The Family Law Reform Act 1995:
the first three years

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This is a report of research undertaken into the operation of the Family Law Reform Act 1995 from the time it came into effect in June 1996 to the end of 1999. The research was conducted by researchers from the University of Sydney’s Faculty of Law and the Family Court of Australia with the assistance of a grant from the Australian Research Council via its Strategic Partnerships with Industry for Research and Training (SPIRT) scheme. The Chief Investigator was Professor Reg Graycar from the University of Sydney and the Industry Partner was Margaret Harrison, of the Family Court of Australia.

In April 1999, an interim report of the project was published and widely circulated. It is also available on the web pages of the Faculty of Law and the Family Court of Australia. The Interim Report was entitled, The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?

The research documented in this report was undertaken during the three calendar years ended 1999. In general, the law and practice discussed reflects the situation at that time. However, the report does make reference to some significant subsequent developments such as the establishment of the Federal Magistrates Service and the passage in November 2000, as we go to press, of the Family Law Amendment Act 2000.

Helen Rhoades, now of the Faculty of Law, University of Melbourne, was the principal researcher employed to undertake the research. We owe her an enormous debt for her outstanding contribution to the project. In addition to the many people who willingly and cheerfully gave up their time to respond to our questionnaires and agreed to be interviewed, we would also like to thank a number of people who assisted in a variety of ways in the completion of this research and in the publication of this report. These include Kate Burns, Suzanne Christie, Chris Cody, Margie Cronin, Linda Newitt, Karen Overman, Danny Sandor, Amy Veitch and Rebecca Young. We are particularly grateful to the Chief Justice of the Family Court, the Hon Alastair Nicholson and the many judicial officers and staff of the court who assisted us in carrying out the project.

As ever, despite all the assistance we received and our best endeavours, all responsibility for the contents of this report remains with us.

Reg Graycar and Margaret Harrison
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chapter 1

EXECUTIVE SUMMARY

11 This is a summary of the main findings of a three year research project undertaken with the support of an ARC collaborative grant awarded to the University of Sydney with the Family Court of Australia as the Industry Partner. An interim report of this research was published in April 1999.1

NO EVIDENCE OF SHIFT TOWARDS SHARED PARENTING AMONG THE TARGET POPULATION

12 There is no evidence to suggest that shared caregiving has become a lived reality for the children of separated parents who have engaged with the ‘family law system’ since the coming into force of the Family Law Reform Act 1995 (hereafter ‘Reform Act’). Interviews with, and surveys of, lawyers and counsellors suggest that there have been no real changes in practice as a result of the reforms. Most respondents agreed that mothers continue to do the bulk of the caregiving work after separation,2 and that, as one respondent commented, many fathers still ‘do not consistently make themselves available to the children’.

13 The research also suggests that parents are entering into workable and flexible shared residence arrangements after separation, but that these arrangements are being reached without legal assistance and without any knowledge of the Reform Act. Our interviews with separated parents who are co-operatively sharing their parental responsibilities, including using a flexible shared residence arrangement, established that such arrangements were not attributable to the Reform Act and that these parents would have chosen to share their parental responsibilities regardless of the principles enunciated in the Family Law Act. Significantly, each of these parents had exercised their responsibilities jointly and co-operatively before their separation, and each of the men had taken an active caregiving role.

14 This can be contrasted with the level of disputes and lack of flexibility, particularly the increasing use of detailed specific issues orders about shared parenting, for those parents who use the Court or have orders drafted by solicitors under the Family Law Act. As one of the Registrars of the Family Court summarised the problem, ‘[t]he shared parenting concept is totally at odds with the types of parents who litigate’. Our findings reflect earlier US research which demonstrated that the advantages of shared parenting were dependent upon parents


2 This is consistent with data from the Australian Bureau of Statistics, Australian Social Trends 1999, Catalogue No 4102.0 (1999), at 42-43.
having voluntarily agreed to the arrangement, and upon a previous history of co-operation between the parents.³

FROM CERTAINTY TO CONFUSION

15 The reforms have created uncertainty and confusion about the state of the law. Whereas the previous legislative provisions were clear about who had responsibility for the children and how joint responsibilities were to be exercised (before and after the making of court orders), the meaning of the current shared parental responsibility model is not spelt out in the Family Law Act. The research suggests that there have been multiple conflicting interpretations of the present statutory scheme by lawyers, judges, counsellors, parents and Centrelink staff. While the new terms and concepts remain alien to the vast majority of separating parents who continue to think in terms of custody and access, some non-resident parents believe the new shared parenting regime provides them with ‘rights’ to be consulted about day to day decisions affecting the child. The concept of shared parenting has also led some parents, particularly fathers, to believe that the law requires the children to live half the time with each parent. These parents tend to respond with anger and frustration when advised that the Act does not require this outcome. This problem was summarised in the following comment by a Family Court counsellor:

‘The Reform Act has emboldened parents to ask for equal time. That’s how many fathers have interpreted it. I tell them, ‘It means each of you has responsibilities, but how you share your time is up to you or the Court. The law doesn’t say equal time.’ They get very disappointed. They tend to see the Family Court as a terrible place.’⁴

16 The lack of clarity in the legislation has thus provided fresh ground for disputes between parents.

INCREASED DISPUTES

17 Former Family Court appellate judge, the Hon Dr Peter Nygh wrote when the reforms were enacted:

‘For good or for ill, the notion of continuing parental responsibility will empower those who now languish as ‘access parents’. Whether the system will work if they actually start to exercise that authority remains to be seen.’⁵

18 Our research suggests that the reforms have created greater scope for an abusive non-resident parent to harass or interfere in the life of the child’s primary caregiver by challenging her decisions and choices. As one counsellor noted, the concept of ongoing parental responsibility has become ‘a new tool of control’ for abusive non-resident parents. This also means constant disputes and ‘an endless cycle of court orders’.


A related consequence has been an increase in the number and detail of specific issues orders qualifying and quantifying the resident parent's authority and responsibilities. This can create even more areas of possible dispute and bases for challenge of the carer by non-resident parents. Specific issues orders have now started to become more commonplace than in the early days following the coming into force of the Reform Act, and they tend to be much more detailed and differ in nature from the kind of orders made before the reforms. For example, orders are now used to delegate particular areas of responsibility to parents (for example, who will take the child to sport this week), and are sometimes used to impose standards of caregiving expected of the resident parent (one order reviewed provided that the mother must ‘ensure that [the child]’s school clothes are properly laundered’). Previously, comparable orders were used only to regulate longer-term matters, such as to ensure that the resident parent forwarded copies of the children’s school reports to the non-custodial parent every year.

Some judges and practitioners see the use of detailed orders as a way of averting future disputes about day to day matters. However, the willingness of the parents to be flexible is probably the greatest indicator of whether or not detailed specific issues orders will reduce or increase opportunities for dispute. Dewar and Parker have described specific issues orders as a ‘two-edged sword’, allowing more flexibility in negotiations over children and enabling agreements to be drafted in understandable language, but also giving non-resident parents power to assert a degree of control over the resident parent that does not reflect actual parenting practices.6

TERMINOLOGY

One of the stated reasons for moving away from the language of custody and access was to disrupt the ‘win-lose’ mentality that was seen to accompany that language.7 However, it seems that the change of language has not permeated the consciousness of those litigating under the Act: the vast majority of parents have never heard of ‘residence’ and still ask for custody.

Media discussions confirm this. For example, an article in The Australian in August 2000 headed ‘Fears for father missing with children’, said that the mother had been recently awarded ‘custody’ of the children and that the father had gone missing after collecting them for ‘access’.8

Even those people who work within the system on a daily basis have found it difficult to change their terminology, with some solicitors and judges agreeing to continue with the practice of using ‘the old language’. Our surveys of, and interviews with, practitioners also indicate that many solicitors use ‘residence/residence’ orders for symbolic reasons, for example, to ‘placate’ non-resident parents, rather than to represent any real sharing of

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7 Patterns of Parenting After Separation, A Report to the Minister for Justice and Consumer Affairs, prepared by the Family Law Council, April 1992 (‘POPAS’).
8 The Australian, 11 August 2000. See for another example, the editorial comment on a cover story published by TheBulletin in May 2000: Max Walsh, ‘A Case of Murphys Flaw’, TheBulletin, 30 May 2000 at 8, where he refers both to ‘custody in divorce’ and the ‘dilemma of parental rights’.
The research also suggests that solicitors, judges and registrars continue to approach residence as involving the same legal concepts as custody.

**BEST INTERESTS OF CHILDREN?**

1.14 In deciding whether to make an order in relation to a child, a court must regard the best interests of the child as its paramount consideration.\(^9\) This legislative principle governs the making of interim residence and contact orders just as it does the making of final orders.\(^10\) However, the evidence available at an interim hearing to determine the child’s best interests will be far more limited than that relied upon at the final hearing.\(^11\) In particular, there will not normally be a Family Report to assist the court to make its decision. Our research suggests, confirming Dewar and Parker’s study,\(^12\) that children’s welfare is being compromised in the approach to interim decision making that has developed since June 1996 when the Reform Act came into effect. This is evident in three particular contexts: interim residence orders, interim contact orders, and more generally, in the way that allegations of violence are dealt with at an interim stage. We deal with each of these in turn.

**Shift in approach to making residence orders at interim hearings**

1.15 The Full Court of the Family Court has consistently held that a child’s best interests will normally be met by interim orders that ensure stability in the child’s life pending a full hearing of the relevant issues in dispute, and that such stability will usually be promoted by an order that maintains the pre-existing caregiving arrangements, unless there are ‘strong or overriding indications to the contrary’.\(^13\) The threat of violence in the caregiver’s household would, for example, justify a change of residence under this principle.\(^14\) Our research suggests that the existing arrangements principle has been displaced by judicial concerns about parental ‘equality’ (ie; about not creating a status quo in favour of one parent) since the reforms were enacted. The findings demonstrate that interim residence orders have been made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than by an assessment of the child’s best interests or by application of the ‘existing arrangements’ principle from Cowling’s case.\(^15\) That is, decisions are being made on the basis of the parents’ interests (or more accurately, the interests of the parent who is not the existing primary caregiver), rather than on the basis of the child’s welfare. The current delays in the Family Court in reaching a final hearing have contributed to this practice.

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10. In the Marriage of Cilento (1980) 6 Fam LR 35 at 37.
13. In the Marriage of Cilento (1980) 6 Fam LR 35; In the Marriage of Cowling (1998) FLC 92-801 at 85,006. While there is no presumption in favour of the ‘status quo’, the Court has suggested that trial judges should give clear reasons if they wish to disturb a ‘long standing and satisfactory settled arrangement’: In the Marriage of Bennett (1990) 14 Fam LR 397.
Shift in approach to making contact orders at interim hearings

1.16 Prior to the passage of the Reform Act, the case law established that there was no parental right of access to a child, nor any presumption that access was in a child’s best interests. Nevertheless, the Family Court generally regarded continuity of contact between parents and children as being beneficial to a child’s development, and there had been a consistent judicial tendency to give great weight to the importance of maintaining the parent-child relationship following separation.

1.17 The reforms introduced the notion of children having a ‘right’ of contact with both parents into the Family Law Act. However, the legislation makes it clear that this right only operates to the extent that contact is found to be in the child’s best interests, and that those best interests remain the court’s paramount concern when determining contact orders. This position was confirmed by the Full Court in B and B. The Court there held that the reforms had not created a presumption in favour of contact, and that the child’s best interests are the ultimate determinant of parenting orders. The Full Court also held that the child’s interests are not to be determined by assumptions about contact, but by consideration of the matters listed in section 68F(2). More recently the Full Court has held that while the principles listed in section 60B(2) of the Act provide a ‘context’ for that consideration, no single factor, such as the ‘right of contact’ principle, will be decisive.

1.18 Despite the decision in B and B, our research confirms Dewar and Parker’s findings that there has been a shift in the focus of interim contact hearings, from asking whether access should be ordered, to how to maintain contact until the final hearing. This shift was summarised by one judge of the Family Court interviewed for our research:

‘We’re more inclined to give contact at interim now. It would take a lot at an interim hearing to say no contact now.’

1.19 It has also affected the practice of legal practitioners: solicitors told us that they are now less inclined to ask for suspension of contact for fear of their client appearing to be a hostile parent. As one judge noted in relation to practitioners’ submissions:

‘No one is prepared to say “no contact” any more.’

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17 See for example, In the Marriage of Horman (1976) 5 Fam LR 796 at 799; In the Marriage of Sedgley (1995) 19 Fam LR 363 at 371. See also comments of the High Court in M v M (1988) 166 CLR 69 at 76.
18 Family Law Act 1975 (Cth) s 60B(2).
19 Family Law Act 1975 (Cth) s 65E.
20 B and B (1997) 21 Fam LR 676.
21 B and B (1997) 21 Fam LR 676 at 730. See A v A: Relocation Approach (2000) FLC 93-035 for the most recent Full Court re-statement of this principle.
22 Ibid at 735.
24 In the Marriage of C (1995) 20 Fam LR 24 at 32 and 36.
120 In practice therefore decision makers are often assuming that the best interests of the child will be met by maintaining contact rather than that being an issue for determination. In other words, there is now effectively a 'presumption' (although not a legal one) operating in favour of contact with the non-resident parent, despite the comments of the Full Court in B and B\textsuperscript{26} and despite the express requirement in the legislation to consider the best interests of the child.

**Shifts in outcomes at interim hearings where domestic violence is alleged**

121 The third situation in which it appears that the safety of children has been compromised by the reforms is in the context of decision making where allegations of violence form part of the background to the case. The research compared the types of orders made in a random sample of 1998/99 interim matters that contained allegations of spousal violence with similar interim cases heard before the reforms, that is, in 1995 and up until June 1996. The review showed a trend away from suspending contact at interim hearings as the way of ensuring the child's safety until trial, and towards the use of neutral hand-over arrangements as the preferred protective mechanism. The most common response in the post-Reform Act judgments to allegations of violence was to order unsupervised contact between the father and child using either a collection point that did not require face to face contact between the parties (such as collection of the children from, and delivery to, the children's school) or by directing that the contact hand-overs occur in a public place under the scrutiny of a third person (such as at a police station or a Contact Centre).

122 Supervised contact was used as a safety mechanism far less frequently than a neutral hand-over point, and the rate of orders for supervised contact remained constant between the samples. However, because of the decline in orders suspending contact, the post-Reform Act cases using supervised contact involve more serious levels of violence than those where supervision was ordered prior to the reforms.

123 In recent years, it has come to be acknowledged that the 'core business' of the Family Court now comprises cases involving violence or child abuse and that these are the cases most likely to be litigated, and least likely to settle.\textsuperscript{27} Our research confirmed findings from other research that show that a substantial proportion of interim contact cases involve allegations of domestic violence or abuse.\textsuperscript{28} It is sometimes suggested that allegations of violence are used for strategic purposes in litigation. However, research has shown conclusively that only a small proportion of such allegations fail to be established.\textsuperscript{29} The overwhelming majority of the 30 judicial officers interviewed for this project believed that most allegations were usually

\textsuperscript{26} Ibid.
well-founded. The issue therefore is not about shifts in the veracity of allegations, but about changes in the approach to ensuring the child’s welfare is safeguarded when concerns about domestic violence collide with the desire to encourage contact.

