

Major reforms to the Family Law Act and an Australian Law Reform Commission paper on parenting under difficult circumstances highlight a redirection in thinking about children's rights and the law.

In the old parlance 'access disputes' between parents after separation are acknowledged to be a symptom of the difficulties parents have in establishing workable arrangements for nurturing children. Part of the problem may be our way of talking and thinking about parental responsibilities and children's rights. In this context, an Australian Law Reform Commission paper on the most persistent and difficult cases before the court gives insights into parenting, children's rights and law.

For the Sake of the Kids is the title of the Australian Law Reform Commission's (ALRC) Report on 'complex contact cases' in the Family Court. Complex contact cases used to be called intractable access disputes. Whatever the name, they tie up huge amounts of court resources and legal aid money – not to mention the hidden costs of men and women who are trapped in conflicts that consume their productive time, energy and money.

Complex contact cases are defined in the report as having frequent court appearances, repeated use of court counselling or mediation services, and legal aid. Parents involved in such cases are described as very hostile to each other over a long period and committed to continuing the dispute.

In spite of the cost-cutting motive for the report, the welfare of children is its stated guiding principle. It is undeniable, however, that in fact money

matters. Although very few of the 24,000 divorces each year involving children could be classified as having repeated court disputes about parent-child contact, the few consume a disproportionate amount of resources. However, it is a moot point whether resources saved would go back in the service of other parents and children.

Although complex contact cases are few, they are enormously varied. The Australian Law Reform Commission instigated research to identify cases that later become complex so that case management guidelines could be developed and appropriate services provided. This work is incomplete but has shown some ways ahead.

Four key indications that a case is complex are, most obviously, that there is continuing conflict between the parents, that there is a child under two years in the family, that allegations have been made that the children refuse or oppose contact, and that an application has been made for a restraining order (alleging violence or harassment).

The ALRC Report recommends four areas for reforms in

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handling complex contact cases. These are that management strategies are outlined, appropriate services and their quality assurance are proposed, enforcement procedures and penalties are put forward, and information, education and training programs are identified.

In spite of the cost cutting motive, the key recommendations of the report are guided by the principle that the interests of the child is the paramount concern in all matters relating to contact between parent and child. This principle translates into a qualified acknowledgment that children's interests are served by contact with *both* parents.

The provisos are many and strong. For a start, the report spells out that the child must be protected from physical and psychological harm. In addition, any history of violence in the parents' relationship is to be considered, since children may

be harmed by exposure to conflict and violence between parents even if they are not directly involved. And when the report advocates penalties as a last resort for parents who fail to comply with court orders, the caution is that penalties must not infringe the child's interests.

It seems clear, however, that the child's best interests will be often difficult to disengage in the midst of complex cases. The report broadly defines the nature of violence in the family and clearly paves the way for protection from harm to overshadow the right to contact.

In the recommendations, the court is to manage complex contact cases by early identification, and the appointment of a case coordinator in order to avoid duplication and inconsistency in handling. The child's voice is to be heard independently through a representative who is appointed as soon as the case is defined as

complex. It is also recommended that a case team approach with a 'child interest coordinator' be trialled.

A range of services and management strategies is recommended for further study. These include the gamut of Alternative Dispute Resolution processes, although no one case management route is deemed to be adequate. The report suggests flexibility in service provision to suit the varied needs of complex contact cases.

It is also recommended that contact be preserved and made safe in extreme cases by provision of supervision services which ensure safety. In fact the federal government's Justice Statement has already provided \$5.3 million for such services over four years. In addition, information before and immediately after separation, and child focused and child friendly information with interactive computer programs are all put forward as ways of preserving contact between children and parents after separation – but only if contact is in the best interests of the child. Training for quality services is to be reviewed and up-graded.

At the end of the line, penalties for failure to comply with court orders are recommended. Also proposed are processes for declaring parents to be declared vexatious litigants. One innovative recommendation for children who completely lose contact with a parent is to have a contact register for children of separated parents on the model of those available for adopted children.

It is easy to imagine that complex access cases are few and thus that the parents involved are a race apart. However, many parents have periods in which

they are overtaxed and under-resourced and they 'hit the wall' in managing child contact and sharing responsibilities. In an Australian Institute of Family Studies report on how parents coped after separation, one-third reported high conflict over child access in the first year after separation, but three years later fewer than one in ten were overwhelmed by disputes. In other words many parents may require the services and management strategies suggested in this report.

The ALRC Report is a timely one in that it highlights needs among a particular group, while suggesting reforms that may assist a very sizeable number of separated parents at one time or another. Perhaps one significant recommendation is that further research be done to identify cases that have the potential to become complex. If the precursors of trouble are identified, many parents and children may be helped when it counts.

Hard-nosed bureaucrats may think that such expenditures will be wasteful in that some of the cases put in the complex category will not belong there and will thus waste resources. This is not likely to be the case. If parents receive initial help and resolve their problems they will be removed from the system at no further cost.

Violence and its effects on children's wellbeing receives careful attention in the ALRC Report. Conflict and violence between parents – physical assault and harassment – have not until recently been considered central in the quality of parenting available to a child. This fiction is now being firmly laid to rest. Children may be frightfully damaged by being caught in parental conflicts and the principle of the paramountcy

of the child's welfare is being used to defend them against such circumstances.

As the discussion about penalties in the report shows, the law is only a blunt instrument for mending family disputes. In the end, we need to shift our general standards on parental responsibilities and give parents the tools they need to negotiate separation and the nurture of their children.

A major initiative in the changing attitudes about parenting and divorce is contained in the Family Law Reform Bill. The projected reforms change the ways the family law speaks about parents and children. For example, the word 'custody' (which sounds as though the child is a felon or an object owned by one parent or another) would be removed by the reforms. Similarly, 'access' to a child (with that word's notions of trespass and limitations) would be replaced. The new terms proposed are practical descriptions of children's circumstances – their 'residence' and their 'contact' with parents.

It is heartening to see that under the Family Law Act Reform Bill, parents are endorsed as the responsible adults who make parenting plans for their children and draw up agreements on how to proceed. Parenting plans will have statements about the residence of the child and the contact the child will have with parents. The assumption that parental responsibilities continue for both parents is emphasised. Notions of ownership and exclusive control, which are often central to access disputes should thus be played down.

If successful, the reforms, by empowering parents and using less legal language, should make access disagreements more

manageable. It is unlikely, however, that the very difficult cases will disappear; for the sake of the children they will always need special treatment.

Changes such as those recommended by the Australian Law Reform Commission for the management of child contact disputes rely at every point on close collaborations.

First, both parents and children require information, advice, and options in services so that they are full participants in all matters concerning their family relations. Parents and children have to be full partners.

Second, the report shows ways in which social science and law must collaborate in identifying potentially complex cases, and in managing those cases.

The models of 'case coordinator' and 'child coordinator' bring into the law a notion of continuity between court appearances, hitherto not strong. Any glance through court files shows how hard it is to reconstruct a history. Yet history is what children have and need if their interests are to be well served.

Three things are required for the implementation of the recommendations in this report. Further research is needed to identify more accurately the potentially complex cases. Political will is required to effect recommendations about the management and services for parents and children in complex contact cases. Resources are necessary to provide a range of quality, affordable services both inside and outside the court.

An edited version of this paper appeared in the Sydney Morning Herald on 22 June 1995, under the title 'Put the Children First'.
