

# Legislating for shared parenting

## *The “joint custody” inquiry makes recommendations for change*

After six months of inquiry, the House of Representatives Family and Community Affairs Standing Committee has released its report on child custody arrangements following separation. While stopping short of endorsing contentious measures to mandate shared care of children, the recommendations include a call for radical restructuring of the family law system.

CATHERINE CARUANA

The report of the parliamentary inquiry into “child custody arrangements in the event of family separation” was released, as scheduled, on 29 December 2003.<sup>1</sup> It contains proposals for far-reaching reform of laws relating to family breakdown and of the family law system that administers them.

For many who have followed the debate, the primary issue to be considered by the Family and Community Affairs Committee was whether there should be imported into Australian law a legal presumption of joint “custody”. Under such a proposition, where separating couples cannot agree on questions of residence and contact, it would be presumed at the outset that their children spend equal time with each parent, unless evidence is adduced to rebut the presumption.

The Committee has stopped short of endorsing the proposal for equal parenting time and has instead recommended that a legal presumption of “shared parental responsibility”, or mutual involvement in decisions concerning the children, be incorporated into the Family Law Act.

Other recommendations of significance include the creation of an investigatory tribunal to take over much of the role of the Family Court, the establishment of a network of shop-front family law centres as the first entry point into the family law system, a change in the legal terminology relating to children, and a review of the child support scheme. A summary of these and other findings of interest is outlined below.

### *Presumption of equal time*

The Committee clearly saw an arrangement where children spend near equal time with each parent as the preferred starting point in negotiations between parents. However, they recognised the risk of legislating for the ideal and “forcing this outcome in potentially inappropriate circumstances” (Commonwealth of Australia 2003: 30). In so doing they noted the importance of issues such as family violence, the variability of circumstances affecting families, practical obstacles (such as financial and work constraints), and the weight of professional opinion on the importance of stability for children.

They concluded that the debate needs to shift from an emphasis on time allocation to focus

instead on measures that will foster the continued involvement of both parents in their children’s lives.

However, in an attempt to change what became characterised during the life of the inquiry as the culture of the “80/20 parenting time split”, a number of measures have been proposed to ensure that professionals working in the field encourage parents, in the first instance, to consider an arrangement where parenting time is substantially shared (Recommendation 5).

### *Presumption of equal responsibility*

As mentioned above, the Committee has recommended that a legal presumption of joint or shared “parental responsibility” become part of Australian family law. “Shared parental responsibility”, as defined in the report, requires parents to consult with one another before making major decisions regarding the children (that is, generally relating to, but not confined to, the big issues of health, religion and education – the domain of what was previously known as “guardianship”). The presumption that parents make these decisions in consultation with each other would not apply where there is evidence of “entrenched conflict, family violence, substance abuse, or established child abuse” (Recommendation 2).

This proposal goes beyond the package of reforms introduced in 1995 to encourage shared parenting. The 1995 amendments were claimed at the time to have introduced an implied presumption that parental responsibility be shared (Duncan 1995). By characterising ongoing parental involvement as the right of the *child*, by restating the position that at the time of separation, parents have equal responsibility for and authority over their children, and by encouraging parents to exercise this authority cooperatively, the *Family Law Act* clearly seeks to promote more equal parental involvement after separation. However, in application, the amendments have been viewed more conservatively than government intended.<sup>2</sup> And unlike the old “joint guardianship” orders, “parental responsibility” as currently defined in the Act can be exercised by one parent independently of the other, a situation that is hardly conducive to cooperative parenting.

The Committee suggests that more radical reform is required to break the “sole custody” mindset said



to persist in the family law system<sup>3</sup> and that mandating consultative parenting is the best place to start. However, a requirement to consult will not of itself guarantee agreement. Parents who don't get on but whose conflict does not manifest in violence and abuse can nonetheless have an impaired ability to parent co-operatively. The introduction of a presumption, especially a narrowly defined one, may restrict judicial discretion and impact on a judge's ability to make orders that are "in the best interests" of the child. If the Committee's proposal is adopted, the rebuttable circumstances may need to be more broadly cast than those envisaged by the Committee to ensure that, as far as possible, orders are not made that place children in the crossfire of any ongoing conflict between parents.

