

“Bigger Boys and Stolen Sweethearts”

Parenting after the Shared Parental Responsibility Act

Joe Harman

From the time that the Family Court commenced operations 30 years ago the Court has been under attack from litigants, media and, more recently, legislators. This is, to some extent, explicable (though not justified) by the issues addressed by the Court in parenting proceedings and the strong, irresolvable differences of opinion that exist between parents regarding the parenting of and the time to be spent with their children following separation (an event which is accepted as having the same diagnostic significance as the death of a near relative as a predeterminant of mental illness and particularly depression).

It is a trite contention that “emotions run high” between parents involved in parenting disputes. The heat involved in parental disputes is further compounded by:

- The breach of trust or betrayal often associated with relationship breakdown;
- The financial distress often associated with separation and payment or non-payment of child support;
- The psychological impact of separation upon parental functioning and decision making particularly close to separation;
- A myriad of presenting behaviours precipitating or following separation including drug and/or alcohol abuse, psychological disturbance and violence.

The impacted psychological function of parents (whether due to the transient stress of separation or underlying organic bases) is, perhaps, a greater identifier that matters will be resolved by litigation (rather than some other, less adversarial form of dispute resolution) than previously acknowledged. The existence of such cognitive impairment (as recognised in Professor McIntosh’s report into the CCP March, 2006 “*The Children’s Cases Project-An exploratory study of impacts on parenting capacity and child well-being*”) sits uncomfortably with the traditional adversarial process.

Against such a background parenting disputes have traditionally been determined in a strictly adversarial environment and with no presumptions of parenting arrangements. Whilst the Family Law Act has always identified the desirability of negotiated resolution the ultimate core business of the Court has become the hearing and determination of disputes. This has seen the abandonment of voluntary, pre litigation and confidential counselling and mediation services as a response both to:

Harman & Co Specialist Family Law Solicitors
Tel: 02-4722-9100 Fax: 02-4722-9199
www.harmanandco.com.au

- Significant diminution of funding; and,
- The growth of such resources in the community principally through non government agencies (eg Unifam, Relationships Australia, Centacare, etc).

A growing body of psychological data is now available which deals with and identifies the significant impact upon children of parental dispute.

It is not difficult to comprehend that children would be dramatically impacted by their parent's separation and consequent conflict and discord. Children's primary attachments are generally to one or both of their parents and the very role of parenting (to nurture and to teach) is impacted by high conflict with the consequence that:-

- Children whose parents are emotionally unavailable to them suffer a **loss of care and nurturing**;
- Children whose **parents cannot problem solve**, other than by recourse to litigation, do not learn a co-operative model of parenting;
- Children **observe, adopt and reflect their parent's relationship experiences** and, irrespective of their stage of development, learn to associate anger, conflict, distrust and betrayal with relationships;
- The **financial burden of conflict** (through legal costs incurred through litigation and/or the economic impact of an inability to obtain or maintain employment or a breakdown in child support arrangements) directly affects the day to day physical care of children.
- **Children are permanently damaged by negative, unresolved conflict.**

Criticisms of the family law jurisdiction have, in large part, focused upon the negatives of:

- **Costs;**
- **Delay;**
- **Inflexibility; and,**
- **Litigiousness.**

These criticisms have been compounded by the absence of certainty of outcome and, at least for those who have had their dispute determined by the Court, **maintenance of the "winner/loser" culture** through the incorrectly perceived application of outdated preconceptions of alternate weekend contact models. When one considers that even those cases that are consensually resolved are flavoured by the Court's decisions (such settlements being negotiated "in the shadow of the Court"), these criticisms begin to have wider application.

In the media debate we often lose sight of the basic facts:

- **Approximately 70% of separated couples negotiate their own parenting arrangements** without input from the Court; and,

- **Parenting arrangements as determined by the Court are often more generous** and far more reflective of shared parental involvement than (media driven) community perceptions of the Court's decisions.

Focus falls, instead, on unacceptable data suggesting an increasingly "fatherless" generation of children (as pointed out by Professor Michael Flood occurring in both intact and separated families to varying extent).

In response to these criticisms and since 1998 the parenting jurisdiction of the Family Law Act 1975 has been subject to substantial political review culminating, in 2003, with the release of the ***Every Picture Tells a Story*** report.

The political review has been bipartisan and has addressed both the **manner in which parenting disputes are approached** (including debate as to whether there should be a presumption of "equal time") and **the judicial process to be applied** (focusing on recommendations for the introduction of a three member Tribunal – comprising a lawyer, a psychologist and a social worker-to deal with parenting disputes rather than a Court/Judicial process).

On 10 May 2006 the Federal Government passed the *Family Law Act Amendment (Shared Parental Responsibility) Bill*. The provisions of the Bill came into effect 1 July 2006 and apply, at least as regards the substantive law, to all cases heard and determined from that date.

The Bill has been heralded by Federal Attorney General Philip Ruddock as being "... **designed to keep families out of the Courts and deliver practical, co-operative outcomes for separating families**".

The amendment of the objects of the Act are of some particular significance in that "the new laws reflect the Government's belief that **two factors are of primary importance** in addressing the interests of children in family breakdowns – the right of the child to have **a meaningful relationship with both parents** and the **protection of the child from harm**".

The advertised intention of the Shared Parental Responsibility Bill (as it will be referred to throughout this paper) is to **bring about a shift in culture** of:-

- The Judiciary;
- The Legal Profession;
- Those working with families (both intact and separated) who now fall under the general umbrella of "Family Dispute Workers";
- The broader community

It is on this basis that the reforms have been largely advertised as "**a co-operative partnership between the courts, the legal profession and the community**". The intention is that the legal profession and family dispute workers (counsellors, mediators, support workers and the like) will assist separated parents to achieve **a better child focus** in both the resolution of their parenting dispute and in their future parenting.