1.24 The present approach to making unsupervised orders for contact at interim hearings represents a retreat from the Family Court’s acknowledgment in the years before the reforms, of the adverse psychological effects of spousal abuse upon children’s welfare. That recognition and case law have been effectively displaced by the right of contact emphasis. It is ironic that that body of case law developed without an express reference in the Act to the impact of domestic violence on children's welfare, yet one of the Part VII reforms was to include in the legislation a number of statutory references to the need to ensure the safety of children.

1.25 By contrast with the outcomes of interim hearings, our examination of final judgments disclosed that the rate of orders made for 'no contact' at contested final hearings has remained substantially unchanged from the pre-Act rate. It is notable that this is the stage at which the effects on the child of the alleged violence are subjected to detailed scrutiny and evaluation (for example, by way of a Family Report). This suggests that there is a significant proportion of cases where it can be shown, with hindsight, that the interim contact arrangements were not in the child’s best interests, and may well have been unsafe for the child and the carer.

1.26 As with other orders being made at interim hearings, the delays in reaching a final hearing in the Family Court have contributed to these shifts, with judges and registrars concerned about disrupting the child’s relationship with the father for a lengthy period on the basis of untested allegations.

Shift in approach to making residence orders at final hearings

1.27 There has been a second significant shift in the practice of making residence orders as a consequence of the Reform Act. Prior to the introduction of the reforms, the Family Court rarely made joint custody orders in contested proceedings. Cases such as Padgen, H and H-K, and Forck and Thomas established that such orders were not appropriate unless the parties’ approaches to parenting were compatible, and there was a relationship of 'mutual trust, co-operation and good communications' between the parents, factors that are generally absent in litigated matters. Padgen also noted that the judges of the Family Court had 'not


31 See for example, s 43, s 68K, and some of the provisions inserted into s 68F which lists those matters to be considered in making a determination of the child’s best interests.


33 In the Marriage of Padgen (1991) FLC 92-231.


35 In the Marriage of Forck and Thomas (1993) 16 Fam LR 516.
generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties.\textsuperscript{36}

1.28 The research demonstrates that residence orders giving each parent equal time with the children have been made in contested proceedings since 1996, and in circumstances where there is a high level of conflict between the parties. Such arrangements have been ordered over the strong objections of one parent, usually the mother, including in cases where they have been tested (as interim orders) and one parent has found them unworkable.\textsuperscript{37}

\section*{THE INTERACTION OF CHILD SUPPORT AND SHARED RESIDENCE ARRANGEMENTS}

1.29 The research suggests that the desire to reduce child support liabilities is frequently a motivating factor for seeking and making shared residence arrangements. The majority of sole parent families in Australia are female-headed,\textsuperscript{38} and for many of these families, social security payments and child support are the major (and often sole) sources of income, particularly in the early post separation period.\textsuperscript{39} Previous Australian research showed that women caring for dependent children are particularly vulnerable economically once a relationship ends, and are also more likely than men to experience financial hardship subsequently.\textsuperscript{40} These findings have been confirmed more than a decade later\textsuperscript{41} and children living in such households obviously share the financial disadvantages experienced by their carers.

1.30 The Child Support (Assessment) Act 1989 (‘CS(A)A’) currently provides that the amount of child support otherwise payable is reduced where a parent has contact with a child for at least 30\% of the nights in a child support year (‘the 109 nights requirement’).\textsuperscript{42} At the time the CS(A)A was amended in 1993 to include this variation, it was predicted that it would ‘result in significant pressure being placed upon carers by liable parents simply to secure a reduction in the rate of support.’\textsuperscript{43} Our research suggests that pressure to agree to a shared residence

\begin{itemize}
\item \textsuperscript{36}In the Marriage of Padgen (1991) FLC 92-231 at 78,596. It will be recalled that prior to the Reform Act, the Family Law Act provided that in the absence of a contrary order, parents had joint custody and each was a guardian: s 63F(1) (as it was prior to June 1996).
\item \textsuperscript{37}Note that the 1992 Joint Select Committee Inquiry into the Operation of the Family Law Act recommended against shared parenting reforms because, among other things, of ‘the potential damage to children’ that might result if it were imposed on unwilling parents: Joint Select Committee, The Family Law Act 1975: Aspects of its Operation and Interpretation (1992, AGPS, Canberra) at 106 and 111.
\item \textsuperscript{38}Australian Bureau of Statistics, Australian Social Trends 1999, Catalogue No 4102.0 (1999) at 42-43.
\item \textsuperscript{40}P M CDonald (ed), Settling Up: Property and Income Distribution on Divorce in Australia (1986, Prentice Hall).
\item \textsuperscript{41}R Weston and B Smyth, ‘Financial Living Standards After Divorce’ (2000) 55 Family Matters 15; S Shaver, ‘Poverty, Gender and Sole Parenthood’, Chapter 14, in R Fincher and J Nieuwenhuysen (eds), Australian Poverty: Then and Now (1998, Melbourne University Press), 276 at 290: ‘Gender is clearly central in the continuing high levels of poverty of sole parent families. This reflects the obvious fact that these are very largely families headed by a woman, but the poverty of sole parents stems as much from their situation as sole carers of dependent children as from their sex.’
\item \textsuperscript{42}Child Support (Assessment) Act 1989 (Cth) ss 8(3) and 48.
\item \textsuperscript{43}CCH Australian Family Law Child Support Handbook at 13,301.
\end{itemize}
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arrangement that meets the 109 nights requirement has been exacerbated by the shared parenting reforms.44

INCREASING INCIDENCE OF DISPUTES ABOUT CONTACT

1.31 One of the most significant findings of the research is the large increase in the numbers of contravention applications brought by non-resident parents alleging breaches of contact orders.

1.32 The Family Law Act provides for the imposition of penalties where a parent has breached a parenting order without reasonable excuse (‘contravention applications’).45 Contravention applications are typically brought by non-resident parents alleging a failure by the resident parent to make the children available for contact. In 1995/96 the number of these applications filed in the Family Court of Australia was 786, in 1996/97 it was 1434, there were 1659 filed in 1997/98, 1765 filed in 1998/99 and 1976 in 1999/2000.

1.33 The research findings suggest that many such applications are without merit and that many are pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact. Judges also complained about the extent to which the court’s resources were being diverted to deal with the large number of unmeritorious applications brought by unrepresented parents.

1.34 Our review of contravention judgments from 1998/99 confirmed those observations.46 Almost all (95%) of the applications were brought by contact parents (most of them fathers – 89%), and the majority of cases (62%) were found to be without merit. The application was dismissed in 45% of the cases, and in a further 17% the breach was considered ‘trivial’ or ‘of a minor nature’ and no penalty was imposed. Matters included complaints about the resident parent being 15 minutes late delivering the children for a contact visit, complaints about telephone contact that did not occur at the stipulated time, and numerous cases in which the child’s or the non-resident parent’s circumstances had changed and required a variation of the contact. ‘Make-up’ contact orders (ie; additional contact visits to compensate for missed contact time) were ordered in only 10% of the cases, which suggests that this was not the primary aim of most applications.47

1.35 In the majority of the unmeritorious cases, the father was unrepresented, indicating the important gate-keeping role played by legal practitioners in keeping trivial complaints out of the Court system.

44 Note also that the 2000 Budget announced proposed changes that would reduce the number of nights in the year to one tenth, after which the amount of child support payable by the liable parent would reduce: see Commonwealth Department of Family and Community Services, ‘Budget 2000-01 “W hat’s N ew W hat’s Different”’ (May 2000) available at http://www.facs.gov.au/Internet/FaCSInternet.nsf/aboutfacs/budget/budget2000-wnwd_e.htm. Changes from July 2000 are noted in Chapter 4, at footnote 38.
45 Family Law Act 1975 (Cth) s 112AD.
46 n =110.
47 A recognizance was ordered in 21% of cases, a fine in 3%, a jail sentence in 1% and a community service order in 1%. Determination of the penalty was adjourned in the remaining cases.
INCREASED PRESSURE ON WOMEN WHO FEAR VIOLENCE TO PROVIDE CONTACT

1.36 Our interviews with parents suggest that unsafe contact orders are being made by consent. Most of the parents we interviewed as part of this research had expressed concerns about domestic violence when their contact arrangements were made. We found that many women had agreed to contact arrangements that did not provide them with the level of protection they had wanted. Either they had felt coerced into agreeing to the arrangements by their lawyer (who in turn had advised them about the ‘usual’ approach of the Court at interim hearings to allegations about the father’s violence), or they had believed that there was no other option the father would agree to and they had no resources or were unwilling to ‘fight’. Many had agreed to unsupervised contact on alternate weekends with a neutral hand-over arrangement although they had wanted supervised contact.

RECOMMENDATIONS

1. The Family Law Act should be amended to clarify what is meant by ‘shared parental responsibility’ (s 60B(2)(c)), and to make it clear that there is no presumption of shared residence. The Act should also specify that there is no duty of consultation (with the other parent or parents) when exercising day to day parental responsibility.

2. It is essential that in making decisions based upon the child’s best interests, the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings. For this reason, the Court needs to have available to it enough information to make these assessments. Ideally, family reports should be available in each case that involves an issue of a child’s welfare, though this obviously would have considerable resource implications for the Court.

3. The need to ensure the safety of children should be included in s 60B, as a principle underlying the objects of the Act. An understanding of the deleterious effects of domestic violence on children is an essential part of the background knowledge a decision maker must bring to bear on deciding children’s ‘best interests’ issues. This should involve moving the caution in s 68K, that a court not make an order that exposes a child to an unacceptable risk of family violence, to a more prominent place in the Act, specifically to s 60B.

4. The procedure for dealing with contravention applications should be modified to ensure that those hearing the applications can amend the orders the subject of the dispute without requiring a separate application. At present, the court may only do this where there is a specific application for variation before the Court. (but see now Family Law (Amendment) Act 2000, Schedule One).

5. If the government wishes to pursue the aim of encouraging parents to share parenting, there need to be developments in other laws and practices that would facilitate this outcome. Specifically, workplace practices should enable men to parent more actively before as well as after separation since research shows that parenting after separation and divorce is more likely to be cooperative where that has been the practice during the subsisting relationship.
chapter 2

BACKGROUND TO THE REFORM ACT

PREVIOUS REVIEWS OF THE FAMILY LAW ACT

2.1 There have been several reviews of the Family Law Act since it came into operation, including two significant ones by Parliamentary committees, as well as the Australian Law Reform Commission (ALRC) inquiry into Matrimonial Property. In addition, the Family Law Council has reviewed and reported on a number of matters arising under the legislation, and the Australian Institute of Family Studies has undertaken several key studies, including a major study of the economic consequences of marriage breakdown. The most recent Parliamentary review, by the Joint Select Committee on the Operation and Interpretation of the Family Law Act, reported in 1992. The Committee had wide-ranging terms of reference, yet made only minor recommendations in relation to children’s issues, focusing mainly on property issues.

2.2 A significant number of submissions to that inquiry, as to many of the others, were made by men concerned that their ‘rights’ were ignored by the Family Court and the legislation. Throughout the Act’s history, there have been claims that the Court ‘favours women’ and ‘discriminates against men’. One Family Court study of the outcomes of custody disputes opens by noting that the research was undertaken to explore claims by ‘the Army of Men’ that the Family Court discriminated against men in favour of women. It was claimed that men had a less than 2% chance of being awarded custody, a claim clearly refuted by the Court’s research. Men’s rights groups, and those sympathetic to their concerns, constituted a majority of those who made submissions to the 1992 Joint Select Committee.

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3 P M. McDonald (ed), Settling Up: Property and Income Distribution on Divorce in Australia, 1986; and K. Funder, M. Harrison and R. Westo, Settling Down: Pathways of Parents after Divorce, 1993. The research on which these books were based formed part of the ALRC’s work on matrimonial property.
Patterns of Parenting After Separation

2.3 In the meantime, the Family Law Council had completed its report on Patterns of Parenting After Separation in 1992. One of the issues raised by the Council was the unsatisfactory nature of the language of guardianship, custody and access. It was acknowledged that, despite the attention often given to custodial parents (usually mothers) who allegedly 'thwart' attempts by non-custodial parents to have access to their children (a matter raised before the Joint Select Committee), a significant problem was the tendency of non-custodial parents to distance themselves from their children, to lose contact with them and to fail to support them. Having examined the changes in England, brought about by the Children Act 1989 (UK), and in some other jurisdictions where the language of 'custody' and 'access' had been abandoned, the Council suggested that a move away from the 'win/lose' connotations of the notion of custody may encourage more 'non-custodial parents' to keep in contact with their children. The Children Act's focus on shared parenting was based on the view that 'children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both', and a recommendation by the English Law Commission that the legislation should encourage 'both parents to feel concerned and responsible for the welfare of their children' after separation.

The role of the Children Act

2.4 The Family Law Council's report was not implemented. However, some time after the release of the Joint Select Committee report, the Attorney-General asked the Family Law Council to examine and report on the operation of the Children Act. That request was made in the light of the Government's predisposition to depart from the current regime of guardianship, custody and access in the Family Law Act and to enact provisions based on those contained in the English Children Act. The Government asked the Council to report within three months and this prevented it from undertaking its usual process of public consultation. The response was delivered to the Attorney-General in March 1994, broadly recommending that the Children Act terminology be adopted in Australia.

2.5 It was suggested that the evidence from England showed that 'reactions to date to the changes in terminology made in that Act have been positive and Council remains convinced that the custody/access model should be replaced and that a change in terminology similar to that in the UK legislation will assist in improving arrangements between separating parents for a greater chance of being awarded custody in defended rather than undefended cases. The study of orders made in 1980 in the Melbourne registry of the Family Court found that 79% of orders, including, significantly, consent orders, vested sole custody (then 'care and control') in the mothers. In defended cases - 10% of the total cases - fathers obtained sole custody in 33% and when 'split decisions' were taken into account (either separating children, or joint custody), custody of at least one child of a family was awarded to the father in 44% of the cases.

7 Of the individual submissions received, 524 were from men and 148 from women.
10 Ibid, para 2.10.
in relation to the ongoing care of their children'. During 1994 and 1995, various drafts of a Family Law Reform Bill were prepared. Consultations were held with bodies such as the Family Law Council, the Family Law Section of the Law Council of Australia and the Family Court of Australia. However, a parallel development was an inquiry by the Australian Law Reform Commission (ALRC) into equality for women. In the first part of its main report, the ALRC pointed out some concerns about the operation of the family law system in relation to women who had been targets of violence, and made a number of recommendations directed at ensuring that more regard was paid to safety, both for those women and for their children. Broadly, this led women's organisations, brought together by a newly created 'National Women's Justice Coalition', to join in the consultation process about the Reform Bill and, in particular, to call for changes to some of the draft provisions.