As part of this proposal, the report also recommends a change of language to remove the labels associated with differing allocations of time with children by collapsing "residence" and "contact" into the term "parenting time" (Recommendation 4). This follows on the heels of the 1996 reforms which replaced the proprietary "custody" and "access" with the more neutral terms of "residence" and "contact".

#### **Support and diversionary services**

The report recommends increased funding to the broad range of family relationship services (Recommendation 10) and the expansion of a number of existing services including the contact orders program and the Aboriginal and Torres Strait Islander family consultant program (currently operating in the

Northern Territory and Queensland). The Committee also stressed the importance of promoting services that have a preventative focus, such as relationship counselling and parent support.

#### ***Changes to the system: a Family Tribunal?***

As foreshadowed in the previous edition of *Family Matters* (Caruana 2003), the Committee has recommended that a Families Tribunal, with the power to make decisions relating to parenting and property matters, be established. The Tribunal would be an investigatory, administrative body, largely independent of the court, with simplified, non-adversarial procedures. Lawyers, experts and interpreters would only be involved at the discretion of the Tribunal. A multi-disciplinary panel, only one member of which is to have legal training, would be invested with the authority to make decisions taking effect as enforceable orders.

It is currently unclear whether the Government will act on this controversial recommendation. If it does, the question of the constitutional validity of the Tribunal as envisaged by the Committee will arise. Evidence to the Inquiry from both the Attorney General's Department and the Family Law Council called into doubt the ability of such an entity to make binding orders (see Caruana 2003 for a summary of the Family Law Council's submission). On other advice, the source of which remains unspecified in the report, the Committee has attempted to counter these concerns by technical legal argument. In the leading High Court authority of Brandy's case<sup>4</sup> it was

held that the Human Rights and Equal Opportunity Commission lacked the judicial character required by the Constitution to make orders affecting Mr Brandy's legal rights. By characterising decisions about the care of children as relating to the adjustment of *future* rights rather than decisions affecting *existing* legal rights, as in Brandy's case, these constitutional impediments, it is argued, are overcome. If this were the case, what then would be the status of tribunal decisions adjusting property rights?

Under this proposal, the future role of the Family Court would be limited to determinations in the "hard cases" (that is, involving entrenched conflict, family violence, substance abuse and child abuse), enforcement proceedings, and limited review of Tribunal decisions. The Federal Magistrate's Service would merge with the Family Court and the court would then be streamlined to accommodate a hierarchy of judges and magistrates. Adversarial court processes, including the rules of evidence, would be abandoned or modified<sup>5</sup> and child inclusive practices would be incorporated at every level.

### **Child protection**

In recognising the gaps between state and federal jurisdictions with regard to child protection, the Committee proposed that a special unit attached to the Tribunal be established to investigate allegations of violence and abuse in cases appearing before it. The Committee was quick to point out that this would not derogate from the wider responsibilities of state child protection authorities.

### **Enforcement of contact orders**

The Committee has also seen the need to tighten up the contact enforcement options introduced in 2000, including the imposition of financial penalties for first and subsequent breaches of contact orders. In recommendation 21, the Committee suggests that where contact orders are repeatedly breached consideration should be given to residence arrangements being reversed as punishment for the offending parent. Such a strategy has the potential to subvert the paramountcy of the best interests principle and should be treated with caution.

The requirement that parties make attempts to resolve their dispute via mediation and similar processes prior to initiating court proceedings (Recommendation 9) may help to divert families away from the damaging experience of litigation. Parties seeking legal aid for family law matters are already subject to such a requirement. In another strategy to effect a cultural shift, lawyers, seen by many as the gatekeepers to the family law system (Commonwealth of Australia 2001), will be required to undertake study in the field of social sciences or primary dispute resolution practices in order to gain specialist accreditation as family lawyers.