This objective, if achieved (or more correctly if it continues, for the vast majority of separating couples, to be achieved) will result in :-

- **Less litigation between parties** (with a consequent reduction in the emotional and financial drain of those proceedings)

- **Happier and better parented children** exposed to less conflict and, conversely, exposed to more co-operative parenting and practical, demonstrated problem solving.

Whilst the Shared Parental Responsibility Bill demands a primary focus upon both parents maintaining a meaningful relationship with their children the Bill, somewhat paradoxically, is not the only change facing Australian families (and, in particular, those who are separating) from 1 July, 2006. It is important to remember that the reforms brought by the Bill:-

- Are, to a large extent, a **codification of existing programs** operated by the Court and/or reflective of orders and approaches of the Court
- Are part of a package of reforms in the Family Law area including a substantial amendment to the manner in which **child support obligations** will be assessed
- Are part of a substantially **changing Australian culture particular as regards welfare, working and the workplace**. The Howard Government's workplace reforms and key changes in social security payments and safety nets (particularly the "work for welfare" reforms) also impact (in some respects in direct conflict) upon the expressed intention of the Shared Parental Responsibility Bill.
- The **increased economic pressures on Australian families** (even though unemployment is at a 17 year low:
 - Australian's now expend a greater proportion of household income (in Sydney 42%) on **housing cost** than at any previous time in the history of the Nation);
 - **Personal debt levels** are more than double the level of 1997;
 - **Real wages** are increasing at a slower level than CPI;
 - **Spending on public services and publicly funded services** have fallen significantly, in real terms, over 10 years;
 - **Two income households** have doubled in the last 10 years;
 - The number of children and **children living in households experiencing poverty** has more than doubled since Bob Hawke's 1988 pledge that "No child in Australia shall live in poverty by 1990" (according to ACCOS statistics).

One objective that the Shared Parental Responsibility Bill does not express is a desire to change the mindset or practical reality of Australian family life (all the more so for separated parents seeking to maintain two households with an inherent duplication of cost).

The focus of daily family life (sometimes as a necessary albeit unconscious reality) is all too often upon income production. This will remain so (due largely to economic pressures) whilst, the express, primary object of the Shared parent Responsibility Bill is to enshrine and protect the right of all children to "**have a meaningful relationship with both parents**".

It is beyond the scope of this paper (although it should be at the forefront of all debate) how this will be achieved for both intact and separated families having regard to the financial pressures that burden the majority of Australian families and particular having regard to workplace and social security reforms that were introduced on the same day as the Shared Parental Responsibility Bill. This is particularly so in the context of recent material produced

by the Australian Bureau of Statistics and Australian Institute of Family Studies suggesting that:-

- **68% of mothers and 85% of fathers are in paid work**
- **In 66% of intact families both parents are in paid work**
- In 21% of intact families the father is the sole breadwinner
- In 5% of intact families the mother is the sole breadwinner
- **One Third of employed fathers work more than 48 hours per week**
- The most commonly predicted priority for both boys and girls was having a successful career
- Few adolescence (being children the subject of the Australian Institute of Families Studies survey and children aged 12 to 18 years) attached importance to family formation

Social Background

In Australia **approximately one million children have a parent who lives other than in their home** with them. This represents a little over one quarter of children within Australia.

This rate of children's' separation from one parent is comparable with that in the United Kingdom and slightly less than the United States. There is little controversy regarding these statistics. However, there is a deal of controversy surrounding statistics relating to the time that separated parents (usually fathers) spend with their children particularly as a consequence of Orders made by the Court.

The most extreme statistics produced regarding the level of time involvement of separated fathers with their children arises from material produced in 2003 for the Australian Institute of Family Studies suggesting that:-

- 36% of fathers do not have any face-to-face contact with their children
- 17% of fathers see their children during the day only
- 48% of fathers have their children stay overnight

United States, English and Canadian research would suggest similar patterns of post-separation involvement by fathers.

Controversy surrounds the basis for these statistics and, in particular, the level of "absent fathers". Discussion of the causes of such absence vary between those who focus "blame" upon the Courts, mothers with whom children live, fathers themselves or a myriad of other circumstances.

What does not vary in considering any data regarding "absent fathers" is:-

- The desirability of fathers, in fact, being involved; and
- The desire of both mothers and fathers to have fathers more actively involved.

Recent research by Dr Bruce Hawthorne has suggested, in fact, that “...many non-resident fathers, despite having regular and frequent contact with children, wanted more involvement in children’s lives than they currently had. The data also showed that many were particularly dissatisfied with the level of parental authority that they were able to exercise in the separated family.”

Dr Hawthorne’s research also highlights a number of other significant matters relating to post-separation fathering including:-

- The increasing conflict inherent in the of the “**emergent father role**” and the tension between perceptions of traditional and new notions of masculine behaviour and parenting
- That slightly more than half of fathers report they had **little or no input into decisions concerning children** or very little say
- Almost two-thirds of fathers felt that had **little or no involvement in children’s schooling**
- Many non-resident fathers believed they had very little opportunity to assume any **parental role after separation** apart from contributing to the financial support of children

Intact Families

Nearly all children who reside with only one of their parents have, at some time, resided with both of their parents and have experienced their parent’s separation (whether married or not married). A statistically insignificant proportion of children within the Australian experience have been born to parents who have not lived together at all.