2.6 Another important impetus for the new legislation was Australia's ratification of the United Nations Convention on the Rights of the Child (UNCROC). In December 1990 Australia became one of the first countries to ratify the Convention which subsequently entered into force as a declared instrument under s 47(1) of the Human Rights and Equal Opportunity Commission Act 1986 on 13 January 1993. In so doing it did not gain specific statutory recognition, but as Nicholson CJ and Fogarty J noted in *Murray v Director Family Services ACT*:

'It (the Convention) can thus be used to resolve ambiguities in domestic primary and subordinate legislation. If we are correct, it can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such, it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children.'

2.7 The influence of UNCROC on the Family Law Reform Act is considerable – indeed, specific reference was made to it in an earlier draft of the Family Law Reform Bill (No 2) in the equivalent of what is now s 60B(2). In the second reading speech in the House of Representatives in November 1994 the Minister stated:

'In December 1990 Australia ratified the UN Convention on the Rights of the Child. That convention contains a number of basic rights in the raising and development of children towards adulthood. The objects clause to the new part VII of this bill gives recognition to such rights by specifying a number of such rights that should be observed in any agreements or decisions concerning children.'

2.8 However, sometime during the passage of the legislation (between November 1994 and November 1995) the explicit reference to the Convention was deleted, and the Bill, as finally passed, did not contain any direct reference to it. But a reading of s 60B makes it clear that

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12 Ibid, para 31, at 7.
14 Ibid: see especially Chapter 9.
16 See Hansard, House of Representatives, 8 November 1994 p 2759.
the Convention plays a significant, if qualified, role in the legislation. In particular, the ‘right to contact’ provision is drawn from Article 9 Paragraph 3 of the Convention.

OBJECTIVES OF THE REFORM ACT

2.9 The Australian amendments were intended to achieve a number of objectives:

- First and foremost, to effect an attitudinal shift. The aim was to make a difference to ‘the approach taken by parents towards their children’ following the breakdown of the parents’ relationship. In particular, it was hoped to encourage both parents to remain involved in the care of their children after separation, and to see them ‘continuing’ to ‘share’ their parenting responsibilities despite their separation.

- Second, to reduce disputes between parents following separation, by removing the ‘proprietary’ notion of children inherent in custody battles. An important psychological aspect of that aim is the idea that neither parent should be considered more important, regardless of where the children lives or who is the child’s primary carer.

- Third, to direct attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision-making. The legislative changes sought to emphasise the idea that children have ‘rights’, while parents have ‘responsibilities’.

- Fourth, to encourage parents to enter into private agreements about the future care of their children, rather than resorting to a litigated solution. To this end the Reform Act also

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17 See the discussions by the Full Court in B and B (Family Law Reform Act 1995) 21 FLR 676 and Re Lynette (1999) FLC 92-863.
18 For the full text of the Convention see http://www1.umn.edu/humanrts/instree/k2crc.htm.
19 This was also an objective of the English reforms: England, Law Commission, Review of Child Law, Guardianship and Custody, Report No 172 (July 1988), paragraph 2.4.
21 Family Law Act 1975 (Cth) s 60B(2)(a) and (c); House of Representatives, Family Law Reform Bill 1994, Hansard, 21 November 1995, 3303; Senate, Family Law Reform Bill 1994, Explanatory Memorandum, November 1994, para 5. See also Family Law Council, Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989, 10th March 1994, 13. The Council’s Letter recommended the Family Law Act make it clear that parental responsibility for children ‘does not cease on separation and that the best interests of the child will generally require continuing contact with both parents and complementary parenting skills.’ This approach has been recommended in other jurisdictions: see for example, United States, Commission on Child and Family Welfare, Parenting Our Children: In the Best Interest of the Nation, (September 1996), Recommendation 17, which suggested that ‘[g]overnments at all levels should adopt as a priority the goal of keeping both parents involved emotionally and financially in the lives of their children’. The Commission’s view was that replacing the value-laden terms ‘custody’ and ‘visitation’ with terms such as ‘parental decision-making’, ‘parenting time’, and ‘residential arrangements for children’ was ‘less likely to foster conflict and more likely to foster shared parenting responsibilities’.
encourages the use of ‘primary dispute resolution’ mechanisms, such as counselling and mediation, to resolve matters which might otherwise be determined by a court.25

* Fifth, to ensure that contact would not expose people to a risk of violence because of inconsistent contact orders and ‘family violence orders’, and to ensure that evidence of domestic violence is taken into account when making parenting orders.26

### OUTLINE OF THE REFORM ACT AMENDMENTS

2.10 To achieve those objectives, a number of changes were made to the Family Law Act and these are contained in a new Part VII. In summary they are:

- The inclusion in Part VII of a statement of objects and the principles underlying those objects.27 The relevant principles are contained in s60B(2), which, among other things, provides that children have ‘the right to know and be cared for by both their parents’ and ‘a right of contact’ with both parents.28 Those principles are expressed to apply ‘except when it is or would be contrary to a child’s best interests’, and a separate section (s65E) provides that a court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order.29

- Changes to the terminology of court orders. The former powers of guardianship (long-term responsibility) and the component of custody relating to day-to-day responsibility30 that were vested in the parents of a child have been replaced by a single concept of ‘parental responsibility’.31 A new range of ‘parenting orders’ replace the previous custody and access orders, namely, orders for ‘residence’, ‘contact’ and ‘specific issues’.32

- Changes to the effect of court orders. First, the legislation makes it clear that parental responsibility for children remains unaffected by the parents’ separation or the children’s living arrangements.33 Second, unlike custody orders, a residence order does not vest a person with sole decision making power for day-to-day matters,34 nor does it take away any aspect of the non-resident parent’s responsibility for the child.35 It simply names the

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27 Family Law Act 1975 (Cth) s 60B(1) and (2).
28 The other s 60B(2) principles are that, ‘(c) parents 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’.
29 The pre-Reform Act provision required the court to regard the welfare of the child as the paramount consideration. The best interests requirement was seen as being more in conformity with the UN Convention on the Rights of the Child but is not considered to effect any change in the substantive law, see B and B (Family Law Reform Act 1995) 21 FLR 676 at 730.
30 An order for ‘custody’ in favour of a person also conferred the ‘right’ to have the child live with that person.
31 Family Law Act 1975 (Cth) s 61B.
32 Ibid s 64B.
33 Ibid s 61C.
34 Ibid s 64B(3).
35 Ibid s 61C.
person or persons with whom the child will live.\textsuperscript{36} In order to give one parent sole day-to-day or long term parental responsibility for a child, a specific issues order to that effect now needs to be made.\textsuperscript{37} Nevertheless, the legislation also suggests that the scope of a non-resident parent’s decision-making responsibilities may be necessarily reduced while the child is living with the resident parent, even in the absence of an express order to that effect.\textsuperscript{38}

2.11 There is a revised list of matters a court must consider when determining the child’s best interests for the purposes of making a parenting order.\textsuperscript{39} The list now includes as relevant matters any family violence ‘involving a member of the child’s family’,\textsuperscript{40} the existence of family violence orders,\textsuperscript{41} and the need to maintain an indigenous child’s connection with his or her culture.\textsuperscript{42}

2.12 The legislation contains a number of provisions designed to ensure that children and their carers are protected from violence. Judges are now required by the Act to ensure their orders for residence and contact do not expose any person to an ‘unacceptable risk’ of family violence.\textsuperscript{43} In addition, a new Division 11 deals with the problem of inconsistent contact and domestic violence orders. It requires the Family Court to refrain from making any contact order that is inconsistent with a family violence order unless it is in the child’s best interests to do so.\textsuperscript{44} Where a judge or magistrate intends to make an inconsistent order, she or he must comply with a number of requirements, including an obligation to explain the reasons for the order to the parties.\textsuperscript{45} Magistrates are also empowered to vary or suspend a contact order made under the Family Law Act when making a family violence order under State or Territory legislation.\textsuperscript{46}

2.13 The emphasis on the protection of family members from violence is seen again in s 43 in Part IVA, which sets out the objectives of the Act. The Reform Act added to the list of existing principles in s 43 ‘the need to ensure safety from family violence’.\textsuperscript{47}

2.14 The amendments include a range of provisions aimed at encouraging parents to resolve disputes about children before resorting to litigation.\textsuperscript{48} Essentially these emphasise the

\begin{itemize}
\item \textsuperscript{36} Ibid s 64B(3).
\item \textsuperscript{37} Ibid s 64B(6).
\item \textsuperscript{38} Ibid s 63D(2)(b).
\item \textsuperscript{39} Ibid s 68F(2).
\item \textsuperscript{40} Ibid s 68F(2)(i). This provision gave effect to recent Family Court decisions. See for example, In the Marriage of JG and BG (1994) 18 Fam LR 255; In the Marriage of Jaeger (1994) 18 Fam LR 126. See also Juliet Behrens, ‘Ending the Silence, But ... Family Violence Under the Family Law Reform Act’ (1996) 10 Australian Journal of Family Law 35.
\item \textsuperscript{41} Ibid s 68F(2)(j).
\item \textsuperscript{42} Ibid s 68F(2)(f).
\item \textsuperscript{43} Ibid s 68K. Note, however, that in its guideline judgment A v A: Relocation Approach (2000) FLC 93-035, the Full Court did not incorporate reference to s 68K in explaining how a court should evaluate competing proposals in respect of a child.
\item \textsuperscript{44} Ibid s 68K (1).
\item \textsuperscript{45} Ibid s 68R.
\item \textsuperscript{46} Ibid s 68T.
\item \textsuperscript{47} Ibid s 43(ca).
\item \textsuperscript{48} Ibid s 14.
\end{itemize}
importance of mechanisms such as mediation, counselling and arbitration which, as the new term ‘primary dispute resolution’ implies, have been and remain the usual and most frequently used form of dispute resolution for most separated couples.

2.15 The Act also now provides for the registration of ‘parenting plans’ (parental agreements about the future care of the children), by which any ‘parental responsibility’ provisions of a private agreement may be converted into enforceable orders.49

2.16 The Family Law Reform Act was finally passed in late 1995 and came into effect on 11th June 1996. During the first part of 1996, a major education campaign was undertaken by the Government with the assistance of the Family Court and the legal profession to inform the community about the changes in attitude and perception that the Reform Act was intended to bring about.50

THE LAW GOVERNING CHILDREN’S DISPUTES BEFORE THE REFORM ACT

2.17 Before the passage of the Reform Act, the Family Law Act provided that each of the parents of a minor child was a guardian of the child, and that both parents had ‘joint custody’ of their children.51 Custody involved the right to have the child live with the person in whose favour an order was made and responsibility to make decisions concerning the daily care and control of the child, while aspects of guardianship referred to the responsibility for making decisions about the child’s long-term welfare.52 The Family Court was empowered to make orders altering this statutorily prescribed situation, for example, by vesting sole custody of the child in one parent, with an order for the other parent to have periodic access to the child. The most common form of order made by consent of the parents (and to a lesser extent after contested proceedings) was for sole custody to be vested in the child’s mother, with the father having regular access to the child.54 After disputed proceedings, orders altering parents’ guardianship powers were rare.55

2.18 Disputes about the future care of children were governed by the principle that the welfare of the child was the paramount consideration for the decision maker.56 Part VII of the Family Law Act 1975 (Cth) s 63F(1). Parents are ‘encouraged ... in reaching their agreement, to regard the best interests of the child as the paramount consideration’: Family Law Act 1975 (Cth) s 63B(b). This replaces the provision for registration of ‘child agreements’ under the previous s 66ZC of the Act.

49 Ibid Part VII Div 4. Parents are ‘encouraged ... in reaching their agreement, to regard the best interests of the child as the paramount consideration’: Family Law Act 1975 (Cth) s 63B(b). This replaces the provision for registration of ‘child agreements’ under the previous s 66ZC of the Act.

50 A number of counsellors who were surveyed for this research commented that the government should have engaged in an education campaign at the time of the introduction of the Reform Act. Clearly, the campaign did not reach as widely as hoped if counsellors working within the court were unaware of it.

51 This provision was found in Family Law Act 1975 (Cth) s 63F(1).

52 Family Law Act 1975 (Cth) s 63E; In the Marriage of Harrison v Woollard (1995) 18 Fam LR 788; In the Marriage of Newbery (1977) 2 Fam LR 11,652 recently discussed by the Full Court in Reg: Children’s Schooling [2000] FamCA 462. Morrison and Morrison (1995) FLC 92-639 illustrates that decisions about religious upbringing were within the ambit of guardianship prior to the Reform Act. See also the discussion in Vlug v Poulos (1997) FLC 92-778.

53 And in certain circumstances, courts of summary jurisdiction: see the current Family Law Act 1975 (Cth) ss 69J and 69N.


55 See In the Marriage of Harrison v Woollard (1995) 18 Fam LR 788.

56 Family Law Act 1975 (Cth) s 64(1)(a).
Law Act provided a list of matters which were required to be considered in determining what orders would best promote the child’s welfare. Those matters included the child’s wishes, the nature of the relationship between the child and each parent, the likely effect of changing the existing child care arrangements, and the need to protect the child from abuse. In addition, a number of case law principles were developed by the Family Court and the High Court to flesh out the matters in that statutory ‘welfare checklist’.

2.19 In considering how a court should evaluate the various ‘checklist factors’, the Full Court said in Smith and Smith:

‘...the preferable approach to be adopted is to consider each of the matters referred to in the section separately and having regard to the evidence touching upon each of those matters make findings in relation to them. In the course of this exercise, the trial judge should consider, weigh and assess the evidence touching upon each of the relevant matters adduced on behalf of the parties. After a consideration of all of those matters, a trial judge should then indicate to which of those matters he or she attaches greater significance and how all of those matters balance out.’

2.20 It was also established prior to the Reform Act that in determining what orders to make, a judge had a ‘responsibility to reflect community standards and opinions’, but was not permitted to rely on any presumptions or personal views about the appropriate parenting roles of mothers and fathers.

2.21 The High Court has rejected the concept of a presumptive ‘parental right of custody or right to access’, and this was followed by the Full Court determining that there is no onus upon a parent to establish that access would be detrimental to the child. Nevertheless, the cases also made it clear that the court would ‘give very great weight to the importance of maintaining parental ties’, on the basis that it was considered to be ‘prima facie in a child’s interests to maintain the filial relationship with both parents’.