### **Grandparents and extended family**

The second term of reference considered by the Committee related to children's contact with grandparents and other members of their extended family following marital breakdown. In its deliberations on this issue, the Committee drew heavily on Institute-related research by Ruth Weston.

The proposals relating to contact between grandparents and children merely seek to consolidate amendments made in 1995 and to further clarify grandparents' particular legal status. There are specific references to grandparents at a number of points in the Family Law Act. However, this is not the case in the provisions relating to contact and residence where they are included in the "other person" category. While the Committee recommends that this apparent oversight be addressed, the report does not suggest any further measures to elevate the legal status of grandparents in disputes about children, as this may not be in the best interests of children in every case.

### **Child support**

The Child Support Agency came under close scrutiny in the report in a number of areas – particularly in relation to its duty to raise awareness of the options for parents, its lack of research on the issue of child support minimisation strategies, and its record on debt recovery and client relations. Many of these concerns have been highlighted in previous inquiries. In light of the huge volume of complaints about the scheme, as well as significant changes made to the tax system in recent years, the Committee recommended an extensive re-evaluation of the scheme be undertaken by July 2004. In its submission to the inquiry, the Australian Institute of Family Studies had strongly promoted the idea of a review of the scheme.

In addition to the review, more immediate changes to the administrative formula have also been proposed. For unemployed and low-income payers (a significant proportion of liable parents in the scheme), the Committee has suggested that the minimum weekly payment should be doubled, from \$5 to \$10, irrespective of the number of children. Those liable parents at the other end of the income scale would benefit from the recommendation to reduce the income cap, beyond which income is child support exempt. However, such a move may be hard to reconcile with the original philosophy of the scheme – that is, children whose parents have separated should have the opportunity to share in the income and assets of *both* their parents.

The Committee also recommended that the "109 nights" rule, whereby child support is linked with levels of contact, be abolished to ensure that money does not act as a disincentive to shared parenting. Instead, it proposed that non-resident parents who have care of their children for 10 per cent or more nights a year would continue to pay the same child support but would be entitled to a parenting payment to offset the costs of extra contact.

Proposals such as these, especially those which entail a significant commitment of public funds, may need further validation by research to make them palatable to government. Given that there is no research evidence to indicate what the likely impact of these changes would be, it will be critical to ensure that if implemented, any changes are well evaluated.

Other suggested amendments include: a reduced child support rate for income earned from overtime and second jobs (to give non-resident parents

greater scope to establish themselves financially and provide for second families); increased options for financial contributions in kind; and enhanced enforcement and debt recovery provisions.

As mentioned above, the committee has recommended that issues of more fundamental concern are referred for review by a ministerial taskforce which, it is proposed, will include a representative from the Institute. Included among these are: the relative equity of basing child support calculations on gross or net tax; the real cost to separated parents of raising children across two households; the costs of either parent to re-establish themselves after separation; and ways to rationalise child support and social security payments to remove disincentives to more involved parenting and participation in the workforce. The Committee has also recommended that exempt income (income that is deemed to be required by the non-resident parent to live on and which is therefore excluded from child support calculations) and disregarded income (income a resident parent can earn before it affects their child support entitlement) be more closely aligned.

In addition, a recommendation has been made that the Child Support Agency, in conjunction with the Commonwealth Ombudsman, identify more effective strategies for dealing with clients.

### **Impressions**

The report represents an ambitious attempt at social policy formation in the field of family law. As is evidenced by the Chair's comments in the foreword to the report, the task turned out to be a mammoth one for the Committee, "the hardest we have ever undertaken" (Commonwealth of Australia, 2003, p. xii), dealing with a broad range of complex legal and social issues in a very short timeframe. The Committee waded through a record number of written submissions<sup>6</sup> and many hours of emotionally charged verbal testimony. It is to be commended for taking on such a far-ranging brief and quickly coming to terms with the complexities and the competing interests in this fraught area of law.

