⁵ Settlement rates, time and cost savings as well as party satisfaction are said to be the most widely used

³³ H Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001) Carlton: Australian Institute of Judicial Administration Incorporated, at p 5.

³⁴ D W Nelson, above n 32, at p 9; D W Brazil, above n 32, at pp 725-726; L Boule 1996a, above n 29, at p 11.

³⁵ K Mack, above n 11, at p 2.

measures.³⁶ However, there is no evidence that higher rates of settlement mean a better process or outcome.³⁷ As two commentators point out, very high settlement rates may involve dissatisfied parties, who felt pressured to settle.³⁸ Also, assessing success based on settlement rates does not factor in the durability of the outcome. If an agreement later falls apart, it cannot really be considered an effective settlement, especially as it may lead to litigation.³⁹

To assess the effectiveness of mediation, many researchers examine client satisfaction, and the most consistent finding is that it is high.⁴⁰ Again, it is difficult to determine the validity of mediation based on this evaluation given one must ask how satisfaction is measured. Assessing satisfaction is difficult for many reasons.⁴¹ For one, it may not be an adequate measure of success as some studies have shown. It has been pointed out that it is usually measured simply by asking ADR participants if they were satisfied with the process and/or the outcome, or with other specific features.⁴² A participant's subjective assessment of satisfaction may be based on insufficient information about entitlements or alternatives. Much emphasis is placed on client satisfaction to support the push for the use of alternative forms of dispute resolution, with one Australian research team arguing that satisfaction is, "the only relevant and certainly the only practical criterion by which the quality of non-

³⁶ Ibid and at pp 19-20.

³⁷ J B Kelly, "A Decade of Divorce Mediation Research" (1996) 34 (3) *Family and Conciliation Courts Review* 373, at p 375.

³⁸ K Kressel and D Pruitt, "Conclusion: A Research Perspective on the Mediation of Social Conflict" in K Kressel and D Pruitt (eds) 1989 *Mediation Research: The Process and Effectiveness of Third Party Intervention*, San Francisco: Jossey-Bass Publishers, at pp 397, 400-401.

³⁹ R A Whiting, "Family Disputes, Non-Family Disputes and Mediation Success" (1994) 11 *Mediation Quarterly* 247, at p 251.

⁴⁰ K Mack, above n 11, at p 2.

⁴¹ For a detailed discussion of these reasons, see B G Garth, "Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research" (1997) 49 *Alabama Law Review* 103, at p 108.

⁴² K Mack, above n 11, at p 20.

adjudicated outcomes can be evaluated”.⁴³ Other commentators have criticised satisfaction as an “ambiguous” value⁴⁴ as it alone cannot adequately measure the quality of a court-connected process, which has a specific public responsibility for enforcement of rights.⁴⁵ Levels of satisfaction are likely to be affected by what participants believe would have been the result had the dispute been litigated.⁴⁶ As already noted, although participants may believe they are well informed when assessing outcomes, they may be unaware of the choices available or to their legal entitlements.

Furthermore, the results indicating client satisfaction are not restricted to Australia. Extensive research on divorce mediation in many countries indicates that parties usually settled and that most reported they were satisfied with the process and the outcome, though naturally those who settled reported greater satisfaction.⁴⁷ Mediation dealing with contact and residence disputes also appears to have had positive features, mainly involving improved communication, though these improvements reportedly do not appear to last beyond the mediation process itself.⁴⁸ Research on mediation has found that most disputes referred to mediation will settle before, during or shortly after mediation. It is interesting to note that results, including rate of settlement and level of satisfaction, do not appear to differ much, whether voluntary or compelled.⁴⁹

⁴³ M Delaney and T Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997) Sydney: Justice Research Centre, at p 9.

⁴⁴ R Singer, “The Rolling Stones Revisited: Exploring the Concept of User Satisfaction as a Measure of Success in Alternative Dispute Resolution” (1995) 6 *Australian Dispute Resolution Journal* 77.

⁴⁵ D R Hensler, “Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System” (2003) 108 *Penn State Law Review* 101; K Kressel and D Pruitt, above n 38, at p 396.

⁴⁶ K Mack, above n 11, at p 21.

⁴⁷ *Ibid*, at p 3.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*, at p 2.

Some commentators have raised significant criticisms about the value of certain research findings. One has stated that “there is a tendency... to place too much emphasis on empirical research as... a device for the evaluation of solutions to particular problems”.⁵⁰ This can result in “false expectations and... disappointment that is... unjustified”.⁵¹ More recent ADR research has taken a different direction by analysing participants’ perceptions of ADR in relation to vital elements of the psychology of procedural justice, or raising policy questions about the role of ADR in the courts apart from efficiency claims.⁵²

From the above discussion, it appears that mediation would be a better alternative to litigation in solving child related disputes only if it upholds the rights of the child as well as of the other parties.⁵³ Extensive research concerning family mediation, including Australian research, would support this as it concludes the following: clients across countries reach agreement in divorce mediation more than half of the time;⁵⁴ client satisfaction with both the mediation process and outcomes in all countries and settings is quite high;⁵⁵ satisfaction with mediation was higher among those who reached agreement than among those who did not;⁵⁶ positive features of mediation for participants in contact and residence disputes focus on the capacity to communicate to the other party in an enclosed setting, and include the opportunity for parents to express their opinions, talk about their children, have their concerns taken seriously and receive helpful ideas from mediators about parenting issues

⁵⁰ B G Garth, above n 41, at p 131.