2.22 The cases provided a number of circumstances that might lead to a refusal of access. In M and M, the High Court provided that access should not be ordered where it would expose

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57 Section 64(1)(b).
58 Section 64(1)(bb)(i).
59 Section 64(1)(bb)(iii).
60 Section 64(1)(bb)(va).
61 (1994) FLC 92-488 at 81084. In A v A: Relocation Approach (2000) FLC 93-035, the Full Court said those remarks remain good law and elaborated the importance of a court explaining ‘to which of those matters it has attached greater significance and how those relevant matters balance out.’: at paras 105-107; see also para 82.
62 Macmillan and Jackson (1995) 19 Fam LR 183 at 192 and 193. The trial judge in that case had made orders giving custody of a young boy to his maternal grandparents, rather than to the applicant father. In doing so, the judge was critical of the father’s plan to refrain from seeking employment outside the home until the child reached school age, because in the view of the trial judge, such a period of unemployment would lead to ‘entrenched welfare dependency’ and represented a ‘poor role model’ for the child. See also Gronow and Gronow (1979) 144 CLR 513 at 526-29.
63 M and M (1988) 166 CLR 69 at 76.
64 In the Marriage of Brown and Pederson (1991) 15 Fam LR 173.
65 M and M (1988) 166 CLR 69 at 76.
the child to an ‘unacceptable risk’ of abuse, that is, where the likely detriment to the child’s welfare outweighed the potential benefits of maintaining contact with the parent.\(^{67}\)

In Bieganski,\(^{68}\) the Full Court decided that the legislative obligation to protect children from abuse extended to protection from emotional harm, and cautioned trial judges to consider the limitations of supervised access in protecting children from such harm. Other cases established that the effect of the access parent’s conduct on the custodial parent (such as where there has been a history of domestic violence) was relevant to determining whether access would be in the child’s interests,\(^ {69}\) and might justify a refusal of access where it was ‘likely to impact adversely’ on the custodian’s capacity to care for the child.\(^ {70}\) Similarly, access might be suspended where ‘the need for peace and tranquillity in the custodial parent’s household’ was as considered ‘a more compelling need for the child’ than contact with the non-custodial parent.\(^ {71}\) Several cases decided shortly before the Reform Act was passed also held that an unacceptable risk of harm to the child might be established by evidence of domestic violence in the household, even though the child him or herself was in no danger of being physically assaulted or had not witnessed the violence.\(^ {72}\)

**THE CHILDREN ACT: AN IMPERFECT ANALOGY?**

2.23 It should be noted that the Reform Act does not mirror the Children Act’s principles in all respects. For example, the Children Act makes no reference to the issue of domestic violence,\(^ {73}\) whereas the Australian reforms contain a number of provisions specifically designed to ensure parenting arrangements do not expose children and their carers to a risk of violence. Those changes to the legislation were largely the result of the ALRC’s inquiry into equality for women, and in part, reflect the practice of the Family Court prior to the reforms. Another important distinction is that the English legislation’s ‘no order presumption’\(^ {74}\) – the principle that a court should only make an order if it can be shown that to do so would be better for the child than making no order at all – has not been adopted as part of the reforms here. The Children Act also makes no reference to parenting plans.

**A CLEAR REFORM AGENDA?**

2.24 Despite the amount of scrutiny to which the Family Law Act has been subject, there is no specific reform background to the Part VII amendments. First, the desire to mirror the English Children Act provisions fails to acknowledge the fact that a major aspect of that

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68 In the Marriage of Bieganski (1993) 16 Fam LR 353.
69 In the Marriage of Irvine (1995) 19 Fam LR 374. See also In the Marriage of Grant (1994) FLC 92-506 at 81,259.
70 In the Marriage of Bieganski (1993) 16 Fam LR 353 at 368.
71 In the Marriage of Sedgley (1995) 19 Fam LR 363 at 371.
72 In the Marriage of JG and BG (1994) 18 Fam LR 255; In the Marriage of Patsalou (1995) 18 Fam LR 426; In the Marriage of Jaeger (1994) 18 Fam LR 126.
73 Note however that the more recently enacted Family Law Act 1996 (UK) contains provisions making violence a relevant matter in proceedings under the Children Act.
74 Children Act 1989 (UK), s 1(5).
legislation is the law dealing with public, rather than private, children's matters. Its own reform agenda was very much based in revising the law dealing with the former, not the latter. So far as its private law aspects were concerned, they were aimed at attitudinal rather than legal change, ie, it was hoped to encourage non-resident parents (ie, fathers) to keep in contact with their children. In that respect the Australian aims were quite analogous; they were directed at promoting a normative standard of parenting behaviour for those whose relationships had broken down.

2.25 More specifically, there was no real 'mischief' to which the Reform Act's co-parenting reforms were directed. For example, the background to the Reform Act can be contrasted with the situation prior to the enactment of the Child Support Scheme, when research had clearly demonstrated that few children were receiving adequate amounts of child maintenance and action was needed to change that situation. Unlike the impetus for the child support reforms, there was no evidence that children were being harmed by the previous law and practice governing custody and access. The majority of calls for reform to custody law had come consistently from aggrieved non-custodial parents, and in particular, fathers' rights groups who claimed that the legislation and the Family Court discriminated against them. Those claims were not supported by the empirical studies which showed that the Family Court made orders in favour of fathers at twice the rate of those made by consent.

2.26 Further, the need to encourage parents to share their parental responsibilities after separation was not based on any uncontested research information. Rather, the available research evidence established that multiple interacting variables (including the custodian's financial circumstances and the level of communication and conflict between the parents),

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78 P McDonald (ed), Settling Up: Property and Income Distribution on Divorce in Australia (1986) at 262.


81 See note 54 and see also J Fife-Yeomans, 'Court to investigate custody “bias”' The Australian 1 October 1998.
rather than the single factor of parent-child contact, influence children’s adjustment following parental separation.82

THE STRUCTURE OF THIS REPORT

2.27 In the following chapter (chapter 3), we outline how we went about the research (ie, the process and methodologies used) and discuss the ways in which the research evolved to take account of changes in the family law environment. In the next chapter (chapter 4), we look at shared parenting, while in chapter 5 we examine the issues of contact and the impact of violence in the context of family law disputes. In each of chapters 4 and 5, we describe our findings from the case law, as well as the results obtained from interviewing lawyers, counsellors, judges and registrars and family law clients contacted through a range of legal and other relevant services. In the final chapter (chapter 6), we look at dispute resolution issues and provide data where relevant. The themes that emerge and the recommendations are all contained in the Executive Summary (chapter 1).

chapter 3
THE RESEARCH

INTRODUCTION: PREDICTIONS AND CONCERNS

3.1 The main purpose of the project was to examine the consequences of the Reform Act in the light of Parliament’s stated intentions and rationale for its introduction. Funding was available for a three year period, and we anticipated that the experiences and perceptions of the various population groups affected by the new legislation would change in a number of ways over time as they became incorporated into practice and were the subject of judicial interpretation. Thus the overall object was to obtain a ‘moving picture’ of the Reform Act’s impact, that is, to track the course and interactions of effects as they arose over that period. In doing so we focussed on the consequences for users and consumers of the new law – parents, lawyers, counsellors and judges predominantly – and for the ‘family law system’ itself, and compared those where possible with what we knew about the situation before the introduction of the amendments. We also explored a number of the predictions and concerns about the Reform Act that had been raised at the time of their introduction. These fell into three broad categories:

(1) That the reforms would increase the complexity of family law practice but make little difference to parental behaviour

3.2 A number of family law practitioners predicted that the reforms would require more time with clients explaining the changes, and that the complexity of practice would be increased. For example, solicitors noted that whereas clients ‘knew what they meant’ when they ‘asked for custody’, there would now be a great deal of uncertainty about each parent’s respective duties, and that this would result in increases in applications for detailed specific issues orders.¹ For example, one Family Court judge predicted higher rates of litigation over specific issues such as ‘choice of school, religion, haircuts, and the like, where under the previous law these matters were often determined by whichever parent was awarded custody’.² Some family lawyers had also raised concerns that specific issues orders would ‘provide warring parents with the opportunity to seek orders relating to the minutiae of each other’s care of the child’.³

3.3 Family law practitioners also predicted that the statutory exhortations and the new terminology would have little to no impact on parental behaviour, particularly in the context of relationships that have broken down.\(^4\) This view was also suggested by a study by the Australian Institute of Family Studies conducted prior to the Reform Act’s implementation, which indicated that reforms designed to effect an attitudinal change among parents were unnecessary.\(^5\) Other commentators predicted that in practice the contact parent’s exercise of parental responsibility would be largely limited to decisions concerning the child’s long-term welfare, and hence the idea of ongoing shared parental responsibility would ‘prove to be more of a symbolic ideal than a practical reality’.\(^6\)

(2) That the reforms promoted fathers’ rights, rather than children’s interests

3.4 As noted in Chapter 2, the shared parenting reforms were not the result of research into the effects of the pre-existing law on children’s well-being and adjustment,\(^7\) but were largely a response to the complaints of non-custodial fathers about ‘discrimination’ and ‘gender bias’ by the Family Court in ‘awarding’ custody. For this reason, some commentators suggested that the shared parenting and right of contact principles were effectively a code for the increased ‘rights’ of contact parents,\(^8\) and predicted that those most likely to benefit from the reforms were fathers (who are the majority of contact parents). It was suggested that these principles would provide non-resident parents with increased opportunities to harass their former partners, for example, by seeking detailed specific issues orders regulating the resident parent’s care of the children and/or by using court proceedings (or threats of court proceedings) to challenge the primary carer’s decisions.\(^9\)

(3) That the reforms would have particularly adverse effects for women in situations of domestic violence

3.5 A number of concerns were raised about the negative possibilities of the Reform Act for women who had experienced abusive relationships. Some foreshadowed the ‘right to contact’ principle being used to pressure women who had legitimate concerns about violence into


agreements for contact that would compromise their safety. One commentator noted that the new section 60B principles underpinning the reforms are 'pre-emptive', and that it is not always in the best interests of a child to be cared for by both parents or to have contact on a regular basis with both parents or for the parents to share duties concerning the care of the child. Others predicted that women leaving a violent relationship might find it difficult to obtain the Court’s permission to relocate if it would reduce the father’s contact with the child. Another concern was that the shared parenting emphasis gave violent men ‘a right to involve themselves in the lives of their former partners and children at precisely the moment at which they present the highest risk to them’.

3.6 This concern was also identified by the Australian Law Reform Commission in a pre-Reform Act inquiry into difficult contact cases. The Commission noted that it had received a number of submissions which told of men seeking contact orders but then failing to have contact with their children, despite pursuing lengthy disputes in court. Its report, disseminated while the Reform Act was being drafted, referred to the frequency with which ‘the non-custodial parent’s use of litigation seems motivated more by a determination to exercise power over the former partner and the children than by any desire for continuing contact’. The report also acknowledged submissions which noted how frequently contact parents failed to see their children, whilst media, Court and political attention continued to focus on the failings of mothers.

3.7 A further problem for women centred on the Reform Act’s promotion of primary dispute resolution processes such as mediation and counselling, and their inappropriateness for women separating from abusive partners.

3.8 When our project began, the English experiences of the Children Act were largely undocumented, although by mid 1996 the legislation had been in operation for nearly 5 years. Despite some particular differences (most notably the presumption against making an order in disputes involving children) and its primary focus on public law proceedings, the Children Act had

15 Ibid.
17 Which was considered but not adopted in Australia.
changed the terminology of parenting orders and attempted to encourage both parental responsibility rather than rights, and co-operative parenting after separation. As Chapter 2 explains, it was something of a catalyst and subsequently a blueprint for the Australian reforms. Research findings and other information from England became increasingly available as our project progressed. Reference is made to these throughout this final report, and we also draw upon the research findings of John Dewar and Stephen Parker whose empirical work on the operation of the Reform Act in Queensland helped to inform our own study.19

METHODOLOGY

3.9 The issues of who should be included in the project and in what way information might best be captured were obviously of central importance to the project’s design. Resource, budgetary and time constraints required us to decide initially who we should sample and in what numbers, and what means we should use to obtain the necessary information. At the same time (given the nature of the research and its duration), we considered it essential to allow enough flexibility to include other sources of information, and possibly additional respondents, at a later stage should the early findings suggest their need.

3.10 Given the objectives, time lines and exploratory nature of the research we decided to collect data from individuals and groups by several different means. This allowed us to include a number of perspectives and to use a combination of qualitative and quantitative information, primarily the former.

3.11 Taking a largely qualitative approach provided us with opportunities to explore issues in depth with affected groups in order to gain an understanding of how each population being studied interacted with the others, and how the stated objectives of the legislation were being mediated by these populations.20 It also allowed us to obtain a picture of the complexity of the environment in which the legal changes were operating.

Survey of family court decision makers, lawyers, counsellors and mediators

3.12 Between mid 1996 and early 1999 we interviewed, on a one to one basis, 30 Family Court judges (including judicial registrars), 45 family law solicitors and barristers (including private and community legal centre practitioners) and 13 Family Court counsellors in Sydney, Parramatta, Newcastle, Melbourne, Dandenong, Brisbane and Adelaide. In addition, between May 1997 and mid 1998 we surveyed family law solicitors, Family Court counsellors and private and community based family counsellors and mediators throughout Australia. The questionnaires contained both closed and open questions, the latter allowing the respondents to explain their views in some detail. We received a total of 166 completed questionnaires from solicitors, 55 from Family Court counsellors, 113 from private and community counsellors and 46 questionnaires from private and community mediators.

18 Those proceedings in which the State is a party, as opposed to private law proceedings which involve family members or possibly unrelated third parties.
20 These are described as some of the benefits of using qualitative data in V Janesick, ‘The Dance of Qualitative Research Design’ in N K Denzin and Y S Lincoln (eds), Strategies of Qualitative Inquiry, Sage Publications, Thousand Oaks, 1998 at 53.
3.13 We also conducted interviews and surveyed the staff of several domestic violence services in Victoria, Queensland and New South Wales. Following the publication of the interim report in April 1999 and during the remainder of 1999 we re-interviewed 14 judges, 26 family law solicitors and 10 Family Court counsellors to measure possible changes in their attitudes and experiences since we had spoken to them in the early stages of the project.

**Court observations**

3.14 We observed hearings of interim children’s matters in the Melbourne, Brisbane, Sydney, Adelaide, Parramatta, Dandenong, Newcastle and Coffs Harbour registries of the Family Court, as well as a circuit court sitting in Bendigo. Over the life of the project we also analysed and compared a selection of 635 unreported pre- and post-Reform Act interim and final judgments and orders, plus 39 pre- and post-Reform Act reported judgments.

**1999 interviews**

3.15 In late 1999, in the latter stages of the project, we interviewed 10 of the then newly appointed senior registrars whose primary responsibilities involve the hearing and determination of interim parenting matters. At this time we also interviewed 65 parents who were clients of either a women’s legal service, a community legal service or a contact service, and also surveyed by questionnaire 84 parents who had agreed, via their solicitors, to be included in the study. In addition, 4 senior registrars in different States completed questionnaires relating to the outcomes of 118 interim parenting matters heard in three States during December 1999.

**Parent interviews**

3.16 When we began the project it became obvious that different perspectives would be provided as a result of sampling the separated parent population than would be gained by sampling the ‘professional’ populations under study – counsellors and mediators, legal practitioners and Family Court decision-makers. This made the inclusion of information from parents particularly important, although we realised that its collection would be accompanied by a number of methodological problems.