Whilst the focus of political attention with respect to the Shared Parental Responsibility Bill has been upon outcomes following separation, **little attention has been paid to the vast quantity of data that exists relating to the involvement of parents with their children within intact families** and the differences demonstrated by this data between the time spent with children by mothers and fathers and possible causes for this.

Whilst research conducted throughout the economically developed world suggests that father have, in recent years, become more involved in parenting and spending time with their children, there remain significant differences in how fathers parent.

Further, significant research has been undertaken to trace the development of the fathering role over the last century as fathering has journeyed from the late 19th Century role of financial provider to the far more emotionally sensitive and involved contemporary father.

Important differences still remain between fathers and mothers and how they parent. It is not the role of this paper to focus specifically upon those issues other than to highlight that statistical samples of parental involvement with children in intact families have consistently found that:-

- **Mothers continue to spend more time with children** (up to triple)
- **Fathers spend a greater proportion of their time in leisure** and play activities than do mothers

- Fathers, correspondently, spend a **smaller proportion of time in caring for their children's physical needs** and dealing with household maintenance
- **Fathers spend much greater time with children on weekends than weekdays**

Research has also consistently shown (positively) that **fathers can impact upon various aspects of children's development** and that the absence of a father can, correspondently, negatively impact. These significantly include:-

- Children's' self-esteem
- Cognitive development and academic achievement
- Social behaviour
- Sex role, identity and socialization

So clear is the data supporting such impacts that Dr Hawthorne for instance has opined ".....any post separation family arrangement which severely restricts non-resident father's involvement and consigns them to the fringe of family life, can have serious implications for children's wellbeing and development".

But what of the time that fathers spend with their children in intact families? It is worth spending some short time reflecting upon recent data:-

- Canadian research suggests that between the 1970's and the 1990's the time that parents spent with their children increased by about one hour per day. The same research suggests, however, that **whilst parental time committed by fathers has increased, it is still only 67% of the time that mothers spend with children** and even when both parents are in full-time employment.
- Canadian and American fathers devote about 1.4 hours per day to child related activities
- English research would suggest that **the time that fathers spend with their children on weekends is nearly double that spent during the week**. Further, the time spent by fathers in childcare is approximately half of that of mothers (particularly during the week)
- US research from 1997 would suggest that of total parenting time committed to children (in two parent families) that:-
 - When mothers don't work **fathers contribute approximately 30% of total parenting time;**
 - When mothers do work **father contribute approximately 40% of total parenting time** and with the effect that mothers contribute 3 – 4 times the actual time to parenting as fathers
 - The same American research concludes that **parents with higher incomes devote more time to childcare** than parents with lower incomes
 - UK research of July 2006 suggests that **a typical working parent spends 19 minutes per day looking after their children** as their primary activity. This research goes on to indicate that a further 16 minutes is spent looking after

children as a secondary activity (meaning that they are doing something else at the same time as having their children in their care).

Research relating to the work patterns of parents would also suggest some real economic impediment to actively involve parenting including:-

Research by the U.K. Equal Opportunities Commission suggests:-

- Fathers are **more likely to be employed and to work longer hours** than men without dependent children
- **89% of fathers with dependent children are employed**
- Fathers are less likely to work part-time (4%) than men with children (9%)
- Mothers are more likely to work part-time (60%) than women without children (32%)
- UK fathers work an average of 46.9 hours per week
- Around 1 in 8 fathers in Great Britain work excessively long hours (being 60 hours or more) and almost 40% work 48 hours or more per week
- Men's earnings are generally a higher proportion of family income than women's
- Men's workplaces, particularly in traditional industries, are less likely to offer flexible working arrangements
- Father's expectations about whether they will have access to a work/life balance policy in their workplace are lower than mother's
- Women's lower pay levels means that it is women in the main who reduce working hours after children are born (reinforcing traditional gender roles in the family)
- Men are more closely involved in looking after children when mother's earn more than they (i.e. the father) do

Similar UK research by the economic and social research council suggests that mother's, when in full-time employment, work an average of 40 hours per week compared with 47 hours per week for fathers.

Australian research is not at all dissimilar and suggesting that:-

- 68% of mothers and **85% of fathers are in paid work**
- In 66% of intact families both parents are in paid work
- In **21% of intact families fathers were the sole wage earners** (compared to 5% of mothers as the sole wage earner)
- One-third of employed fathers work more than 48 hours per week

It is perhaps in light of this data that one hears calls as follows:-

“Fathers should spend more time alone with their children in order to strengthen their relationships and help ensure bonds are not broken if parents split-up”

Lord Filkin 28 October 2004

“The main obstacle to fathers’ involvement in their children’s lives after divorce and separation is their lack of involvement prior to divorce and separation”

Michael Flood 1 December 2003

“We need to understand better what inhibits more satisfactory levels of contact. Most attention has been paid to relational factors between parents. We also need to examine the financial and logistical factors. Even in intact relationships it may well be that many working parents would like to have more time with their children”.

Smythe/Parkinson 2003

It is in the framework of these statistics and the general political, economic and cultural environment that the Shared Parental Responsibility Bill now operates.

So what the amendments do?

The Shared Parental Responsibility Bill, on one hand, heralds the introduction of **a whole new regime of family dispute resolution**.

Whilst many of the substantive changes to the law are not groundbreaking (to those experienced in dealing with disputes before the Court) some of the structures that are put in place to deal with family disputes are fundamentally new.

Funding of existing community resources is vastly improved and long overdue.

On the passage of the shared parental responsibility bill 10 May 2006 the Attorney General Phillip Ruddock indicated the thrust of the amendments as being “... **designed to keep families out of the courts and deliver practical, co-operative outcomes for separating families**”. This is supported through “... the biggest ever investment in the Family Law system [to] encourage a co-operative approach to the difficult issues surrounding family breakdown”. Indeed the Government has allocated expenditure of \$443 million over four years.