⁵¹ Ibid.

⁵² As observed by K Mack, above n 11, at p 25.

⁵³ Most evaluative research on ADR has been directed at mediation specifically, especially family mediation and the comparison between mediation and litigation: K Mack, above n 11, at p 2.

⁵⁴ J B Kelly, above n 37, at p 375; J A Pearson, “Family Mediation” (1994) in S Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings – Implications for Courts and Future Research* State Justice Institute, at p 60.

⁵⁵ J B Kelly, above n 37, at p 377; J A Pearson, above n 54, at p 63.

⁵⁶ J B Kelly, above n 37, at p 378.

and plans;⁵⁷ clients benefit from small but more short-term improvements in cooperation and in communications following custody mediation.⁵⁸

Wade has summarised mediation results generally, emphasising that the positive results are linked to high quality and well-resourced programs.⁵⁹ Kressel and Pruitt also summarise mediation research in generally positive terms.⁶⁰ Based on these findings, it would appear that the reforms are heading in the right direction with the emphasis on alternative forms of dispute resolution, however, as I have indicated, these can not be the only factors that determine the success and suitability of these processes.

I now turn to the issue of ADR versus litigation. A comparison of ADR generally to litigation is difficult because of the diversity of ADR processes. Again, I am endeavouring to assess if ADR works better than litigation to resolve disputes relating to children. This will help me determine whether or not ADR has a valid purpose and whether or not the reforms will result in more successful outcomes.⁶¹ Briefly, the positives of ADR are user satisfaction and cost effectiveness; and the negatives are the lack of guarantee of substantive fairness and potential pressures imposed on a vulnerable party.

⁵⁷ Ibid.

⁵⁸ Ibid, at p 379.

⁵⁹ J Wade, "Current Trends and Models in Dispute Resolution Part II" (1998) 9 *Australasian Dispute Resolution Journal* 113, at p 115. He refers to many surveys in Australia and the US, which consistently show that highly trained, debriefed, problem-solving mediation services (especially in family disputes), staffed by well-paid mediators, who use an intake process, are successful in that they have moderate to very high levels of settlement, durability of settlements, customer satisfaction, and preservation and/or restoration of the parties' ability to communicate in the future.

⁶⁰ K Kressel and D Pruitt, above n 38, at pp 396-399. They conclude that: parties perceive that mediation affords them a degree of control and privacy as well as satisfaction at being able to state their own position; the evidence on rates of compliance with mediated agreements is generally favourable; mediation is usually unable to alter incompatible patterns of relating.

⁶¹ I wish to reiterate that the usual ADR process in court-connected programs is "mediation" in some form: K Mack, above n 11, at p 27.

Comparing mediation specifically to litigation is a difficult task because of the lack of clear performance standards or quality measures for litigation, and the need for clarity in what “litigation” consists of.⁶² For instance, one must ask if the comparison is between ADR and trial, or ADR and lawyer negotiation, or ADR and a judicial settlement conference. These difficulties make it almost impossible to assess whether or not ADR is more successful than litigation in the realm of family law.

Although many of the major research findings illustrate the difficulty of reaching reliable, empirically based conclusions with enough accuracy to determine whether or not ADR works better than litigation, some broad generalisations may be possible.⁶³ In terms of user satisfaction, it appears that participants in family mediation report considerably greater satisfaction than those who litigate their divorce or residence and contact dispute. One researcher states that, “with few exceptions, study after study concludes that mediation is consistently favoured as compared with adversarial interventions”.⁶⁴ Although outdated, another report demonstrates that participants in mediation experience high levels of satisfaction with mediation, in contrast to the dissatisfaction felt with “the adversarial legal system”.⁶⁵

From a costs savings point of view, there is some evidence of benefits for users of mediation, but the benefits for the courts are not so clear.⁶⁶ Several studies have found that

⁶² K Mack, above n 11, at p 3.

⁶³ For a more detailed discussion on these generalisations, see W D Brazil, “Court ADR 25 Years After Pound: Have We Found a Better Way?” (2002) 18 *Ohio State Journal on Dispute Resolution* 93.

⁶⁴ J A Pearson, above n 54, at p 63.

⁶⁵ J A Pearson and N Theonnes, “Divorce Mediation: Reflections on a Decade of Research” in K Kressel and D Pruitt (eds) 1989 *Mediation Research: The Process and Effectiveness of Third Party Intervention*, San Francisco: Jossey-Bass Publishers, at pp 27-28.

⁶⁶ K Mack, above n 11, at p 28.