3.17 Access to a representative sample of parents was a major issue, as was the fact that there is no simple way to identify the separated parent population. We also realised that any information received from parents would be different in nature and substance from accounts given by family law professionals. Separated parents typically have intense personal dealings with the family law system and, quite understandably, focus on their own case rather than analysing broader systemic issues. They also tend to have less overall information about the way the system works, but instead have a very real, individual understanding of how it worked (or failed to work) for them. For all these reasons it is important that their perspectives, while subjective, be taken into account.

3.18 The family law clients who completed questionnaires had recently received legal advice about residence and/or contact. Our aim was to gauge the extent to which the philosophy and legal effects of the reforms had been understood by them and to obtain their views about the law and the system.

3.19 Subsequently, and in order to follow up on information given to us in earlier interviews with practitioners, judges, registrars court counsellors and domestic violence workers, we
conducted telephone interviews with parent clients of women’s legal services, community legal services and contact services in New South Wales, Queensland, Victoria and South Australia. The interviews with parents focussed on their contact arrangements, using a combination of standardised and non-standardised questions. This was to obtain some information about, for example, whether parents were happy or concerned about the contact arrangements that had been made or imposed on them. They also had an opportunity to tell their stories in their own way, for example to highlight certain aspects of their experience that were particularly important to them.

3.20 Many of the contact arrangements they discussed with us had been made by consent and converted to court orders. Others remained private agreements without the backing of a court order, although a small number were the result of litigation. The majority of respondents (50) were resident mothers, and domestic violence had been an issue for most of them at the time their arrangements for contact had been agreed upon.

3.21 It was obvious that the population of parents we included in the project could not and would not be representative of the wider group of those who have experienced separation. We do not suggest that their experiences are generalisable to a larger population. However, their responses provide powerful accounts by a group of women and men who feel themselves, and particularly their children, to be in a vulnerable position because of previous or current family violence. They also frequently experienced an inability to access the system properly because of insufficient means and lack of legal aid.

The population affected by the Reform Act

3.22 The Family Law Reform Act has the potential to affect a large number of Australian families. In the 3 years of the research project (1997-1999 inclusive) an average of just over 50,000 divorces have been granted annually, and more than half of those divorcing couples had dependent children at the time of their divorce. An unknown additional number of both married and unmarried couples with children separate each year, and at any given time 21% of all families are classified as being sole parent families, the vast majority of these because of relationship breakdown. Just over 93% of all recipients of Parenting Payments (previously known as Supporting Parents’ Benefit and then Sole Parent Pension) are women.

3.23 Despite the size of the population possibly falling within the ambit of the reforms, family law ‘on the books’ has at most a peripheral effect on the lives of many separated parents. Disputes about children are confined to a minority of these parents for a variety of reasons. They may know nothing about the law or they may have no need of it. They may avoid it because they cannot afford legal advice or choose to have only minimal contact with lawyers. Advice from

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22 Between 1998 and 1999 the proportion of divorces involving children has fallen from 55% to 54%. However, the number of children involved in divorce has increased from 0.95 to 1.13 children per 100 children aged under 18 years in the population: Australian Bureau of Statistics, Marriages and Divorces, Cat. No 3310.0, 1998.
24 Ibid.
friends, colleagues, mediators and others is often given concurrently with, or instead of, legal advice. We were also very aware that in the current restrictive legal aid climate many parents are unable to obtain even preliminary legal advice and are unable or unwilling to represent themselves. This was reinforced in interviews with the staff of several Community Legal Centres.

3.24 In addition, an unknown proportion of parents in dispute with each other will reach a negotiated settlement without necessarily starting formal proceedings but after consulting a lawyer, and this may be formalised as a consent order or remain a purely private (and therefore unenforceable) agreement. These are the clients who have been described as ‘bargaining in the shadow of the law’. A small proportion initiate proceedings and go some way down the pathway towards litigation, often leaving it at various points along the way. Ultimately 19% of all those who file a parenting application have their matters fixed for trial, but last minute settlements mean that just over 6% of all applicants have their dispute decided by a judge. The law is obviously of crucial importance to parents in these latter categories.

3.25 The various pathways people may take in dealing with their disputes provide a number of methodological difficulties when designing a study of this nature, not the least of which is: what is the family law ‘system’, and who is sufficiently ‘in it’ to be affected by it? It is clear that the ways in which parents enter the system, and the source of the information they receive determine much about their understanding of the process and of their experiences. For those who receive legal advice and who rely upon it to resolve or litigate their dispute, the influence and power of lawyers should not be underestimated. Before the passage of the reforms one Family Court judge predicted that the effectiveness of the statutory exhortation to share parenting would ultimately depend on ‘how lawyers use it in communications with clients’.

**Professional participants**

3.26 For obvious reasons the professional participants in the system – judges, lawyers, registrars and counsellors – were easier to identify and locate than were the parents. But family law professionals are still a fairly diverse group. They have different backgrounds and may be trained in either law, social work or psychology, or a combination of these. They may come into contact with parents at different times and in different circumstances, and may respond differently to the legislation and what it can and should achieve. This heterogeneity also extends to attitudes within professional groups. Although the Family Law Act is Federal legislation that operates across Australia different Family Court registries also have different cultures, (albeit operating within the broad umbrella of the Family Law Act and Rules), and the practice of family law is often less uniform than may be supposed. In smaller registries, for

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29 With the exception of Western Australia which has its own State legislation. Western Australia also has a separate Family Court of Western Australia.
example, individual attitudes, beliefs and practices may have a disproportionate impact on the way cases are managed and views and beliefs transmitted.

3.27 Different interpretations of the reforms and their significance added to the richness of the opinions we received as, for example, judges, lawyers and counsellors commented on the behaviour and attitudes of members of the other professional groups, including sometimes their own. The inclusion of matters in and from regional registries such as Bendigo and Coffs Harbour also allowed regional perspectives and practices to be taken into account by way of observation and case analysis.

Judgments

3.28 Judgment analysis was an important aspect of the project and revealed pre and post Reform Act outcomes as well as information about circumstances surrounding both interim (to a limited extent) and final parenting orders at different time points. The judgments analysed were predominantly, but not solely, unreported. They were provided to us by judges and judicial registrars and were also obtained via the Court’s ‘Lotus Notes’ data base.

3.29 In examining the caseload of the Court we recognised that its jurisprudence extends far beyond the reported Full Court (and even first instance) decisions, although these are obviously the most public face of the Court’s workload. Almost by definition, they often reflect more arcane aspects of the law and/or involve unusual factual situations, which reveal little about the day to day operation of the reforms.

3.30 As the project progressed it became increasingly obvious that interim decisions were both prolific and influential, given the extent to which hearing delays were effectively converting these into final decisions. Their significance became apparent early in the study, particularly where respondents commented on issues of violence raised at this stage of their proceedings. Despite their importance both numerically and to the families concerned, interim decisions are not reported, reasons for judgment are very rarely given, and their visibility within the system as a whole is therefore minimal.
3.31 In total 635 interim and final orders were analysed, covering the periods before and after the Reform Act came into operation. These included 252 unreported interim judgments and 229 final parenting order judgments, 20 interim and 23 final re-location cases, and 110 contact enforcement judgments. Thirty nine pre- and post-Reform Act reported decisions were also analysed.

3.32 The various characteristics of the Reform Act on which we concentrated are described below, together with a description of the major sources of information we sought about each.

**Shared parenting**

3.33 The Reform Act does not define 'shared parenting', and the federal parliament gave no legislative indication of the extent to which it intended separated parents to make shared residence arrangements for their children and/or to share decision-making and/or the caregiving activities involved in raising children (for example, helping with homework and transport to school and sporting events). There is also uncertainty about how parents are expected to make decisions about their children in the context of shared responsibility. The Reform Act does not specify whether they must consult one another when exercising their shared parental responsibilities, or whether they may discharge these independently. For these reasons, it was difficult to evaluate the extent to which the shared parenting aim has been successful. However the research explored a number of aspects of the concept.

- First we focussed on the kinds of parenting orders (in litigated matters and where orders were made by consent) that have been made since the Reform Act, and compared these with children’s orders made before its introduction.
- Secondly, we analysed the contents of orders dealing with particular aspects of parental responsibility (specific issues orders), and the extent to which each parent’s duties and responsibilities for the children were separately delineated in court orders since the introduction of the Reform Act. This was done by surveying unreported judgments and by interviewing solicitors about their pre- and post-Reform Act practices.
- Thirdly, we surveyed and interviewed the various professionals employed within the system (solicitors, counsellors, mediators, and judges) about their perceptions and expectations of the shared parenting emphasis as it operated in practice. We also explored with members of these groups the uptake of the new language, and the extent to which residence represents something different from custody.
- We surveyed a group of parents about their arrangements and understanding of the new law, and interviewed another group of parents about their arrangements and expectations of shared parenting.
- We explored the financial consequences of shared parenting arrangements in the areas of child support and social security, relying on the relevant legislation, budget papers, policy manuals and demographic data.

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33 This can be contrasted with the Children Act’s model which stipulates that there is no duty of consultation: Children Act 1989 (U K) s 2(7). The Australian position in respect of the obligation to consult where an order confers joint responsibility is discussed by the Full Court in Vlug v Poulos (1997) FLC 92-778.
**Right of contact**

3.34 We investigated the effect of introducing a ‘right of contact’ principle in a number of ways.

- First the research explored the extent to which non-resident parents have been provided with opportunities for increased contact with their children as a consequence of the reforms. We reviewed unreported interim and final judgments, looking at the usual amounts of contact time afforded to non-resident parents compared with those given to access parents under the previous system.

- As a component of the judgment review we compared the rate of orders refusing contact pre- and post-Reform Act, including the reasons for refusal.

- We noted Family Court statistics which showed the numbers of applications for access/contact orders made before and after the reforms.

- We observed interim hearings and recorded the extent to which they made reference to the right of contact.

- We surveyed and/or interviewed both private and community legal centre solicitors, Court and community counsellors, mediators and judges about the differences in their practices (if any) in relation to contact as a result of the Reform Act.

- In the early stages of the project, the Full Court of the Family Court handed down its first decision interpreting the reforms. B and B (Family Law Reform Act 1995)\(^{34}\) dealt with a ‘relocation’ dispute. Argument in the case centred on the right of contact principle and whether it had created a presumption in favour of contact that would have to be displaced by a resident parent seeking to move away with the child. The Full Court held that the principle had not created such a presumption.\(^{35}\) However, the survey of legal practitioners we conducted during the early stages of the project, and before the Full Court’s decision had been handed down, suggested that solicitors believed the Reform Act had made a difference to this issue. We explored the divergence of opinion between practitioners and the Full Court in subsequent surveys and interviews with lawyers, counsellors and trial judges, including the impact of the Full Court’s decision upon their practices and/or advice.

- Early interviews with judges and judicial registrars of the Family Court also suggested that the Reform Act had given rise to an increase in the number of ‘harassing’ contravention applications by non-resident fathers who had ‘trivial’ complaints about contact arrangements. As a consequence of this information, we conducted an analysis of 110 Family Court contravention applications heard during 1999.

- We also conducted interviews with staff at 6 contact centres and 3 women’s legal centres, each in 3 states. Comparisons could not be made between the pre- and post Reform Act reliance on contact centres, as all but one had only been established since the Act came into operation.

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\(^{35}\) Ibid at 735.
Family violence

3.35 As there is a definite tension between the family violence provisions of the Reform Act and the section 60B principles that emphasise shared parenting and the child’s ‘right of contact’, the project included an investigation of the practical interaction of these provisions.

- We compared pre- and post-Reform Act unreported decisions, to test the extent to which the provisions dealing with the right of contact and with family violence had led to changes in practice, and more specifically, whether it was now more difficult for resident parents with domestic violence concerns to obtain an order suspending contact.
- We looked at the rates of orders for contact where domestic violence was alleged; and compared judicial reasoning in pre-and post-Reform Act decisions.
- We also surveyed and/or interviewed legal practitioners, counsellors, judges and judicial registrars about their practices and approaches to contact orders where there are allegations of domestic violence.
- Later in the project, we conducted similar interviews with the senior Registrars who had then been recently appointed to hear interim parenting matters.
- We also interviewed workers at domestic violence outreach centres and women’s legal centres about their experiences with clients who had been the targets of family violence.

3.36 The interviews with parents who had consent orders or private agreements for contact included questions about the circumstances surrounding their finalisation, and about the durability and workability of the arrangements. The majority of respondents were resident parents who had had domestic violence concerns at the time the orders or agreements were made.

Litigation and agreements

- We examined Family Court statistics on the numbers of applications in children’s matters before and since the operation of the Reform Act, as well as the rate of registration of parenting plans compared to the incidence of registration of ‘child agreements’ before the reforms were passed.
- During the initial stage of the project, solicitors suggested that parents’ access to the Family Court and reliance on private agreements had been affected by the reduced availability of, and stricter guidelines for, legal aid in family law matters. More specifically, solicitors from community legal centres, and domestic violence outreach service staff reported that women in violent relationships were being pressured into agreements for ‘unsafe contact’ as a result of the combination of the ‘right of contact’ emphasis and the decreased availability of legal aid for family law matters, which occurred contemporaneously with the Reform Act’s introduction. Consequently our interviews with solicitors, community legal centre and domestic violence workers, as well as those working in Legal Aid Commissions, focussed on the extent to which they had concerns about the future safety of their clients when consent agreements were being made despite there being a history of violence.
- We also explored these issues in the interviews with parents who had entered into private agreements or consent orders about contact and who had concerns about domestic violence.

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36 Registration of ‘child agreements’ was provided for under the former Family Law Act s 66ZC.
The reform environment

3.37 As with much empirical research, it is difficult to attribute effects to a particular cause, and it
is dangerous to do so in a vacuum. Several changes to the practice of family law occurred at
about the same time as the reforms came into operation and these must be taken into account
in interpreting the research results. One or more of these changes may have interacted with
the reforms in a variety of ways which are difficult to measure. The changes include the
introduction of simplified court procedures in January 1996 which were intended to
encourage earlier settlement of matters, and hence reduce litigants’ costs. The procedures
were implemented by way of changes to the Family Court Rules and to the Guidelines which
regulate the management of cases as they progress through the Court system.