To the extent that it is suggested that there is significant investment in the Family Law system this needs to be seen in the clear context of a division between expenditure on court and legal structures and community sector spending (as well as being cognisant of the infrastructure and running costs involved in establishing and operating the 65 funded Family Relationship Centres).

The additional funds committed to these changes will not, in any way, bolster or improve the budgets of the Family Court and Federal Magistrates Court. Whilst there have been recent fresh appointments to the Federal Magistrates Court these have (other than replacing departing Judges and Federal Magistrates) been funded through the Workplace Relations amendments and to deal with disputes in that area. The Court structure will not receive any additional funding and, indeed, there is some concern that levels of expenditure (which have consistently reduced over the last 10 years) will not be maintained.

The absence of any commitment of funding for the Court has some substantial impact in light of amendments which dictate:-

- A far more resource intensive, judicially managed hearing process; and
- Obligations imposed upon the Court, in a number of specific instances, to deal with proceedings promptly and efficiently.

To meet the above requirements (or challenges) the Court will need substantial resources beyond those they presently have (which are inadequate to administer the previous less resource intensive hearing process). Already **hearing delays have increased substantially** in both the Family and Federal Magistrates Courts.

The absence of additional funding to the Court structure is perhaps explicable through (inaccurate) Government belief that:-

- separated couples, to date, have not made use of dispute resolution alternatives other than litigation
- Separated parents have not been encouraged by legal practitioners or other services to explore a co-operative resolution of disputes but rather to have recourse to litigation as the sole or primary means of dispute resolution
- The introduction of Family Relationship Centres and additional funding to existing in community services will result in a dramatic and immediate reduction in the Court's workload. Whilst Family Relationship Centres remain a voluntary path at this time they are well patronised and, like the Courts, already experiencing a **substantial backlog** in service delivery.

To the extent that an immediate fall-off in the Court's workload was expected, anticipated or craved one could well describe this vision of the brave new world of family dispute resolution as equally fantastical to that of Aldous Huxley. This is so both as a reflection of the pace of change and in light of the anticipated (and realised) increase in filings as litigants became aware of and sought to utilise the amendments to their advantage – in seeking increased time. In an attempt to stem this flood the legislation includes provision to make clear that the changes in the law, of themselves, are not sufficient to establish a "change of circumstances" (as needed to re-apply). However, it is a reality, after 9 months of the legislation operating, that filings have not reduced.

However, the general, overall philosophical intention of the amendments is to be commended and embraced by all of those working in family dispute resolution and one would hope that a longer term vision (as would be required if a substantial cultural shift is anticipated) would see :-

- An **increased level of consensual arrangements** (although approximately 95% of parenting arrangements are consensual at present)
- **Better functioning post separation parenting relationships** with increased, enhanced and appropriate co-operation and communication
- **Better functioning (both economically and emotionally) parents**
- **Better functioning and better financially supported children**

The Major Changes

From 1 July 2006 a number of important amendments to the Family Law Act have come into effect. Some of the changes will impact immediately and others will be introduced over the next 2 years.

The amendments will only affect parenting proceedings (involving care arrangements for children) and will not affect issues of property adjustment.

The major changes are:

- **Terminology** used in parenting orders
- **Matters that are considered relevant** by the Court;
- **Presumptions and mandatory considerations;**
- **The hearing process;**
- **Obligations on family advisors**
- **Enforcement in contravention proceedings**
- **Family Violence and Allegations of Abuse**
- **Pre Litigation Procedures** (what is required before an Application can be filed with the Court).

This paper will focus on a selection of these changes.

Terminology

The table below sets out the terminology previously and presently used by the Court in parenting orders and the terminology applied from 1 July, 2006

Pre 01.05.1997	01.05.1997-30.06.2006	Post 30.06.2006
<i>Custody</i>	<i>Residence</i>	<i>Live with</i>
<i>Access</i>	<i>Contact</i>	<i>Spend time with</i>
<i>Guardianship</i>	<i>Parental Responsibility</i>	<i>Decision Making</i>
	<i>Specific Issues Orders</i>	<i>Specific Issues Orders</i>

All existing orders remain valid and will simply be read and interpreted using the new terminology (eg an order that previously read “the children shall reside with...” will now be read as “the children shall live with...”).

Matters Considered Relevant

In dealing with any parenting application the Court the Full Court has set out, in a case of **Goode [2006] FamCA 1346** the need for the Court to consider:

- The **evidence** in the case
- The **objects or philosophical considerations** set out in the Act (**s.60B**)
- A consideration of whether the parties should have **equal shared parental responsibility (s.61DA)** and, if so, to then consider, subject to it promoting the children’s best interests and being reasonably practicable, making orders for children to spend **equal time or substantial and significant time with both parents (s.65DAA)**
- Consider a **specific list of matters (particularly s.60CC) setting out what is relevant in determining the best interests of a child**

In all parenting cases the paramountcy principle (s.60CA) remains – that is that the best interests of children shall, at all times be, the paramount consideration. A child’s best interests is paramount, however, and not the sole consideration – all other considerations are secondary.