“mediation... was significantly less expensive” than the adversarial process⁶⁷ and other research has provided important evidence that mediation will reduce legal fees.⁶⁸ Interestingly, upon reviewing divorce mediation research, Pearson concluded that “compulsory mediation programs... have been found to be highly cost effective and helpful to courts”,⁶⁹ however, she has noted elsewhere that there is “little impact on the courts’ overall workload”.⁷⁰

In relation to whether results differ in any significant way between family mediation and litigation, the research is contradictory. One pro-mediation commentator summarised the research as demonstrating the following: mediation results in more joint parenting arrangements; there are higher rates of compliance with mediated agreements compared to arrangements reached in the adversarial process; and users of mediation are notably more satisfied than adversarial comparison groups.⁷¹

On the other hand, research conducted by Pearson reports the following: while some studies find evidence of generosity in mediation agreements, others reveal the opposite; although early evaluations showed a tendency towards joint parenting, more recent evaluations fail to reveal outcomes of distinct parenting arrangements; regardless of the dispute resolution process, children tend to live with their mothers; contact patterns are fairly consistent across forums; some studies find short-term improvements in compliance and relitigation for those who mediate and mediated agreements can be equally as unstable as those originating from judicial forums or lawyer conducted negotiations; and while

⁶⁷ J B Kelly, above n 37, at p 376.

⁶⁸ J A Pearson, above n 54, at p 62.

⁶⁹ J A Pearson and N Theonnes, above n 64.

⁷⁰ J A Pearson, above n 54, at p 61.

⁷¹ J B Kelly, above n 37, at pp 376-378.

mediated agreements resemble non-mediated ones in many ways, they usually contain more detail about visitation arrangements and avoid the use of vague contact orders that often bring parents back to court.⁷² Essentially, Pearson concludes that “mediation outcomes resemble those generated in other forums and share many of the same weaknesses”.⁷³

After two decades of research into US court-based ADR program development, Bergman and Bickerman observed “that well-run ADR programs *may* reduce cost and time, that ADR is satisfying and fair for *most* participants and that good ADR can cost money.”⁷⁴ This demonstrates the difficulties in assessing the general suitability of ADR to all family law matters. An investigation of conciliation of child disputes in the UK contrasted different models of conciliation and concluded that “in general, conciliation of all types reduced the number of disagreements between parties and generated settlements which the parties regarded as satisfactory – agreements were reached in 71 per cent of cases and of these 74 per cent were described as satisfactory”.⁷⁵ However, the same investigation concluded that on economic grounds alone the increased cost of providing conciliation was not sufficiently offset by cost savings to the public or the parties, and identified “the policy question” as whether the other benefits gained from conciliation can be shown to justify the additional cost.⁷⁶ Hence, the issue raised by this investigation is whether or not it is really economically beneficial to make these resources widely available. This brings us back to the question of the Government’s goals in pushing ADR.

⁷² K Mack citing J A Pearson, above n 11, at pp 28-29.

⁷³ J A Pearson, above n 54, at p 80.

⁷⁴ E Bergman and J Bickerman (eds) (1998) *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs*, Pike & Fischer Inc, Bethesda, Maryland, at p ii.

⁷⁵ A Ogus et al, “Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs” (1990) 53(1) *Modern Law Review* 57.

⁷⁶ *Ibid*, at p 74.

The Government's implied claim that ADR is better than litigation does not have any sound empirical basis. At best, it is a value preference driven by an ideological stand and economic factors. In the following section, I assess why mediation and mandatory mediation can be problematic.

8.4 Problems with mediation and mandatory mediation

In this section, I will discuss the possibility of a flexible referral criterion for mandatory mediation; the substantive fairness of mandatory mediation; its significance for access to justices; and its implications for victims of domestic violence.

It will not always be possible upon first glance to assess whether a matter should be exempt from the requirement to undertake mediation, and for this reason, the reforms ought to allow for the circumstances of each case to be scrutinised before a referral is made.⁷⁷ Clearly there are difficulties in assessing the suitability of ADR for family law matters as compared to litigation, and the number of variables in each dispute makes the task even harder. For some cases, mandatory mediation at the time of separation may be absolutely inappropriate, yet for others, mediation may be more suitable at another point in time. For these reasons, flexible referral criteria may be more useful than the general rule of mandatory mediation for all families.

Reasons for non-referral have been identified, and there is much debate about the substantive fairness of mediation and its significance for access to justice.⁷⁸ For example,

⁷⁷ Alternatively, the reforms should recognise the diversity of contexts in which ADR will be called upon to assist. This would be problematic, however, given the impossibility of predicting all the types of disputes and issues that arise in each matter. Inevitably, certain variables from certain matters would be omitted and this line of approach would also become too prescriptive, and potentially discriminatory.

⁷⁸ As noted by K Mack, above n 11, at p 2.

there is a substantial body of literature, which argues that family disputes with a history of violence should not be referred to mediation. Astor provides numerous justifications for this: the imbalance of power created by violence is extreme and too significant for a neutral mediator to remedy; the nature and history of the relationship between the parties renders consensual decision-making impossible; mediation places undue pressure on the target of violence; mediation can endanger the safety of women who are the victims of violence and the safety of children in their care; and mediation is highly likely to result in unjust and exploitative agreements where there has been violence. In addition, she argues that mediation of family law matters involving violence removes the issue of violence against women from the public eye and threatens existing protections.⁷⁹

A major concern amongst many commentators is how to ensure that victims of family violence are not disadvantaged or put at risk by the current changes to the system, while at the same time allowing them to benefit from some of the opportunities that ADR can potentially offer.⁸⁰ Similar concerns have been raised about the possible power imbalances in ADR processes between parties along cultural, ethnic, gender and age dimensions. Some researchers point to the capacity of certain ADR processes to be flexible and adapt to these factors.⁸¹

⁷⁹ H Astor, "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3.