One particularly encouraging aspect of the report was the way the Committee embraced the concept of child-focused practice in family law. Professor Moloney, speaking at a recent forum on the "joint custody" debate (reported in the last edition of *Family Matters*, see Caruana 2003) recognised the significance of the Committee's viewing of Jenn McIntosh's work with children at the Family Mediation Centre in Melbourne. The impact that this, and meetings with other children, appeared to have on the Committee is evident from the following comment in the report: "They told their stories and as a result the real meaning of this inquiry was clearly understood" (Commonwealth of Australia 2003: x1). By focusing on the children's needs rather than the rights of parents, the Committee appeared to achieve greater clarity in its findings.

At the time of writing (mid-April 2004), the Government had yet to respond formally to the report. As mentioned earlier, the revenue implications may impact on the extent to which some of the recommendations are adopted. The Chair of the Committee, Mrs Kay Hull MP, pointed out that:

"This is complex social policy with funding implications. It is not and cannot be revenue neutral." (Media release 29 December 2003)

In undertaking this inquiry, the Committee was specifically instructed in the terms of reference to have regard to the Government's response to the 2001 report of the Family Law Pathways Group. While the House of Representatives report draws on the work by the Pathways group, it in many ways eclipses the earlier inquiry. While acknowledging it as providing a "strong backdrop" to their work, the Committee concluded that the Pathways report failed to "address the basic philosophical underpinnings of family law . . . [and] is conservative in its solutions" (Commonwealth of Australia 2003: 3-4). As such, the Family Law Pathways Taskforce, and others working to implement Pathways initiatives will no doubt be awaiting the Government response with interest.

Irrespective of this, the process of inquiry has certainly been a useful one in stimulating public debate. The challenge now is to reconcile the findings of this Committee with those of the Pathways Advisory Group in formulating a coherent and realistic reform agenda.

### **Endnotes**

- 1 For a copy of the report, go to: [www.aph.gov.au/house/committee/fca/index.htm](http://www.aph.gov.au/house/committee/fca/index.htm)
- 2 The matter has yet to be considered by the courts and the general view is that such a presumption of shared parental responsibility should not be implied (Butterworths 1332.3).
- 3 Statistics provided by the Family Court of Australia on the outcomes in cases that settle and go to trial confirmed for the committee anecdotal reports of the high incidence of the 80/20 or "live-with-mum-and-visit-dad" model. In particular, the committee was struck by figures that showed that orders where time with the children was substantially shared had reduced since the introduction of the 1995 reforms (p. 22).
- 4 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245
- 5 The Family Court of Australia recently announced the establishment of the Children's Cases Program, a pilot program whereby matters relating to parenting issues will be handled in a more inquisitorial rather than adversarial manner, as occurs in many European jurisdictions. Under this model, judges take a more active role in directing proceedings, with lawyers assisting the court in its investigations.
- 6 The previous Family Law Update (Caruana, 2003) incorrectly cited the number of submissions – there were a total of 1715 written submissions, some of which were supplementary submissions. 380 confidential submissions were received and for 450 the name was withheld.

### **References**

- Family Court Legislation (2001), *Australian Family Law*, Vol. 1, Butterworths, Australia.
- Caruana, C. (2003), "The 'joint custody' debate: Where to now?" *Family Matters*, no. 66, pp. 64-67.
- Commonwealth of Australia (2003), *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, House of Representatives Standing Committee on Family and Community Affairs, Canberra.
- Commonwealth of Australia (2001), *Out of the Maze: Pathways to the Future for Families Experiencing Separation: Report of the Family Law Pathways Advisory Group*, Canberra.
- Duncan, P. (1995), *House of Representatives Debates*, Hansard, 21/11/95, p. 3303.
- Media Release (2003), House Family and Community Affairs Committee, Canberra, Issued: 29 December.

---

Catherine Caruana is a senior researcher with the Family and Marriage Research Program at the Australian Institute of Family Studies.