Objects and Principles

The **objects and principles of the Act (s.60B)** will continue to be stated, inter alia, as:

“... to ensure that children receive **adequate and proper parenting** to help them achieve their full potential and to ensure that **parents fulfil their duties and meet their responsibilities** concerning the care, welfare and development of their children”; and,

- Children have **right to know and be cared for** by both of their parents;
- Children have **right of regular contact** with both their parents and other significant people;
- **Parents share duties and responsibilities** concerning the care, welfare and development of their children; and
- Parents should agree about the future parenting of their children

The objects have, significantly, been amended to project the two clear directions that the Court is given being:

- **The importance of both of a child’s parents having a meaningful involvement in the child’s life;** and,
- **A sharing of responsibility between parents.**

Presumptions

The Act now contains a presumption that parents have **joint and equal shared parental responsibility**. Previously the Act contained a presumption that parents had **joint and several** parental responsibilities.

The distinction between joint and several and shared and equal parental responsibilities is important. Joint and several parental responsibilities invested each party with full and complete power to make decisions with respect to children's long term care, welfare and development. Accordingly, each party was free to make decisions independent of the other although case law imported an obligation upon parents to consult with each other about those issues. As the obligation was implied rather than expressed then no recourse (other than an application for restraints and injunctions) was available if one parent made decisions about long term issues without recourse to the other.

On the basis that parents will now have (unless the presumption is rebutted) joint and shared equal parental responsibility then **parties have a positive obligation to jointly make decisions about a range of issues**. This obligation will be enforceable by way of contravention application (alleging a failure to comply with the Courts Order) or injunction/restraining order. This has, in the first 9 months of operation of the Act, particularly been applicable to parents who change residence or children's schools without agreement of both parents – the Court has been quick to restore the previously agreed arrangements and including by ordering a parent who has moved away to return.

The presumption of shared equal parental responsibility is rebuttable. However, the presumption is expressed to not apply only when there are reasonable grounds to believe that a parent has engaged in:-

- **Abuse of the child or another child** who was a member of the parent's family; or
- **Family violence**; or
- If there is evidence that satisfies the Court that **it would not be in a best interests of the child** for the parents to have equal shared parental responsibility (Section 61DA)

Importantly the Act will include, for the first time some **definition of what issues are included as the subject of long term decision making** and including:

- **Education**
- **Religion**
- **the child's name**
- **health**
- **changes to living arrangements particularly if this would impact on the child's relationship or ability to spend time with either parent.**

Equal Time and Substantial Time

If parents have shared parental responsibility the court **must**:

- consider whether a child **spending equal time with each of the parents** would be in the **best interests of that child**; and
- consider whether a child spending equal time with each of the parents is **reasonably practicable**; and

and, if it is, consider making an order to provide for the child to spend equal time with each of the parents.

If the court does not make an order for a child to spend equal time with each of the parents then the court must:

- consider whether a child spending **substantial and significant time with each of the parents** would be in the **best interests** of that child; and
- consider whether the child spending substantial and significant time with each of the parents is **reasonably practicable**;

and if it is, consider making an order to provide for the child to spend substantial and significant time with each of the parents.

The Act gives some definition to **what is meant by substantial and significant time** and defines it in these terms:

“...a child will be taken to spend **substantial and significant time** with a parent only if:

- the time the child spends with the parent includes both:
 - days that fall on **weekends and holidays**; and
 - days that **do not fall on weekends or holidays**; and
- the time the child spends with the parent allows the parent to be involved in:
 - the **child’s daily routine**; and
 - **occasions and events that are of particular significance to the child**; and
- the time the child spends with the parent allows the child to be involved in **occasions and events that are of special significance to the parent**.

Arrangements where one parents cares for a child during the school week and the other parent has every weekend is not what is intended. **A sharing of both time and responsibility is required.**

If neither equal time and substantial and significant time are practicable or considered, in any given case, to be in a child's best interests then the Court can make such orders as they wish regarding the time a child will spend with each parent or other significant person.

The obligation to consider the above (equal time and substantial and significant time) **does not amount to a presumption** that those things apply. In considering whether either equal time or substantial and significant time are appropriate the requirement that the best interests of a child be considered as the paramount consideration remains. Evidence of past care arrangements and of child development and attachment remain significant to those considerations particularly with pre school aged children. A consideration of "Primary Care" based on past, pre-separation care arrangements has, on the whole, continued.

How to determine what is in a child's best interests?

s.60CC gives the Court 2 primary considerations and a list of additional considerations and the Court must consider:

Primary Considerations

- the benefit to children of having a **meaningful relationship with both parents**; and
- the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Additional Considerations

- any **views expressed by the child**
- the nature of the **relationship of the child with each of the child's parents** and with other persons (including any grandparent or other relative of the child);
- the **willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship** between the child and the other parent
- the **likely effect of any changes in the child's circumstances**, including the likely effect of any separation from either parent, any other child or other person
- **practical difficulty and expense**;
- the **capacity of each parent** to provide for the child's physical, emotional and intellectual needs;
- the child's **maturity, sex, lifestyle and background**;
- The right of **Aboriginal and Torres Strait Islander children to enjoy their culture** (including the right to enjoy that culture with people who share that culture);
- the **attitude demonstrated by parents to their responsibilities as parents**;
- any **family violence** involving the child or a member of the child's family;
- any **family violence order** (but only if the order is a final order and the making of the order was contested by a person -ie ADVO's made by consent do not count);
- avoiding **further proceedings**;

- any **other fact or circumstance** that the court thinks is relevant (including relevant published research).

Procedures

Since March, 2004 the Parramatta and Sydney Registries of the Family Court have been trialing a less adversarial and more child focused hearing process called the **Children's Cases Program**.

From 1 July, 2006 all children's cases in the Family Court will be heard and determined using this model and all children's cases in any court (including the Federal Magistrates Court) will be heard using a more flexible and less adversarial model.