⁸⁰ A Bickerdike, A Bailey, J Pullen and H Cleake, *Family violence and family mediation. An arranged marriage or an opportunity for growth*, presented at the 9th Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/bickerdike2.html>. This group of researchers has outlined a service delivery model detailing referral mechanisms, exclusion criteria, assessment methodologies and specific clinical interventions that are appropriate for this client group.

⁸¹ As pointed out by T Buck, above n 7.

8.4.1 Possible solution: flexible referral criteria for dispute resolution

I believe that if the Government had made ADR processes flexible to fit the variables of each matter, it would have been pushing the system in a better direction. By assessing the suitability of mediation on a case-by-case basis, the use of mediation would arguably have a more valid purpose with successful outcomes on a short- and long-term basis.

The voluntary use of mediation has also been said to have an impact on the validity and success of the new reforms.⁸² Many argue that consensual participation is a given for most ADR processes⁸³ and is crucial to its legitimacy.⁸⁴ The supposed basis for ADR effectiveness and legitimacy is that parties voluntarily participate in good faith with a shared desire to resolve their dispute.⁸⁵

It has been argued that mandatory mediation can impact negatively on meaningful involvement in the dispute resolution process because it could be seen as simply a procedural step, which parties must overcome in order to file a court application.⁸⁶ Furthermore, it could lead to a rise in bad faith negotiation, early termination, a decrease in agreement rates, greater entrenchment of the dispute, reluctance to use mediation in the future, lower job satisfaction for mediators, and increased public dissatisfaction with both mediation and the family law system in general.⁸⁷

⁸² H Astor and C Chinkin analyse the debate on party choice, above n 25, at pp 269-274.

⁸³ J Howieson, "Perceptions of Procedural Justice and Legitimacy in Local Court Mediation" (2002) 9(2) *Murdoch University Electronic Journal of Law*, at paras 10-11.

⁸⁴ H Astor, "Rethinking Neutrality: A Theory to Inform Practice: Part I" (2000) 11 *Australasian Dispute Resolution Journal* 73.

⁸⁵ *Ibid.*

⁸⁶ As pointed out by NADRAC, above n 5.

⁸⁷ *Ibid.*

One Canadian commentator contrasted levels of coercion and found some evidence that greater coercion implied cases were slightly less likely to settle, whereas referrals that were less coercive meant there was a slightly higher chance at settlement.⁸⁸ Hence, mandatory mediation at the point of separation should be subject to the same screening process as voluntary mediation, and mediators should be permitted to decline cases that are unsuitable.

On the other hand, numerous studies have shown that voluntariness does not affect settlement,⁸⁹ nor does initial party interest affect satisfaction.⁹⁰ There are comparable findings for divorce mediation where agreement rates, satisfaction and willingness to suggest the process to others are similar for mandatory and voluntary participants.⁹¹ Some even argue that without compulsion, few litigants (and their lawyers) would use ADR.⁹² Perhaps one way to judge the validity of mandatory mediation in family law is to look at what parties choose when given the option.⁹³

⁸⁸ T Hedeem, "The Effects of Coercive Referrals to Dispute Resolution", paper presented at the LSA/CLSA Joint Annual Meeting, Vancouver, British Columbia, 30 May – 1 June 2002, at p 17.

⁸⁹ J M Brett, Z I Barsness and S B Goldberg, "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers", (1996) 12 *Negotiation Journal* 259, at p 259; D Smoyer, "District of Columbia Superior Court, Multi-Door Dispute Resolution Division" (1998) in E J Bergman and J G Bickerman, above n 73, at pp 32-33.

⁹⁰ J D Rosenberg and J Folberg, "Alternative Dispute Resolution: An Empirical Analysis" (1994) 46 *Stanford Law Review* 1487, at p 1539.

⁹¹ J A Pearson, above n 54, at p 73.

⁹² J Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) *Journal of Dispute Resolution* 241, at pp 299-301; J A Pearson, above n 54, at p 27; A Zariski, "Disputing Culture: Lawyers and ADR" (2000) 7(2) *Murdoch University Electronic Journal of Law*, at www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html, para 3. Research findings are contradictory and inconclusive on the effect of compulsory referral success, for example, an assessment of the Ontario court-connected mediation program found that cases where parties selected the mediator were most likely to achieve complete settlement: K Mack, above n 11, at p 47. A US researcher found that in Ohio, cases were more likely to settle if they entered mediation at the judge's initiative or at a party's request than if they were arbitrarily referred to mediation: R L Wissler, "Court Connected Mediation in General Civil Cases: What We Know from Empirical Research" (2002) 17 *Ohio State Journal on Dispute Resolution* 641, at p 676. Other studies have identified links between voluntariness and greater success: K Mack, above n 11, at p 48.