3.38 In addition, as mentioned, from late 1996 more rigorous legal aid guidelines were
implemented which included new ‘caps’ on the amount of aid granted in family law matters.
This resulted in a reduction in the availability of legal aid funding for family law matters
generally, although the effects were not experienced evenly across the different States.37

3.39 Undoubtedly a combination of more accessible procedures, and particularly the reduced
availability of legal aid, has led to an increase in the numbers of self-represented litigants,
which has increased delays in hearings and reduced settlement opportunities.38 Available
statistics show that currently 35% of Family Court defended hearings, duty matters and
directions hearings involve one or more unrepresented parties.39

3.40 In mid 1999 the Court responded to concerns about delays in matters reaching final hearing
by delegating judicial powers to a new category of senior registrars. The delays were the most
likely cause of a significant increase in the numbers of interim parenting matters in the
system, which increase in turn had resulted in Family Court judges spending more and more
time in duty lists and less time in the hearing of final defended matters. In the Family Court’s
annual report for 1997-98 the Chief Justice referred to his concern at the delays to final
hearings being experienced across the Court, particularly in Melbourne, Newcastle, Adelaide
and Brisbane.40 In the same annual report the Court’s statistics as at 30 June 1998 showed
that none of the 11 registries of the Court was able to hear standard children’s matters within
the period of 43 weeks from filing as the performance indicators required. In major registries
such as Brisbane, Sydney and Melbourne times between the filing and final hearing of
children’s matters averaged 87 weeks, 48 weeks and 92 weeks respectively.41 The appointment
of the senior registrars during mid 1999 allowed the judges to sit exclusively in trials rather
than dividing their time between trials and duty lists.

38 See A Nicholson, The State of the Court, Opening Address to the Third National Family Court Conference,
39 J Dewar, B Smith, and C Wells, Litigants in Person in the Family Court of Australia (2000) Family Court
40 Family Court of Australia, Annual Report, 1997-98, at 22.
41 Ibid at 32.
3.41 Another change that occurred contemporaneously with the commencement of the Reform Act in mid-1996 was the establishment of nine government funded supervised contact and ‘hand over’ centres throughout Australia. In the relevant geographical locations these centres have provided judges and registrars at interim hearings with an alternative to the suspension of contact or to reliance on family members to supervise where there may otherwise be a risk to the child.

3.42 The research project has had an impact of its own. The interim research findings were published in April 1999 and were widely distributed and made available on the Court’s website. We were subsequently invited to take part in the training provided to the new senior Registrars in May 1999. We later interviewed the registrars and their comments suggested that our concerns about the continuation of contact in circumstances involving family violence had been heeded. In particular, registrars were paying considerable attention to issues of violence in interim hearings and were aware of the requirement to consider family violence imposed by section 68K.

3.43 In December 1998 the Government announced that a Federal Magistrates Service (FMS) would be established to deal with less complex family law and federal civil matters. The Federal Magistrates Act 1999 received royal assent 12 months later and came into operation in July 2000. In relation to family law, the FMS has jurisdiction to determine both interim and final parenting matters, with filing fees being lower than those levied in the Family Court. The establishment of the Federal Magistracy will obviously provide an additional forum for parents in the future, but the timing of this research did not allow us to make any assessment of its workload or impacts.

**Overseas interest**

3.44 At the time the Australian reforms were introduced several overseas jurisdictions were also considering changes to child-related laws. As our research progressed we received inquiries about it and also requests for the interim report, once it was published, from a number of different countries. These included Singapore, Hong Kong, Canada and South Africa. In June 1998, Reg Graycar was asked to meet with the Canadian Joint Parliamentary Committee on Custody and Access to provide information about the Australian reforms and the research findings. In June 2000, Helen Rhoades spoke about the research at the Canadian Law and Society Association annual conference and in December 1999, Margaret Harrison was invited to speak about the findings of this research at a colloquium on ‘Best Interests’ in Toronto, Canada. In April 2000, she also discussed the work at a family law conference in Cape Town, South Africa. All three authors were involved in plenary presentations about the research at the 1998 and 2000 National Family Law Conferences. Margaret Harrison and Reg Graycar spoke at the 9th International Society of Family Law conference in Durban, South Africa (July 1997) and the three authors also presented the findings at the 10th International Society of Family Law, in Brisbane, July 2000. In 1999, Margaret Harrison also discussed the research findings at the conference of the Association of Family and Conciliation Courts in Washington DC. Helen Rhoades has made presentations about the research to a national

42 [http://www.ozemail.com.au/~anzaccs](http://www.ozemail.com.au/~anzaccs). In the 1999 May budget, the federal government announced a further $15.6 million dollars to fund an additional 25 children’s contact services over four years in areas of high need, with an emphasis on rural, remote and urban fringe areas.
conference of the Association of Australian and New Zealand Access Services and to a national family law teachers workshop in 1999. Helen Rhoades and Margaret Harrison participated in June 2000 at a training program for the newly appointed Federal Magistrates and as noted in the report, we were also involved in training the Family Court’s senior registrars appointed in 1999.

3.45 During 1999 we were contacted by Mr Justice Wall, Chairman of the English Children Act Sub-Committee of the Advisory Board on Family Law, who was conducting an inquiry into parental contact in cases involving domestic violence. The Family Court subsequently made a submission to the Inquiry which drew on our research. The Advisory Board sent its report to the Lord Chancellor in February 2000. As this report nears completion the New Zealand government has also expressed an interest in revamping its children’s legislation.

Acknowledgments and anonymity

3.46 All those who responded to the questionnaires and participated in the interviews did so voluntarily after we either approached them, or they were contacted and invited to participate by their advisers or (in the case of community counsellors and mediators) their organisations. This type of research relies heavily on respondents’ goodwill and we are very grateful for the interest those we approached showed in the project, and for their willingness to participate.

3.47 An important issue in the conduct of the research project was the issue of anonymity. Section 121 of the Family Law Act effectively prohibits the publication of any identifying matter in relation to Family Court proceedings. Independently of this provision we wanted to encourage all respondents to speak freely about their experiences and attitudes and we assured them that their confidentiality would be protected. As a consequence we have deleted all names, case numbers, registry locations of decisions and other pieces of identifying material from this report.
chapter 4

SHARED PARENTING

INTRODUCTION

4.1 The Family Law Reform Act 1995 promotes the idea of both parents being actively involved in their children's lives following their separation and regardless of their previous marital status. As chapter 2 explains, the legislation was not motivated by any specific reform agenda, but there was apparent concern that many non-custodial parents were withdrawing from involvement with their children once their relationship with the other parent had broken down. Consequences of such a withdrawal have been identified as including emotional damage, low self esteem and anxiety in children, and a falling off in child support payments.\(^1\) There was also concern that 'notions of ownership in children' had been fostered under the previous system by assigning 'rights to custody' to one parent.\(^2\) To redress these problems, the Reform Act removed 'the automatic nexus between custody and the responsibility for the daily care and control of the child', and replaced it with the concept that parenting after separation should involve the ongoing responsibility of both parents.\(^3\)

4.2 The shared parenting principle is spelt out in section 60B(2) and particularly sub section (c), which exhorts parents to 'share duties and responsibilities concerning the care, welfare and development of their children', and sub section (a), which provides children with 'the right to know and be cared for by both their parents'. The emphasis on ongoing responsibility is reinforced by section 61C(2), which stipulates that parental responsibilities for children are not affected 'by the parents becoming separated or by either or both of them marrying or re-marrying'. The notion of joint parental responsibility is also affected by the Reform Act's removal of the previous Part VII provision that vested day to day decision making responsibility in the custodial parent.\(^4\) The earlier provision, which was contained in the former section 63E(2), gave the parent with a custody order 'the right to have the daily care and control of the child' as well as 'the right and responsibility to make decisions concerning the daily care and control of the child'. By contrast, a residence order does not per se 'take

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4 Ibid.
away or diminish any aspect of the non-resident parent's responsibility, but simply describes the children's living arrangements.

4.3 The new Part VII does not include any comprehensive explanation of how shared parenting is intended to operate in practice. Given the uncertainty about its practical implications, our research sought to explore the extent to which the reforms have affected two aspects of post-separation parenting arrangements. The first aspect discussed in this chapter involves the extent to which there has been a shift towards the use of shared residence arrangements since the reforms came into operation. The second part of the chapter deals with the question of whether there have been changes to other aspects of post separation parenting such as decision making and caregiving. The discussion of the findings draws upon analyses of judgments and private agreements, as well as interviews with parents, decision makers and advisers (both counsellors and lawyers). It also discusses the financial implications of shared parenting arrangements in relation to child support liabilities and receipt of social security payments.

**SHARED RESIDENCE**

4.4 Before the introduction of the Reform Act, the most common form of order (both court-ordered and by consent) provided for sole custody to be vested in one parent (usually the mother), with the non-custodial parent having regular access to the child. The Family Court rarely made joint custody orders in contested proceedings. Cases such as Padgen, and Forck and Thomas established that such orders were not appropriate unless the parties’ approaches to parenting were compatible, and there was a relationship of cooperation, good communication and mutual trust between the parents, factors that are generally absent in contested proceedings. It was also noted in Padgen that the judges of the Family Court:

   ‘... have not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties.’

4.5 Under the Reform Act it is possible to make what are referred to as ‘symbolic’ residence/residence orders, that is, orders that designate both parents as resident parents.
even though the children will not spend equal amounts of time with each. For example, an order might provide that the children ‘reside with’ the father each alternate weekend and ‘reside with’ the mother at all other times. As well, there is scope, as there was under the previous Part VII, for ‘actual’ shared residence orders to be made, that is, where the children will live for equal periods of time with each parent on a rotational basis.

**Case law developments**

4.6 The most significant Full Court decisions touching on the issue of residence arrangements are B and B and Cowling. In B and B, the Full Court held that symbolic residence/residence orders should be made in ‘appropriate’ cases, and noted that ‘there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the new legislation’. The Court stopped short of preferring this format, commenting instead that ‘a residence/contact order should not be seen as a second best option’, and that residence and contact should be used ‘where the contact is of relatively short duration’. The Full Court also made it clear that the pre-Reform Act case law principles that had been developed to deal with custody and access disputes continue to be applicable to residence and contact applications. This would include the case law dealing with joint custody orders outlined above.

4.7 In Cowling, decided in 1998, the Full Court affirmed and re-stated the pre-Reform Act criteria for determining interim residence arrangements. Those criteria are that the child’s best interests will normally be met by orders that will ensure stability in the child’s life pending a full hearing of the relevant issues in dispute, and that such stability will usually be promoted by an order that maintains the existing residence arrangements, unless there are ‘strong or overriding indications to the contrary’.

**Perceptions and practices**

4.8 Questionnaires were issued to solicitors, counsellors, mediators, and solicitors’ clients, and personal interviews were conducted with legal practitioners, counsellors, mediators, judges and parents. In addition to specific questions about pre- and post-Reform Act residence arrangements, the questionnaires and interviews canvassed more generally practitioners’ personal views of the shared parenting aspect of the reforms, and the extent to which the amendments had affected their practice and their advice to clients. Solicitors and counsellors were also asked to reflect on their clients’ understandings of the law and on the practices of the Court and interim hearings were observed in 9 registries of the Family Court.

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15 In the Marriage of Cowling (1998) FLC 92-801.
17 Ibid.
18 Ibid at 728.
19 In the Marriage of Cowling (1998) FLC 92-801 (and see also In the Marriage of Cilento (1980) FLC 90-847; (1980) 6 Fam LR 35).
20 In the Marriage of Cowling (1998) FLC 92-801 at 85,006.
Parents

4.9 Parents’ perceptions of the reforms were gleaned in a number of ways. Solicitors and counsellors who were interviewed were asked to comment on their clients’ understandings of the reforms, questionnaires were issued to clients of family law solicitors in early 1999,21 and personal interviews were conducted with a selection of parents who had parenting orders or agreements in late 1999. Parents’ perceptions were also gauged by observations of self-represented litigants in interim hearings and as evidenced by submissions made by litigants in the surveyed Family Court judgments, including descriptions of the parents’ views in Family Reports.

4.10 Many of the solicitors and counsellors who were surveyed noted that there had been a sudden demand by fathers for ‘equal time’ residence arrangements when the reforms came into operation. The vast majority (85%) of respondents to the Court Counsellor questionnaires reflected that the reforms had increased the expectations of fathers and correspondingly affected the expectations of mothers. The following comments are examples of those perceptions:

‘A lot of men think the reforms mean they have more rights eg. the right to have the children half the time. A lot of women think the changes mean they can never move, or they have to let the father have shared (50/50) residence.’

‘There is a higher expectation (by men especially) of shared parenting orders (but not always resulting in hopes being met).’

‘Men frequently take it to mean that shared parenting is automatic.’

‘I often find myself explaining that the concept of shared parental responsibility does not mean that children live half the time with each parent.’

4.11 The responses to the client questionnaires issued in 1999 disclosed a divergence between the views of mothers and fathers. The concepts of ‘equality’, ‘fairness’ and ‘justice’ were central to many fathers’ understanding of the reforms. Comments linking shared residence to child support were also prevalent among the responses by male clients.22 The following selection provides an example of the men’s views:

‘The 1996 legislation is certainly not having the impact on the Courts it should have. I believe Courts should assume parents will share kids unless a problem with either parent is cause for concern. Men lose the house, children, and community, then are expected to pay. W ages are not high enough to support this: NOT FAIR!’

‘As an individual growing up I believed all people were equal in the eyes of the law. It was a huge shock to me to find that because I am a male my rights with regard to children are not the same as the mother’s. My solicitor and barrister made it clear to me that I was disadvantaged due to being the father. In an egalitarian society both sides should have an equal say and the arguments weighed up according to their merits. The whole system needs to be overhauled. Evidence of the frustration felt by fathers is on the news constantly. Added to this is the manipulation of the system by mothers – no doubt precipitated by solicitors.’

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21 n =82 (49 women; 33 men).
Similar views were evident in some of the unreported final judgments that were surveyed. For example, in a 1999 case in which the father sought an actual shared residence arrangement, the Family Report noted:

'The father] holds firmly to the conviction that the scenario which he envisages is the only conceivable enactment of absolute justice.'

In one 1997 case, the father (who was self-represented) submitted that the Reform Act had increased the legal 'rights' of fathers. Although the case related to contact, it shows that some parents have read the reforms as creating entitlements for 'non-custodial parents'. The Judge in that case said:

'The father] made it plain that the main event which had triggered the present application was the massive amendments to the Act in June 1996. He expressed the view that the new provisions relating to children entitled him to a greater degree of contact. It transpired that he had not actually read the Act but had gained this impression by newspaper reports and other anecdotal evidence.'

Women's responses to the client questionnaires tended to reflect a different emphasis, one that focussed on the caregiving and domestic labour consequences of the residence arrangements, and upon the impact on the children. The following selection provides an example of the women's views:

'Since our separation, I have struggled to maintain a stable and loving home despite moving house and taking up full time employment. The stability I have worked hard for is threatened each time my ex-partner takes me to court or mediation or counselling. I don't know how to address this problem other than to emphasise that the custodial parent is the one ultimately responsible for the care of the children. It shouldn't be a responsibility given equally, because the non-custodial parent may make decisions which impact negatively on his (or her) ex-partner and children. For example, when I moved house, my ex-partner sought court orders that the children were not to be moved from their school. As a consequence I now drive the children each morning on a round trip of 40 km before I go to work. We leave 45 mins earlier than necessary and the children are tired in the mornings. This long term decision by my ex-partner has impacted negatively on my and the children’s lives on a daily basis. It has not affected him.'