The Family Law Act will contain a statement of 4 principles for the hearing of children's cases being:

Principle 1

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

Principle 2

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

Principle 3

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

Principle 4

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

This new, less adversarial process will mean:

- **Rules of evidence will not be strictly applied;**
- The **Judge hearing the case will control** the manner in which the proceedings are conducted and will direct what witnesses will give evidence
- **Issues in dispute will be defined** and evidence confined to those issues
- **Hearings will commence at an earlier stage** and may be spread over several events before the same Judge rather than all in one hearing.
- Orders or **determination of issues** in dispute can occur at any time rather than awaiting a final hearing
- **Child and Family Consultants** (Court Counsellors) will attend hearings to assist parties and the Judge define and resolve issues.

Pre Litigation Procedures

For some time the Family Court's rules have contained a requirement that parties do everything they can to attempt to resolve their case or at least limit issues in dispute between them **before** any application is made to the Court.

An application to the Court is and should always be a last resort used only when:

- There is **real urgency or risk to a person or property**
- **One party will not participate** in discussion (and there is no other way to move forward)
- Discussion has occurred but **issues remain which cannot be resolved.**

From **3 July, 2006** the first Family Relationship Centres will commence operation. Over the next 24 months over 60 such Centres will be established throughout Australia.

Family Relationship Centres are intended to provide counselling and mediation services to separated couples (directly or by referral) and as they are rolled out the expectation of what attempts to resolve matters before filing an application will increase.

Until 1 July, 2007 the Family Court's pre litigation procedures will apply to all proceedings. It is expected that a genuine and reasonable attempt will be made to resolve the dispute before any application is filed with the Court. This would include through exchanging information, documents and proposals and negotiating or attending counselling or mediation.

From 1 July, 2007 all fresh applications (meaning that the parties to the proceedings have not previously been to Court or had orders made), will need to attend **compulsory mediation** through or by referral from a Family Relationship Centre before they can apply to a Court for parenting orders.

From 1 July, 2008 all parties, (regardless of when they separated or whether they have previously been to Court), will need to attend **compulsory mediation** before they can make any application to the Court.

Once all 65 Family Relationship Centres are fully operational (ie from 1 July, 2008) then **no parenting application can be filed with the Court unless and until compulsory mediation has been completed** and a certificate to that effect provided to the parties and filed with the Court.

There will remain a small number of **exceptions** to the requirement for compulsory, pre litigation mediation relating to:

- Extreme **Urgency** or delay/unavailability of mediation
- **Child Abuse** or risk of abuse
- **Family Violence** or risk of family violence.

Obligations on Family Advisors

Most advisors (whether legal or non-legal) working with families and separated parents adopt a holistic approach towards the resolution of family disputes. Further, and perhaps of greater importance, those experienced in working with separated families are conscious of the **need to assist parties in maintaining** (or perhaps for the first time developing):-

- **Effective co-operation, co-parenting and communication skills**
- **Respect for each other** and the other's role as a parent

The Shared Parental Responsibility Bill imposes specific obligations on all advisors (legal and non-legal) to advise parents of the following:-

- That they can **consider entering into a Parenting Plan** (as opposed to Consent Orders made by the Court) and inform them of where they can obtain assistance in developing a Parenting Plan and its contents
- Advise them that if it is reasonably practical and in the best interests of their child that they could **consider a shared care arrangement**
- Advise them that if it is reasonably practical and in the best interests of their child that they could **consider substantial and significant time with each parent**
- That all **decisions in developing future parenting arrangements** (whether by Parenting Plan or Court Order) should be considered and negotiated with the **best interests of the child as the paramount consideration**
- Advise parties of the **matters that can be included in their parenting plan** (including not only the time that the child spends with each party but other issues such as how they will make decisions regarding future disputes and the like)
- Advise parties that **any order made by the Court can be subject to a Parenting Plan** entered into between the parties
- Advise parties of the desirability of including in a Parenting Plan a **mechanism for dealing with future disputes** (e.g. commitment to attend mediation or the like)
- The desirability of including provision in any parenting plan for **the manner in which future parenting arrangements will change** or be changed to take account of changing needs or circumstances of the child of the parties
- Advise of and explain the **programs that are available to assist parents** experiencing difficulty in complying with (or obtaining compliance with) parenting plans.

For non-legal advisors some of the areas of advice would represent some difficulty. To give advice to a party, for instance, regarding the differences between a Consent Order and a Parenting Plan (how they are entered into, what is required to make them legally binding, differences in the enforcement or variation of them, etc) is a matter of legal advice and, accordingly, it would be hoped that a substantial networking of cross-referral and co-operation will further develop (as such networks already exist informally) to ensure that the advice needs of parties are dealt with and addressed thoroughly and appropriately.

Parenting Plans vs Consent Orders

The Shared Parental Responsibility Bill places a significant emphasis upon Parenting Plans and **encourages the use of Parenting Plans** as opposed to Consent Orders.

The concept of a Parenting Plan is not new. Parenting Plans have existed under the Act since the 1980's. The intention of Parenting Plans, when first introduced, was to enable parties to enter into a less formal version of an enforceable arrangement.

Prior to 1 July 2006 Parenting Plans were rarely used and probably because:-

- They required registration with the Court. Accordingly, it was difficult to ascertain any significant saving (of formality, time or expense) when Consent Orders, similarly, involved filing documentation with the Court
- Parenting Plans involved substantial difficulties in enforcement

From 1 July 2006, Parenting Plans will be far less formal than previously and will involve nothing more than **a written agreement between parties** which is signed. The agreement need not be registered with a Court and is simply retained by the parties.