⁹³ K Mack looks into this, above n 11, at p 48. In Australia, the AC Nielson research into family mediation has indicated that most people simply do not know about mediation: AC Nielson (1998) *Family and Child Mediation Survey: Final Report*. It reported that in 1995, 17% of people surveyed indicated they had heard of family mediation; by 1998, the figure had risen to 18%. Of those aware of it, 16% said they would not be

After considering the research findings on the voluntariness of mediation, I reiterate that carefully considered intake procedures that factor in the individual circumstances of each dispute are imperative. Astor notes that, “one of the important determinants of the efficiency and effectiveness of any court connected dispute resolution program is that of appropriate diagnosis and referral.”⁹⁴ Hence, a determination of whether or not an individual case would benefit from ADR and the timing of that intervention requires careful consideration.

The point at which a dispute should be directed to ADR or should be re-routed from litigation to ADR is a controversial issue as there are many factors to be taken into account with each individual case. Mack’s review of court referral to ADR effectively exposes the assumption that specific types of disputes can be regularly “matched” with a particular type of ADR method, and concludes that there are considerable limits on the capacity of empirical research to establish clear referral criteria.⁹⁵ Her research does, however, provide some positive and consistent messages, for example, the recurring results of high client satisfaction with mediation, which hardly changes according to whether the mediation is voluntary or involuntary.

Therefore, before mandating mediation for all but a few types of matters, the reformers ought to have thought carefully about why a party might choose or resist ADR, as this may affect the appropriateness of a compulsory referral. For example, if a party refuses ADR because of a fear of violence, that fear should not simply be overridden without precise

keen to use family mediation, and 52% of those said they preferred to handle their problems themselves or not involve other people. Of the 70% who said they would be willing to use family mediation, the most commonly voiced reasons were that it would be better than court, less stressful, help with communication, provide an objective opinion and be more cost-effective.

⁹⁴ H Astor, above n 84.

⁹⁵ K Mack, above n 11.

intake procedures and measures to ensure personal safety, nor should it automatically mean the case is eliminated from the potential benefits of such processes. If a party refuses because they simply believe mediation is not appropriate for their dispute, a different response may be necessary to ensure the party is well-informed about what ADR actually involves and its potential value. An important question relating to party choice is, who would be appropriate to analyse the suitability of referral? It has been suggested that although parties and their lawyers will have a more detailed understanding of their own dispute and needs, they may not have sufficient understanding of ADR processes to make suitable choices.⁹⁶

I have pointed out that the Family Court Rules 2004 already stipulated that pre-action procedures were to be exhausted before a party filed an application in the FCA. Hence, the reforms extend those rules in the FLA. Perhaps the Government feels justified in mandating mediation in light of research indicating that those who are compulsorily referred to ADR do not generally express objections after attending the process,⁹⁷ nor do they opt out, if given the choice.⁹⁸ However, as one commentator has stated, acceptance of an ADR process does not necessarily mean that it is the preferred process.⁹⁹

By automatically assigning disputes to an ADR program, a legal culture is fostered to enhance the acceptance of ADR and make it part of standard judicial practice.¹⁰⁰ It has been observed that while in some jurisdictions, mandatory referral of disputes to ADR is

⁹⁶ K Mack, above n 11, at p 50.

⁹⁷ J Macfarlane, *Court Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (1995) Toronto: Queen's Printer for Ontario, at p 72.

⁹⁸ J D Rosenberg and J Folberg, above 90, at p 1538.

⁹⁹ K Mack, above n 11, at p 50.

¹⁰⁰ R M Shusterman and E K Burrows, "Mediation in Michigan State and Federal Courts" in E Bergman and J Bickerman, above n 73, at pp 132-133.

thought inappropriate and problematic, in others it is considered standard and rarely discussed.¹⁰¹ Perhaps what the Australian Government is trying to achieve is the latter system.

I will go as far as arguing that it would be beneficial to assess the intensity of the conflict in all matters so as to avoid wasting resources. This would inevitably be a risk in mandating mediation rather than assessing the characteristics of each dispute. Case types are not themselves predictive, even though some of the bundles of features that recur in a particular case type may be.¹⁰² One commentator has suggested that it is not specifically the family nature of the dispute that will determine the success of ADR, but the multi-issue nature and the ongoing relationships that are key factors in successful ADR.¹⁰³

My proposal is to provide mediation upon separation with a greater chance of success. I acknowledge the drawbacks in the implementation of a system that assesses the factors of each individual case to determine the suitability of a referral to mediation, notably that it would require an enormous amount of resources and raise several questions of principle,¹⁰⁴ however, in circumstances where the ADR process would be dealing with entrenched disputes, this would be a better direction than mandatory mediation.

In summary, I argue that the reforms would go in the right direction when a flexible, case-by-case approach to dispute resolution is adopted. However, for the Government to really make progress in its support for families through the use of ADR, it must not only develop a flexible assessment of the suitability of mediation upon separation, but also

¹⁰¹ Ibid.

¹⁰² K Mack, above n 11, at p 67.

¹⁰³ R A Whiting, above n 39.

¹⁰⁴ Such as the question of who would make the referral.

provide assistance to couples before separation. A prime time would be before the children are born.

8.5 A better direction for the family law system: early intervention

I am arguing two major points: that ADR should not be mandatory at the point of separation; and that if the goal is to teach people skills for dispute resolution, then intervention in the form of compulsory counselling should happen much earlier than at the point of separation.