'Final court orders were made last October (1998). To minimise contact between my ex-partner and myself, the children have far more contact with their father than is comfortable for them. The children are unhappy and have exhibited both emotional and physical signs of their discontent. Soon after final orders were made, and I discovered they did not work, I found that it would be very difficult, time consuming, costly and inconvenient to have them changed.'

The majority of the clients who responded to the questionnaires had an arrangement in which the children's primary residence was with the mother and there was periodic contact with the father. The children were living with the father in 4 cases, and one of those was a consequence of the mother having fled the home to a refuge because of violence and she was trying to obtain a residence order. Only 4 of the parents had a shared residence arrangement.

Another noticeable feature of the responses to the parent questionnaires was the common use of the language of 'custody' and 'access' by parents, all of whom had been legally advised about the new terminology. The questionnaire responses also demonstrated that both men and women had a high degree of dissatisfaction with the 'family law system'.

4.17 Of the 65 parents who were interviewed, 17 either had a formalised private agreement (10) or an informal arrangement (7) about residence and contact. Three of the 17 arrangements involved the children spending equal amounts of time with each parent (two were for ‘week about’ and one involved the children rotating homes every two days). Another two involved flexible arrangements where the children lived primarily with the mother and the father had ‘unlimited access’ to the children. Significantly, only one of these five parents had sought legal advice. None was aware that the Family Law Act promotes shared parenting. Only one parent wished to have the agreement converted into court orders. The others said they preferred to keep the arrangements informal and flexible.

4.18 The ‘flexible’ approach to residence arrangements by parents who had not entered the ‘family law system’ stands in marked contrast to those parents with shared residence arrangements who appeared before the Family Court. We examined a random sample of post-Reform Act final judgments (discussed in more detail below). Although these are illustrative of some trends, judgments were not available from all registries of the Court and therefore are not necessarily representative of all judgments delivered during this period. In the sample we found 8 cases in which there had previously been consent orders about residence. In 7 of those 8 cases the arrangement had been for actual shared residence of the children, almost all of them a ‘week about’ arrangement. The eighth was a symbolic residence/residence arrangement in which the children had been living with the father for 10 nights per fortnight and with the mother for 4 nights per fortnight. In each case the mother was seeking to have the consent order varied because the arrangement had become unworkable for her. In several instances the mother said she had agreed to the orders under pressure, and in two there was evidence of violence by the father.

Solicitors

4.19 In the early stages of the research, solicitors’ personal evaluations of the Reform Act’s shared parenting agenda were mixed. Some thought the law had effected a real change to the balance of power between parents, while the majority saw the new law as simply ‘old wine in new bottles’. Most of those who were surveyed were not optimistic about the success of the shared parenting goal, and many expressed feelings of ‘reform weariness’. The following comments reflect those views:

‘The reforms seem to be a political exercise to satisfy lobby groups but in practice make no significant difference.’

‘It is merely a sop that makes the non-resident parent feel involved or that they have lost less.’

‘The reforms are essentially typical of most family law “reforms” – which are mostly just changes, not necessarily improvements – promise much, create a lot of confusion and deliver very little. You can’t legislate human nature.’

‘I believe that the reforms have only effected change in terminology. The legislation was clearly directed to the 5% of couples who cannot resolve child issues amicably but I do not believe that changing the names in any way alters the perceptions and attitudes of those people – they will always want their day in court.’

4.20 Practitioners were also asked to reflect on clients’ perceptions of and reactions to the reforms. The majority of such comments noted negative consequences, such as increased opportunities for conflict and litigation. The following are examples of solicitors’ comments:
'There is a public perception that contact parents, usually fathers, have more control over residence parents. There is also a perception that grandparents now have rights that they did not have before the amendments. I don't think the amendments have affected “reasonable” people very much at all. I think they have aggravated the aggressive and antisocial behaviour of others – perhaps as a result of disappointment of unrealistic expectations.'

‘Fathers are fighting harder than ever for more involvement in children's lives and for an EQUAL rights approach to children. A lot of litigation about children seems to have been encouraged. It to some extent has been seen as a charter for non-resident parents’ rights. Best interests of children perhaps diluted somewhat.’

‘The community sees the changes as cosmetic only and it is sometimes hard to sell the new terminology.’

4.21 Most solicitors’ views remained essentially unchanged at the time of the re-interviews in late 1999. The majority noted that parents/clients continue to use the term ‘custody’ rather than ‘residence’, even after the new law has been explained to them. Some solicitors suggested that the only clients who are familiar with the new terminology are those who have ‘had some exposure to the system’. As one practitioner commented:

‘ Anyone who knows about residence is probably a voracious litigator.’

4.22 The results of the May 1997 survey of solicitors showed that many practitioners at that time continued to approach ‘residence’ as though it were ‘custody by another name’. Further questionnaires were issued to solicitors in July 1997, February 1998 and April 1998. This misconception did not change significantly over time. One-third of respondents to the July 1997 questionnaire, 44% of the respondents to the February 1998 questionnaire and 26% of the respondents to the April 1998 questionnaire said that ‘residence’ represented a change from custody in name only. By the time of the re-interviews with solicitors in late 1999, the majority said that the language of ‘residence’ had become ‘instinctive’ or ‘second nature’ for them, but admitted that, ‘in reality’ most practitioners still understood the term to mean custody.

4.23 The early questionnaires (during 1997 and 1998) showed that very few solicitors (6% of those surveyed) were ‘regularly’ using symbolic residence/residence orders when formulating orders, although 47% said they ‘sometimes’ drafted orders in that way. By contrast, 45% of the surveyed solicitors routinely used a ‘residence and contact’ format.

4.24 Most practitioners noted factors such as the parents having ‘a working relationship’ or ‘fairly open lines of communication’ as pre-requisites for the use of symbolic shared residence orders. However, many solicitors (61%) said they were more likely to seek a residence/residence arrangement if acting for a father with child support obligations, than if the client was the mother and primary carer of the children. The ‘psychological benefit’ to the father of allowing him to ‘feel as though he has equal responsibility’ for the children was often referred to as a consideration in deciding to use a symbolic shared residence format.

4.25 By the time of the re-interviews in late 1999, there had been a shift in favour of the symbolic residence/residence format, with many solicitors saying they now use such orders as often as residence and contact orders. Again the sentiments about the psychological benefits to fathers – ‘so they feel like they’re not just the weekend parent’ – were stressed. The desire to reduce child support payments also continued to be a factor in the decision to use symbolic residence/residence orders. Some practitioners noted that their decision about the form of orders depended on the amount of contact involved, with a shared residence framewor
being used only when there is contact for ‘more than every second weekend’. For others, the client’s instructions were decisive. This did not necessarily mean that the client had used the word ‘residence’. For example, one solicitor described her practice in this way:

‘Some want a definite custody concept and I tend to use residence and contact with them. Others talk more about the amount of time they want the kids to spend with each parent, and for them I frame orders as residence/residence.’

4.26 In the 1999 re-interviews with solicitors, a number of practitioners in Queensland and Victoria noted that symbolic shared residence arrangements had resulted in a reduction of social security entitlements for some clients. These clients, who were the primary caregivers under such orders, had had their Family Allowance payments reduced because Centrelink staff took the view that the parents were substantially sharing the care of the children. Interviews with members of the Social Security Appeals Tribunal (SSAT) suggest that this involved an interpretation of the purpose of the Reform Act. In other words, symbolic shared residence orders have been interpreted consistently with the government’s intention of encouraging shared parenting, so that both parents are construed as having ‘legal responsibility’ for the children sufficient to demonstrate eligibility for a share of the Family Allowance payment: the financial implications of shared residence orders are discussed later in this chapter.

4.27 When first interviewed in 1997 and 1998, the vast majority of solicitors did not favour the use of actual shared residence orders. This remained the case in late 1999. At the earlier stage, a number reported having clients who had agreed to shared residence arrangements in (Family Court) counselling or mediation sessions. Some said this was a consequence of counsellors telling clients that the court will require parents to share the parenting of their children. In each case the legal practitioner expressed concerns about the impracticability of the arrangement and many were critical of counsellors for pressuring clients to agree to shared residence. Solicitors during the later interviews again made similar observations and criticisms. A number of practitioners talked about seeing clients who had sought advice about setting aside consent orders for ‘equal time’ residence arrangements that were not working.

4.28 Solicitors were also asked whether there had been any changes to the hearings of children’s matters as a consequence of the reforms. During the early interviews (1998), several practitioners commented on the continued use of pre-Reform Act terminology by some judges, and the tendency of some to speak of ‘awarding’ residence to a parent. Several solicitors in Adelaide reported that interim orders for children to live ‘week about’ or on a ‘split week’ basis with each parent had become commonplace in the Adelaide registry since the reforms. This practice had reportedly ‘dropped off’ when practitioners were re-interviewed in late 1999, at which time the majority of interim decisions were being made by the newly appointed Senior Registrars.

**Counsellors**

4.29 Counsellors’ responses to the questionnaires suggest that they are generally more enthusiastic about the shared parenting emphasis of the reforms than lawyers are. The following are examples of comments made by Family Court counsellors:

‘On the whole I believe these changes should give children a better deal and allow them contact with both parents. ... I think the changes are positive - apart from protection
issues of violence and abuse most people do not have legal problems, they have
relationship problems.’

‘On the whole the reforms are a step in the right direction & I feel positive about their
thrust & hopeful that they will prove beneficial to children.’

‘It is an opportunity for attitudinal change and to remind the community of children’s
needs & rights. But there was an inadequate level of public education about the new Act.’

4.30 In their general observations about the reforms, many of the private counsellors also stressed
their personal commitment to the ‘spirit’ or ‘philosophy’ of the reforms. However, although
counsellors generally supported the ‘shared parenting’ ideal, most viewed ‘equal time’
arrangements as disruptive and destabilising for children, and said they would not
recommend them unless there was an existing high level of co-operation between the
parents. The vast majority of those counsellors who were surveyed agreed that there is a
considerable divergence between the theory and practical reality of shared parenting, with
most noting that the reforms have failed to make a difference to post-separation arrangements
in practical terms. The following comments were made by private and community-based
counsellors about the reasons for the failure of shared parenting in practice:

[The failure of shared parenting] is not necessarily a reflection on people's genuineness.
Most parents would -- and do -- agree with the theory of shared responsibility but find
the practical reality difficult, often as a result of the personal pain of separation.’

‘Mostly women end up carrying lots of responsibility and male partners still have
children for limited time and do not consistently make themselves available to the
children.’

‘Few separated couples are adult enough to work together as a parenting team.’

‘[Shared parenting fails] because often cases involve domestic violence and the abuse
continues through the children.’

‘The non-resident parent often does not accept any or only limited parental
responsibility.’

‘There are benefits in highlighting parents' need to agree on specific parenting issues,
but in circumstances where power and control are motivating forces, every time
re-negotiation takes place on an order, power is given to the objecting parent. This has
become a new tool of control and an endless cycle of court orders.’

4.31 A common theme in the responses to questionnaires and in interviews with counsellors was
that the reforms have been misinterpreted by parents (mainly fathers) as requiring ‘50/50
residence’ arrangements. A number of counsellors said they have often had to explain to
fathers that the law does not require that outcome, and such explanations were said to have
led to feelings of anger and a sense of ‘injustice’ among fathers. In the words of one counsellor:

‘The Reform Act has emboldened parents to ask for equal time. That's how many fathers
have interpreted it. I tell them, "It means each of you has responsibilities, but how you
share your time is up to you or the Court. The law doesn't say equal time." They get very
disappointed. They tend to see the Family Court as a terrible place.’

4.32 In terms of their own practice with clients, the Reform Act has had relatively little impact
upon the practice of most counsellors. The reasons given for that lack of change centred on a
perception that the reforms have embodied the long-standing approach of counsellors to
post-separation parenting. Many counsellors were critical of lawyers and of the legal advice
given to parents about shared parenting, which they saw as failing to adapt to the shared parenting spirit of the reforms. Criticisms centred on the suggestion that lawyers and judges were treating the changes as ‘just words’, and were continuing to frame orders in a way that reproduces custody and access arrangements. The following comment provides an example:

’It seems that law yers have just been substituting the new terminology to fit in with the old concepts. It seems to me that the important but subtle shift required in thinking about the concepts the reform act was designed to introduce is not easy for them to grasp.’

4.33 Counsellors were more prepared to encourage parents to deviate from their pre-separation division of responsibilities than were lawyers, and more likely to promote a regime of shared residence and responsibilities. Counsellors however were not familiar with, nor felt bound by, the relevant case law, such as the ‘existing arrangements’ principles from Cowling23 and Cilento,24 and this may account (at least in part) for the differences between the advice they give to clients and that given by solicitors about residence arrangements. Counsellors were also usually not familiar with the actual provisions of the Reform Act, but rather tended to have a generalised understanding of what the reforms were about. For example, some counsellors made reference to the ‘contact parent’s right’ to see the child, and several believed the law ‘requires [counsellors] to encourage joint parenting.’

4.34 Both Court counsellors and their private and community-based counterparts were generally more supportive of symbolic shared residence arrangements than solicitors and more likely to suggest such an arrangement to clients. The use of symbolic residence/residence arrangements remained popular with counsellors in 1999. They referred often to the psychological benefits to fathers of ‘the language of shared residence’ as the reason for adopting that format.

J udges and judicial registrars

4.35 Judges and judicial registrars were interviewed during late 1997 and early 1998, and re-interviews were conducted in late 1999. In the early interviews, most said their approach to making residence orders had not changed as a result of the reforms, and this remained their view in later interviews. A few however had developed a practice of making equal time orders at interim hearings, or as close to that as possible, whenever the circumstances allowed. Several people gave ‘equality’ reasons for this practice, such as the need to be ‘even-handed’ with the parents, or avoiding the creation of a status quo in favour of one parent prior to the final hearing. These respondents saw this approach as reflecting the ‘spirit’ of the reforms. Their views had not changed in 1999, and statements such as ‘I like to do it to keep it even’ were again offered as the rationale for making actual shared residence orders at interim hearings.

4.36 On the other hand, several judges said that they felt that orders for the children to spend equal amounts of time with each parent would rarely be workable for those families who appeared before the Court, and/or commented that such arrangements seemed designed to placate parents rather than serving children’s interests.

4.37 Judges were generally more prepared to use ‘symbolic’ residence/residence orders than actual shared residence arrangements. Approximately one-third of the judges who were initially

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23 In the Marriage of Cowling (1998) FLC 92-801.
24 In the Marriage of Cilento (1980) FLC 90-847.
surveyed said they were willing to frame final orders in terms of symbolic residence/residence when possible, provided that it would not be a source of constant dispute between the parents. At the time of the re-interviews many judges remained willing to canvass the idea of symbolic residence/residence orders at final hearings, again provided there was no issue of violence or possibility of harassment of the primary carer. Most thought that the making of such orders should be confined to situations where there is a substantial ‘contact’ period. However, several judges said the determining factor was the level of co-operation between the parents – whether the parties ‘can get along’ – rather than the amount of time spent with the children. Like the solicitors and counsellors, some judges spoke of using ‘symbolic’ residence/residence orders for psychological reasons, for example, to ‘give dad a sense that he has quite a lot of responsibility’.