A Parenting Plan can deal with any aspect of a future parenting relationship including:-

- The person or persons **with whom a child will live**
- The **time the child will spend with any other person** or persons
- The **allocation of parental responsibility**
- How parties will **consult with respect to future decision making**
- **How parties will communicate** with each other and with their children
- **Maintenance or Child Support** (although child support arrangements, to be enforceable, would need to be registered with the Child Support Agency – this would not be difficult as a Child Support Agreement need only be in writing and signed by the parties being the same requirement of a Parenting Plan so the same document can fulfil both purposes).
- The processes to be used by parties to **resolve future disputes or variations** to arrangements
- Any other aspect of the **care, welfare or development of a child**

A Parenting Plan can deal with exactly the same issues as an Order made by the Court.

The only restriction placed upon the use of a Parenting Plan was an amendment made to the Bill late in its passage through Parliament which provides (s.60C (1A)):

“An agreement is not a Parenting Plan for the purposes of this Act unless it is made free from any threat, duress or coercion”.

If any allegation were raised that an agreement had been entered into as a consequence of threat, duress or coercion then Application would need to be made to a Court and the Court would need to be satisfied, on available evidence, that this were the case.

It is clearly the intention of the Shared Parental Responsibility Bill that parties will stay away from the Court process when at all possible. This would include parties staying away from the Court process when they have reached agreement (such that they need not obtain any Order by consent).

There is one substantial and significant legal difference between arrangements agreed between parties and formalised by a Parenting Plan as opposed to an Order made by the Court (whether by consent or otherwise). A **Parenting Plan is not legally binding or enforceable** (such that a party cannot, for instances, bring a contravention application to seek to enforce their rights under a Parenting Plan) and, if a Parenting Plan were not complied with by one or both parties, then application would need to be made to the Court to obtain Orders.

In any proceedings before the Court the Court is obliged to have regard to Parenting Plans. This arises in two ways:-

- If a Parenting Plan exists and an application is then made to the Court, **the Court must have regard to the terms of the Parenting Plan** in any Order that it makes. The Court must have some regard to the parenting plan although they are not bound to follow what the parties have previously agreed.
- If the Court has already made Orders then the parties can enter into a subsequent Parenting Plan and the **Orders that the Court made are subject to that Parenting Plan** unless the Court has (in exceptional circumstances only) provided that the Courts Orders cannot be varied by a subsequent Parenting Plan. It is envisaged that such an Order would only be made in circumstances where it is considered that a child is at risk of physical or psychological harm or there is substantial evidence (presumably relating to domestic violence) that a parent will seek to use coercion or duress to gain "agreement" of the other party to a parenting plan) (Section 64D).

Family Violence and Allegations of Abuse

Family violence and abuse are given specific significance in that:-

- One of the two primary objects of the Act is to recognise **the need to protect children from physical or psychological harm** or from being subject to or exposed to abuse, neglect or family violence
- The **grounds for rebutting the presumption of equal shared parental responsibility are clearly identified** as being allegations of family violence or abuse; and
- Specific provision is included requiring that **parties identify allegations or issues of family violence and abuse** and that these cases be **dealt with promptly** (Section 60K).

The Act goes so far as to require that if a document filed in proceedings alleges :-

- **Abuse of the child** by one of the parties;
- **A risk of abuse** to the child if there would be a delay;
- **Family violence** or risk of family violence;

then **the Court must** :-

- Consider what **interim or procedural orders** (if any) should be made to enable **appropriate evidence** about those allegations to be obtained and to **protect the child or a party**.
- **Deal with the allegations raised as expeditiously as possible.**

Further definition is given - **these steps must be taken within eight weeks** of the filing of the document raising the allegation.

The Court is also then empowered (as they were not previously) to **direct a state agency (including the Department of Community Services and Police) to provide a report with respect to those allegations** (which one would think would be similar to the type of report that is directed and provided by the Department of Community Services in child abuse cases presently dealt with under the Magellan program operating within the Family Court).

This prioritisation of cases involving allegations of family violence and abuse is tempered somewhat by:-

- The lack of commitment to **adequate resourcing** of the Court to meet the obligation imposed to deal with matters promptly and expeditiously;
- Provisions included within the Act which exclude the Court having regard to **family violence orders** unless they are final Orders or Orders made other than by consent;
- An amendment to costs provisions within the Act which compels the Court to **consider making a costs order against any person who has raised allegations**

of family violence or abuse which are found to be false. This provision in itself is, perhaps, one of the aspects of the amendments which is most clearly and fundamentally based on a misconception and noting that positive finding that such allegations are false are extremely rare and notwithstanding the protestations of some interest groups that such allegations are rife and common place.

Questions and Issues for Legal Studies Syllabus

- 1) How is the changing conception of family taken into account by these amendments?
- 2) How are aboriginal children any better off?
- 3) How do the reforms treat non-main stream cultural groups and their beliefs?
- 4) Can a parenting dispute ever be resolved in a permanent fashion or is the successful resolution of parenting disputes the maintenance or creation of change management and co-operation and can a Court achieve that?
- 5) Does shared parenting work for children or is it a solution for parents?
- 6) Does shared parenting really depend on income? Is it about time or money?
- 7) How can shared care be achieved in a meaningful way in the context of Australian communities including work place and social security pressures?
- 8) Are the reforms reflecting community expectations or are they an attempt to force change in the community by legislation?
- 9) What is the role of a parent in parenting their children?
- 10) Should parenting orders made by the Court reflect arrangements that parents have previously arranged and/or agreed between themselves or should the Court (in applying Parliament's legislation) engineer future arrangements for parties?
- 11) What problems (practical or otherwise) might be faced in achieving the expressed objects of the Act (to provide meaningful relationships between children and their parents) by:
 - a) Family Relationship Centres and other Family Dispute Workers;
 - b) The Court;
 - c) By Parents.
- 12) Can shared responsibility be a reality between parents who don't communicate or is it just for control freaks?