It should not be mandated at the point of separation because this is only effective for many families as a short-term, focussed intervention. Therefore, rather than mandating mediation when a relationship breaks down, couples ought to be provided with long-term skills in resolving disputes and forging suitable parenting arrangements.

Clearly the Government has identified that couples require assistance when making long-term and short-term living arrangements for their children before they reach a point where communications have completely broken down. Therefore, the Government has introduced the compulsory use of mediation as early as possible after separation. I argue that assistance to families must be provided at a much earlier point – preferably before the creation of the family. That way, mediation upon separation could be far more effective. By intervening at that early stage, many of the problems and uncertainties identified with ADR and compulsory ADR would be overcome, as I will demonstrate below.

It is important to clarify here the meaning of the term “early intervention”. It is said to refer to the early identification of problems, prevention and early remediation. Sometimes it

also applies to early intervention in early childhood.¹⁰⁵ While early intervention projects attempt to reduce risk factors and increase protective factors, positive long-term outcomes for families frequently require additional support along the way, particularly at times of transitions.¹⁰⁶

Essentially, this proposal is compatible with the establishment of Family Relationship Centres and introduction of parenting advisers. However, I am suggesting the timing for attendance at a Family Relationship Centre be different and the services reach each and every family. Naturally, my proposal would require the use of a significantly greater number of resources given it would be catering to many more people, and such a program would not really be described as alternative or primary dispute resolution given its purpose would not be to assist with the resolution of disputes but to prevent them. The very fact that it would not be dealing with existing disputes, but would be attempting to prevent future disputes, will help overcome many of the criticisms levelled at the current reforms.

One of the major flaws in the changes to the system that I have identified above is that they are too prescriptive and ignore the variables of each dispute.¹⁰⁷ Not all disputes about parenting matters are the same. I have attempted to show that mediation may not be suitable for all disputes at the exact time stipulated by the Government, and that it may be

¹⁰⁵ Australian Government Department of Family and Community Services, "Evaluation of the Stronger Families and Communities Strategy 2000-2004. Early Intervention – particularly in Early Childhood", Issues Paper, June 2004: [http://www.facs.gov.au/internet/facsinternet.nsf/VIA/sfsc2/\\$File/Early_Intervention_particularly_in_Early_Childhood.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/sfsc2/$File/Early_Intervention_particularly_in_Early_Childhood.pdf), at p 1.

¹⁰⁶ Although I focus on early intervention in the family, I do not mean to neglect those who have existing problems and who need assistance to address them. Nor do I believe the Government should become complacent about families that have received early intervention support.

¹⁰⁷ This is a recurring concern for commentators, for example, Murphy, Campbell and Pike, who believe the concentration on details of the "contact regime" by the Government rather than on an holistic "parenting plan" is too prescriptive: P Murphy, A Campbell and L Pike, "Our Children's Health and Safety Needs: Progress Report on a Parenting Plan Template", presented at the 9th Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/murphy.pdf>.

appropriate for some disputes that the Government assumes ought to be exempt from such processes. Unless a referral criteria for mandatory mediation is flexible enough to cater to a wide range of factors that are present in vastly different disputes, by nature it risks being too prescriptive.

The primary reason my proposal could not be accused of being too prescriptive is its timing. Given there would not yet be an established status quo in each individual family and no entrenched conflict at the stage at which I propose introducing counselling and education, there would arguably be no need for an assessment of the suitability of the program to the dispute, and hence no risk of a referral criteria being too narrow. Although some couples would assert they do not require counselling and education, I argue it would be suitable for all families simply based on its goals to provide preventative measures for subsequent disputes (or effective ways to deal with them), as well as education on the family law system. Due to its timing, such a program would not be trying to change already established practices and structures within each individual family, but ideas and theories on how practices and structures should be. Problems become entrenched when they are embedded in habitual ways of thinking, feeling and behaving,¹⁰⁸ and habitual behaviour is difficult to change once it has become established. For that reason, many early intervention projects seek to work with families to develop positive practices from the start, such as parenting practices from birth.¹⁰⁹

¹⁰⁸ Australian Government Department of Family and Community Services, above n 105, at p 6.

¹⁰⁹ Ibid.

By removing the need to deconstruct already established roles and practices,¹¹⁰ the establishment of a comprehensive plan for the joint parenting of children would hopefully be more realistic.¹¹¹ Hence, the timing of the program would not only overcome problems of narrow referral criteria, but would also assist with setting patterns of behaviour and practices suitable to each individual couple before the formation of the family. It would also hopefully increase the chances of providing couples with long term skills at resolving disputes. By seeking to prevent rather than cure, the program could hopefully cater effectively to each individual couple without requiring a referral program that is necessary when assessing the suitability of mediation to specific entrenched disputes. Naturally, such a program would have to respond to the considerable diversity in cultures, language backgrounds and age of couples, and recognise the different needs among them.

It has been argued that a focus on early intervention and prevention, rather than on treatment after a problem has developed, is both socially and economically more effective in the long run.¹¹² In addition, early intervention programs have been found to provide psychological and social benefits to children, families and communities, including: higher rates of employment and skill levels in mothers; reduced welfare expenditure; improved school performance; and a reduction of child abuse and neglect notifications.¹¹³ The

¹¹⁰ By saying this, I am not ignoring the fact that there is a need to deconstruct ideas about roles and practices that have been set by history and specific cultures.

¹¹¹ Joint parenting arrangements are also subject to a society that is conducive to such arrangements, as I have argued.

¹¹² E Fish, "The benefits of early intervention" in *Stronger Families Learning Exchange Bulletin* No 2, Spring/Summer 2002 pp 8-11: <http://www.aifs.gov.au/sf/pubs/bull2/ef.html>. In Australia, the Stronger Families and Communities Strategy has embraced early intervention as part of its approach to enhance family and community wellbeing. Consequently, the Stronger Families Learning Exchange at the Australian Institute of Family Studies has been developed to improve knowledge about how early intervention projects may be adapted for a variety of Australian contexts and the benefits that may result.

¹¹³ Ibid.

benefits of providing such programs are also said to extend to cost-effectiveness, which is crucial for policy makers to demonstrate.¹¹⁴

In my view, it would be far more appropriate to assist a couple to develop a parenting plan that addresses arrangements for children before a status quo is established and while the parties are still communicating effectively, rather than after a family has become accustomed to a specific structure and precise practices, and is in the throes of separation. Joint parenting needn't be a concept for the separated family alone. At least, a couple ought to be offered the opportunity to assess whether or not it would suit their lifestyle before the birth of any children. If they choose not to embark on joint parenting, there is at least a possibility of spelling out the costs and benefits of their chosen arrangement for both the spouses.

In addition to overcoming certain flaws identified in the Government's reforms for mandating alternative forms of dispute resolution at the point of separation, my proposal would prove more appropriate for several other reasons. By mandating the attendance of a couple at a Family Relationship Centre before the birth of any children, the parenting advisor would hopefully play a greater role in promoting family relationships than during the aftermath of separation. In fact, the term "parenting advisor" would arguably be more appropriately applied to someone providing advice and guidance on parenting before a couple becomes parents, than to someone intervening after a couple has already had children. While the Government suggests the parenting advisor plays a dual role in terms of advice-giving and dispute resolution after separation, I argue it would be better to delineate the two tasks and have a parenting advisor who gives advice and guidance before the birth

¹¹⁴ Ibid.

of children, as well as a mediation practitioner who assists with dispute resolution after separation. This would lighten the skills set required by such practitioners and allow specialised training for the acquisition of appropriate qualifications for each role.

In terms of the Government's mediation objective of both parents having a meaningful role in their children's lives, this proposal can help before a couple becomes parents, rather than when parents are separating. Establishing such a mentality and fostering strong family relationships at the earliest point possible in the life of the family would be a much better direction for the law. This is especially so in light of research showing that parents who are able to cooperate with one another and communicate effectively are often much more able to make good parenting decisions post-separation.¹¹⁵ Hopefully my proposal for a program of compulsory early intervention would give mediation greater validity and an increased chance at successfully resolving any disputes upon separation.¹¹⁶

My proposal simply assists in the development of effective practices to reach the largest number of families and to contribute to the quality and duration of arrangements put in place. It may even encourage the later use of mediation to resolve disputes if a family does subsequently separate, since many of the concepts raised in mediation, such as parenting plans and shared parenting arrangements, would have already been discussed in the counselling and education program compulsorily attended prior to the birth of the child/ren.

¹¹⁵ National Alternative Dispute Resolution Advisory Council, "Submission in response to 'A New Approach to the Family Law System: Implementation of Reforms' discussion paper 10 November 2004: [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(EAF6E03C496C7A11D2A141976803674B\)~05+January-+Submission.htm/\\$file/05+January-+Submission.htm](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(EAF6E03C496C7A11D2A141976803674B)~05+January-+Submission.htm/$file/05+January-+Submission.htm), at p 6.

¹¹⁶ I reiterate that this proposal does not eliminate the option to attend mediation or other forms of alternative dispute resolution if issues subsequently arise. Unless arrangements are flexible, it is quite feasible that a couple would require assistance at a later stage to accommodate a constantly changing situation as a child progresses through his or her developmental years and/or as parents' households change and possibly merge with another household of a separated spouse.

It may also make couples think about whether or not they share the same views on parenting and parenting arrangements. What it would no doubt achieve is greater communication between future parents and an increased understanding of the way the system operates when determining the future arrangements for the children upon the breakdown of the family. This would arguably take much of the pressure off the adversarial system that is viewed by the Government as being the primary cause of the problematic way in which care arrangements are made for children post-separation.

CHAPTER 9: CONCLUSION

In this thesis, I have critiqued the two major changes to the Australian family law system that have been introduced in the latest reforms, namely a rebuttable presumption of shared parenting¹ and compulsory family dispute resolution. In light of the previous chapters, and as a result of my assessment of the suitability of the reform provisions to the stated aims, I confidently conclude that the reforms are not constructive and that the Federal Government has the power to implement changes differently.

In response to the Government's alleged desire to improve the way parenting arrangements are dealt with after separation and to encourage both parents to have a meaningful involvement in their children's life, I have suggested an alternative path. I recommend intervening much earlier in the life of the family, and in view of the discussion in this thesis, I strongly propose that it is the only way to achieve the Government's stated goals.