FAMILY LAW ACT 1975 - SECT 60B

Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best [interests](#) of [children](#) are met by:
 - (a) ensuring that [children](#) have the benefit of both of their [parents](#) having a meaningful involvement in their lives, to the maximum extent consistent with the best [interests](#) of the [child](#); and
 - (b) protecting [children](#) from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or [family violence](#); and
 - (c) ensuring that [children](#) receive adequate and proper [parenting](#) to help them achieve their full potential; and
 - (d) ensuring that [parents](#) fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their [children](#).
- (2) The principles underlying these objects are that (except when it is or would be contrary to a [child's](#) best [interests](#)):
 - (a) [children](#) have the right to know and be cared for by both their [parents](#), regardless of whether their [parents](#) are married, separated, have never married or have never lived together; and
 - (b) [children](#) have a right to spend time on a regular basis with, and communicate on a regular basis with, both their [parents](#) and other people significant to their care, welfare and development (such as grandparents and other [relatives](#)); and
 - (c) [parents](#) jointly share duties and responsibilities concerning the care, welfare and development of their [children](#); and
 - (d) [parents](#) should agree about the future [parenting](#) of their [children](#); and
 - (e) [children](#) have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

FAMILY LAW ACT 1975 - SECT 60CA

Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular [parenting order](#) in relation to a [child](#), a [court](#) must regard the best [interests](#) of the [child](#) as the paramount consideration.

FAMILY LAW ACT 1975 - SECT 60CC

How a court determines what is in a child's best interests

Determining [child's](#) best [interests](#)

- (1) Subject to subsection (5), in determining what is in the [child's](#) best [interests](#), the [court](#) must consider the matters set out in subsections (2) and (3).

Primary considerations

- (2) The primary considerations are:
 - (a) the benefit to the [child](#) of having a meaningful relationship with both of the [child's](#) [parents](#); and

- (b) the need to protect the [child](#) from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or [family violence](#).

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:

- (a) any views expressed by the [child](#) and any factors (such as the [child's](#) maturity or level of understanding) that the [court](#) thinks are relevant to the weight it should give to the [child's](#) views;
- (b) the nature of the relationship of the [child](#) with:
- (i) each of the [child's](#) [parents](#); and
 - (ii) other persons (including any grandparent or other [relative](#) of the [child](#));
- (c) the willingness and ability of each of the [child's](#) [parents](#) to facilitate, and encourage, a close and continuing relationship between the [child](#) and the other [parent](#);
- (d) the likely effect of any changes in the [child's](#) circumstances, including the likely effect on the [child](#) of any separation from:
- (i) either of his or her [parents](#); or
 - (ii) any other [child](#), or other person (including any grandparent or other [relative](#) of the [child](#)), with whom he or she has been living;
- (e) the practical difficulty and expense of a [child](#) spending time with and communicating with a [parent](#) and whether that difficulty or expense will substantially affect the [child's](#) right to maintain personal relations and direct contact with both [parents](#) on a regular basis;
- (f) the capacity of:
- (i) each of the [child's](#) [parents](#); and
 - (ii) any other person (including any grandparent or other [relative](#) of the [child](#));
- to provide for the needs of the [child](#), including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the [child](#) and of either of the [child's](#) [parents](#), and any other characteristics of the [child](#) that the [court](#) thinks are relevant;
- (h) if the [child](#) is an [Aboriginal child](#) or a [Torres Strait Islander child](#):
- (i) the [child's](#) right to enjoy his or her Aboriginal or [Torres Strait Islander](#) culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed [parenting order](#) under this Part will have on that right;
- (i) the attitude to the [child](#), and to the responsibilities of [parenthood](#), demonstrated by each of the [child's](#) [parents](#);
- (j) any [family violence](#) involving the [child](#) or a [member](#) of the [child's](#) family;
- (k) any [family violence order](#) that applies to the [child](#) or a [member](#) of the [child's](#) family, if:
- (i) the order is a final order; or

- (ii) the making of the order was contested by a person;
 - (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further [proceedings](#) in relation to the [child](#);
 - (m) any other fact or circumstance that the [court](#) thinks is relevant.
- (4) Without limiting paragraphs (3)(c) and (i), the [court](#) must consider the extent to which each of the [child's parents](#) has fulfilled, or failed to fulfil, his or her responsibilities as a [parent](#) and, in particular, the extent to which each of the [child's parents](#):
- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the [child](#); and
 - (ii) to spend time with the [child](#); and
 - (iii) to communicate with the [child](#); and
 - (b) has facilitated, or failed to facilitate, the other [parent](#):
 - (i) participating in making decisions about major long-term issues in relation to the [child](#); and
 - (ii) spending time with the [child](#); and
 - (iii) communicating with the [child](#); and
 - (c) has fulfilled, or failed to fulfil, the [parent's](#) obligation to maintain the [child](#).
- (4A) If the [child's parents](#) have separated, the [court](#) must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

Consent orders

- (5) If the [court](#) is considering whether to make an order with the consent of all the parties to the [proceedings](#), the [court](#) may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or [Torres Strait](#) Islander culture

- (6) For the purposes of paragraph (3)(h), an [Aboriginal child's](#) or a [Torres Strait](#) Islander [child's](#) right to enjoy his or her Aboriginal or [Torres Strait](#) Islander culture includes the right:
- (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the [child's](#) age and developmental level and the [child's](#) views; and
 - (ii) to develop a positive appreciation of that culture.