I have demonstrated why the new amendments are problematic. Above all, they erroneously simplify a complex set of issues in an attempt to endorse a philosophy of the ideal family in which parenting is equally shared and disputes are resolved amicably in the event of a separation. I have argued that before this ideal family can realistically be promoted, there is a need for both a body of law that reflects social reality and a culture that facilitates the implementation of such a change. In doing so, I have not completely rejected the role of law in legitimising certain ideas and setting norms. However, I have stressed that this function of the law would be better used when other institutions that affect the family

¹ As explained in this thesis, shared parenting does not mean shared residence in the legislation.

are geared towards facilitating the desired changes. I have stated that in principle, joint parenting is a good idea in order to foster equal involvement of both parents in their children's life and consequently the possibility of equal involvement of both parents in the labour force. However, I have argued that the methods used, and the time when such expectations surface in the current reforms, are flawed.

Both shared parenting and compulsory counselling should be introduced to couples before their children are born. I believe my proposal to intervene in the intact family would use the role of the law to legitimise certain ideas and set norms in a much more productive way than the current amendments do. This is because the said goals, specifically that of shared parenting, will not be achieved by changing the legal regime or creating a formal equality model of shared parenting alone. Instead, it will take significant social and economic restructuring, developments in industrial laws and changes in the attitudes of parents, specifically fathers, towards parenting. Until these changes are made, laws should not be used as tools for creating social change, but as a means of recognising current social facts, such as women's primary care-giving.

I have demonstrated the dangers in simplifying these issues into a problem that is remedied through legislative change alone. In particular, the danger in introducing a presumption of shared parenting is the curtailment of judicial discretion and consequent shift in focus from the best interests of the child to the rights of the parents. The major critics of the system – fathers' rights groups – have turned the issue into a battle of the sexes and as a result the Government has stepped in to pacify their rights claims with the introduction of a formal equality model of parenting. I can confidently conclude that this is

no remedy. In fact, by replacing the priority of the best interests of the child with a focus on equal parental rights to children, the whole system loses its *raison d'être*.

If these critics of the system could see that the gender divide exists in the day-to-day care of children and the effect it has on the determination of outcomes in children's matters, then maybe they would realise that a change of practices rather than laws alone is a more realistic solution. In any case, the sharing of parental responsibility and equal devotion of parenting time during the intact family would demonstrate a genuine desire amongst both parents for an ongoing relationship with their children.

I have suggested that a change in parenting practices during the intact family would be significantly assisted by a culture that promotes a mentality of shared parenting in the general community, not just for a minority of the population requiring the assistance of the system. I assert that such a culture would incorporate equal parental leave laws, easy access to child care and a program that would guide parents to structure their united family life with an equal division of domestic labour and parenting from before the birth of any child.

The second major change introduced by the current reforms – mandatory mediation – could also assist in this culture change, and is therefore linked to the objective of shared parenting. However, I reiterate that the point at which it should be imposed on the family is not at separation, but before the birth of the children. I have therefore demonstrated that although these two major changes stand apart in the current reforms, they have the potential to work together to achieve the goal of a less adversarial culture in which both parents are given an opportunity to equally share parenting.

The question is whether or not the desire to create such a culture is in fact sincere. If women have increasingly managed to balance work and family life and maintain an ongoing relationship with their children in the event of separation, despite existing in a society that continues to define the female responsibility as care-giving and private, then why can't men?

Finally, I wish to return to the issue at the heart of this thesis – the best interests of the child. On paper, the recent amendments have not changed the fact that when the FCA makes parenting orders affecting a child, the best interests of the child are the paramount principle that the court must consider.² In fact, the Act stipulates that the court must consider the best interests of the child even if orders are sought with the consent of all parties.³

What has substantially changed is the definition of the best interests of the child. I have pointed out that previously, section 68F of the FLA specified that in considering what are the best interests of the child, the court must factor in the wishes expressed by the child, the nature of the relationship between the child and the parents, the child's needs and characteristics, and the need to protect the child from harm. I have also explained that under the amended Act, the definition of the best interests of the child is a two-tiered test consisting of a range of "primary" and "additional" considerations, the primary ones being: the benefit to the child of having a relationship with both of the child's parents; and that the child is to be protected from physical or psychological harm resulting from abuse, neglect or family violence.

² Section 68CA *Family Law Act 1975* (Cth).

³ *Ibid*, s. 60CC(5).

I would like to reiterate that these primary factors are symbolic of the legislature's stated desire to strengthen the importance of both parents continuing to share responsibility after separation, and to protect children from abuse and neglect.⁴ It is the former stated desire that I find most questionable and problematic given that, as I have demonstrated, many parents do not share responsibility in the first place. It is for this reason that I argue that assistance must be provided to families much earlier than at separation, preferably before the children are born, to properly permit the existence of this normative standard, and changes must be made accordingly to external structures that would indirectly affect its realisation.

Changing the definition of the best interests of the child in the legislation is not sufficient to promote a mentality of shared parental responsibility. Furthermore, with the new amendments all channelling towards shared parenting in a culture that does not facilitate it in practice, there is an impending need for more practical measures to be adopted.

⁴ Note 4, at p 7.

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