4.38 On the issue of the change in terminology, it was clear that by late 1999 some judges were still adjusting to the language of ‘residence’ and ‘contact’, as well as to the new conceptual framework. For many judges, particularly the more long-standing judges, the practical reality is that ‘residence’ continues to have the same meaning as ‘custody’. In the words of one judge:

‘We’ll get used to it, but it will probably take 10 years to sink in.’

Senior Registrars

4.39 In late 1999, interviews were conducted with 10 of the 21 new Senior Registrars who had been appointed to determine interim children’s matters. Like many of the solicitors and judges, the registrars said that use of the new terminology had become instinctive, but that the concepts of residence and custody were ‘a bit interchangeable’ in practice. One noted that Family Reports often still referred to ‘custody’.

4.40 On the issue of how orders are framed, all of the Registrars who were interviewed expressed a preference for residence and contact orders, and none was in favour of making actual residence/residence orders, except by consent. Several registrars suggested that applications for shared residence orders are often pursued because of their child support implications. Some were critical of the use of ‘actual’ shared residence orders, and spoke of their inappropriateness for the bulk of parents who seek court orders. As one registrar put it:

‘The shared parenting concept is totally at odds with the types of parents who litigate.’

Court orders

4.41 The research included a comparison of random samples of unreported interim and final judgments that were collected in three batches. Batch 1 includes cases heard in 1995 (before the Reform Act), batch 2 are those heard between July 1996 and March 1998 and batch 3 are cases heard between April 1998 and December 1999. The outcomes and approaches to decision making in the three groups were analysed and compared.

Interim residence orders

4.42 The number of interim parenting judgments analysed totalled 252. Interim hearings in the Family Court are conducted quite differently from final hearings. The matters are generally determined on the basis of affidavit material alone (‘on the papers’). Family Reports and

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25 See Family Law Act 1975 (Cth) s 62G.
other expert evidence are only rarely admitted, and the opportunities to test evidence are very limited. The application of a rule that limits the time for each case to a maximum of 2 hours (‘the 2 hour rule’) prevents the issue of the child’s welfare from being widely canvassed and allegations from being explored. The application of the 2 hour rule varies across Family Court registries. The following is a breakdown of the figures for each type of order.

**Form of order found in unreported interim judgments**

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<tr>
<td>Custody and Access</td>
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<tr>
<td>Shared Custody</td>
<td>8</td>
<td>13</td>
<td>7</td>
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<tr>
<td>Custody with no Access</td>
<td>54</td>
<td>62</td>
<td>57</td>
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4.43 The figures show that shared residence arrangements have not become the new norm in post-separation interim orders since the enactment of the Reform Act. The vast majority are framed as ‘residence and contact’ orders.

4.44 The judgments suggest that ‘symbolic’ residence/residence orders are being made at interim hearings but less frequently than orders for actual shared residence. This reflects the comments made by judges and judicial registrars about their practices. The amount of time children spent with the non-primary resident parent under ‘symbolic’ residence/residence orders tended to be greater than that spent with contact parents under the ‘residence and contact’ orders. Outcomes in the former cases suggest a tendency for children to spend 10 or 11 nights per fortnight with the ‘primary caregiver’, and 4 or 3 nights per fortnight with the non-primary carer (in addition to school holiday contact).

4.45 The breakdown of orders shows more orders for ‘actual’ shared residence than orders for ‘symbolic’ residence/residence. Joint custody arrangements were also found among the interim cases from 1995. However the analysis of the decision making in the cases shows that there has been a shift in the circumstances in which joint residence orders are made. The majority of the post-Reform Act cases in which actual shared residence orders were made did not comply with the principles about stability from Cowling and Cilento set out above. Rather, the outcome was often arrived at expressly to avoid creating a ‘status quo’ in favour of

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26 Order 30 rule 2A(1C) Family Law Rules.

one parent and thereby disadvantaging the other parent at trial, even where there were indications that the mother had been the primary caregiver before separation. For example, orders were made for the children to live ‘week about’ with each party (despite allegations of violence) in one 1997 case because the judge concluded that orders for residence and contact would give ‘one party something of an advantage over the other when it comes to deciding where they should live permanently’. The making of shared residence orders in circumstances where domestic violence has been alleged also demonstrates a shift from the practice of the Court as noted in Padgen above.28

4.46 In 5 of the Batch 3 cases where ‘equal time’ orders were made, the parties had previously had an agreement for ‘actual’ shared residence that had broken down. The mother in each of these cases had sought to have the arrangement varied at the interim hearing because, in her view, it had become unworkable, while the father had asked the Court to confirm the shared care arrangement.

Implications of interim residence arrangements

4.47 The implications of interim residence arrangements have also changed since the reforms were introduced. Prior to the Reform Act interim arrangements were expected to be in place for relatively short periods of time (usually several months). As a result of the current delays in reaching a trial date, interim arrangements are likely to operate for much longer periods (up to two years in some registries). By the time of the final hearing, the interim residence arrangements will have become ‘set in stone’ and may be difficult to vary, even if one parent has found them unworkable. In addition, the limits on legal aid funding for family law matters that were introduced in late 199629 mean that parties who are dependent upon legal aid will generally have exhausted their funds by the time of the interim hearing, and be unable to proceed to trial with representation. As a consequence, interim orders for shared residence of the children are more likely to become de facto final orders than they were prior to the introduction of the Reform Act, and are therefore of far more significance than their ‘interim’ nature suggests.

Final residence orders

4.48 The outcomes and approaches to decision making in a random sample of 229 unreported final custody / residence cases were compared. The tables below represent the form of orders found in each group, with numbers rather than percentages being used because of the relatively small numbers involved.

28 In the Marriage of Padgen (1991) FLC 92-231 at 78,596.
4.49 The majority of the post-Reform Act final orders in our random sample were framed as ‘residence and contact’ orders. For the most part, that outcome reflected the form of orders sought by the parties. However, residence and contact orders were also made in a number of cases in which one parent (the father) had asked for a shared residence arrangement. The Court’s rejection of such applications usually followed from findings that suggested the parents would be unable to co-parent, or because of other ‘disqualifying’ findings relating to one parent (such as findings about domestic violence).

4.50 The absence of any joint custody orders in the 1995 judgments is consistent with the case law principles governing such orders. While such orders have always been available to the Court under the Family Law Act, this clear line of pre-Reform Act authority cautioned against their use in contested proceedings unless the parents could demonstrate a relationship of ‘mutual trust, co-operation and good communications’. Parties who litigate over the care of their children are often those least likely to have such a relationship. The relevant comparison with the ‘old’ joint custody orders is with ‘actual’ shared residence orders. Although such arrangements remain uncommon in the post-Reform Act cases, the 1998/99 judgments suggest there may be an emerging, albeit small, trend towards the making of such orders in contested proceedings. It must be stressed that the numbers involved are very small – the category of actual residence/residence orders in the Batch 3 judgments consists of six cases – and thus the ‘trend’ should be treated with caution. Furthermore, four of the cases were decided by two judges, and thus there are also questions about how representative of the bench as a whole these outcomes are. Nevertheless, some comments can be made.

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30 In the Marriage of Padgen (1991) 14 Fam LR 743; (1991) FLC 92-231; H and H-K (1990) FLC 92-128; In the Marriage of Forck and Thomas (1993) 16 Fam LR 516 (these cases are discussed earlier).

31 In the Marriage of Padgen (1991) 14 Fam LR 743; (1991) FLC 92-231 at 78,596.
4.51 If any trend can be said to be emerging, it is consistent with the emergence of actual shared residence orders at interim hearings during 1996 and 1997 (see discussion of Interim Residence Orders above). In three of the six cases the parties had been operating under interim orders in that form for some time.

4.52 The decision making in each of the six cases reflects a clear departure from the principles in Padgen and Forck v Thomas. In each of the three cases in which the parties had a pre-existing equal time arrangement under interim orders, the mother had sought to have that arrangement varied at trial because it had proved unworkable for her. The Court continued the shared arrangement in two of those cases over the mother's objections, and despite misgivings about its usefulness as expressed in the Family Reports. In one, the psychologist had suggested that the father's desire for an equal time arrangement was 'motivated by his own needs', and in the other the counsellor had pointed to the father's use of the shared arrangement to engage in 'competition' with the mother. In the remaining actual shared residence cases there had been no previous history of shared residence, and it was imposed on parties who had not asked for it. In one, an alternating weekly arrangement was imposed on the parents despite the mother's fears for her own and the child's safety which the Court had found to be real. A second case resulted in orders for a 'week about' living arrangement, despite findings that the father had engaged in 'controlling and manipulative behaviour' and that the parents had incompatible approaches to parenting, and in particular, to dealing with their son's emotional problems.

4.53 Another noticeable shift since the introduction of the Reform Act is the use of 'symbolic' residence/residence orders at final hearings. In 6 of the 8 Batch 2 cases in which symbolic residence/residence orders were made, the children were to live with the 'contact' parent for more than the traditional access period. Of the Batch 3 cases, 6 of the 10 'symbolic' shared residence orders involved the children living with the non-primary caregiver for three or more nights per fortnight (as well as school holiday contact). The difference between the amounts of time given in these orders and the former access regime of two nights per fortnight has implications for the amount of child support payable to the primary caregiver.32 This is discussed later in this chapter.

Financial implications of symbolic shared residence orders

4.54 The research found that symbolic shared residence orders have resulted in reductions to the amount of Family Allowance paid to primary caregivers: see discussion of Solicitors' Practices and Perceptions above. The general rule is that the Family Allowance is to be paid to one parent only, unless a declaration has been made under section 869 of the Social Security Act that it is to be split between the parents. To be eligible for Family Allowance, the applicant must show that he or she has 'legal responsibility' for the child.33 Prior to the introduction of the Reform Act, the Guide to Social Security Law ('the Guide') noted that legal responsibility is 'the right to have and to make decisions concerning the day-to-day care and control of a child', and provided that a custody order was evidence of 'legal responsibility'. Non-custodial

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33 Social Security Act 1991 (Cth) s 1069.
parents could only apply for a share of the payment in relation to periods of continuous access with the child of 14 days or more (‘the 14 continuous days rule’).34

4.55 Changes to the Social Security Act and the Guide that were introduced to ensure consistency of terminology with the Reform Act, replaced the references to ‘care and control’ of children with ‘care, welfare and development’. The Explanatory Memorandum to the Reform Act made it clear that no substantive changes were intended to result from these changes.35 However, Sutherland’s 1998 Annotations to the Social Security Act36 suggested that the effects of the family law amendments on the Social Security Act ‘may include’ the possibility that, as both parents have parental responsibility for the child (unlike the former custody regime), both ‘will necessarily be “legally responsible” for the child for the purposes of the definition of “dependent child”’ in section 5(2)(a) of the Social Security Act’. The Guide was subsequently amended (as of 1 January 1998) to allow Family Allowance to be paid to non-resident parents who have the care of their children for more than 30% of the year, even if the 14 continuous days rule is not satisfied.37 It provides that the proportion of family allowance each ‘customer’ receives is based on ‘the amount of time the child spends in each customer’s care’ under the terms of the order or parenting plan, but that ‘once a declaration is made ... the actual physical residence of the child is not relevant to the ongoing payment of FA (Family Allowance).’38

**SHARED PARENTAL RESPONSIBILITY**

4.56 Under the provisions of the previous Part VII, the parent in whose favour a custody order was made was vested with responsibility for deciding day to day care matters, and the access parent’s authority was correspondingly limited.39 As joint custody orders were rarely made, responsibilities for daily care and decision making were not normally shared between parents after separation.40 On the other hand, joint guardianship orders, which created joint responsibility for the children’s long-term welfare, were commonplace in contested proceedings.41 In the absence of court orders, parents had ‘joint custody’ of their children and

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34 Elliott v Secretary, Department of Social Security (1995) 61 FCR 240.
36 P Sutherland (ed), Annotations to the Social Security Act 1991 (4th ed, Leichhardt, Federation Press, 1998) at 42. The Guide now states that ‘Generally, parenting plans or orders give each parent equal legal responsibility for the child. However, in some cases it may be specified in the parenting plan or parenting order which person has the legal responsibility for the child. If it is not specified that one person has legal responsibility for the child, it is taken that each parent has joint legal responsibility for the child.’
37 See Bloomfield v Department of FACS [1999] AATA 627 (6 August 1999). But see now also the changes noted in footnote 38.
38 Note that from 1 July 2000, Family Allowance became ‘Family Tax Benefit’. The Family Assistance Guide, published by the Department of Family and Community Services, points out that 2 or more adults can be eligible for Family Tax Benefit, provided the adult cares for the child for at least 10% of the assessment period: see 2.1.140 ‘Shared Care of a FTB Child’ available at http://www.facs.gov.au/faguide/guide/21140.htm.
39 The previous s 63E(2) of the Family Law Act 1975 (Cth) provided that a person who was ‘granted custody of a child’ had ‘the right to have the daily care and control of the child’ and ‘the right and responsibility to make decisions concerning the daily care and control of the child.’
40 The Butterworths Australian Family Law Service noted in its commentary on the former s 64 of the Family Law Act that ‘it may be assumed that joint custody orders, which give joint responsibility for daily care and control of the children (see s 63E(2)), will be rare.’
41 See the previous Family Law Act 1975 (Cth) s 63E(1); In the Marriage of Todd (No 1) (1976) 1 Fam LR 1109; 8 ALR 602; (1976) FLC 90-001; In the Marriage of Cullen (1981) 8 Fam LR 35; (1981) FLC 90-695.
were expected to exercise their responsibilities for making daily decisions jointly, while 'each parent' had authority to exercise their guardianship functions without the consent of the other parent.42

4.57 The Reform Act replaced the previous division between guardianship and custodial responsibilities with the concept of both parents retaining their full quotient of 'parental responsibility' after separation, even when residence and contact orders have been made.43 However, the consequences of this regime were not made clear in the legislation, and in fact, the various provisions of the new Part VII are contradictory as to the practical operation of parental responsibility.

4.58 While a residence order in favour of one parent does not of itself diminish the other parent's daily responsibilities for the children,44 section 61D(2)(b) implies that a non-resident parent's responsibilities may be diminished to the extent 'necessary to give effect to the [residence] order'. Because of this confusion, it is unclear whether parents retain their authority to make day to day decisions even though the children are not living with them at the time, or whether each parent has day to day responsibility only when the children are physically in their care. There is also no guidance as to the manner in which parents should exercise their responsibilities after separation, i.e. whether they can act independently or must consult one another before making decisions.45

4.59 These uncertainties led a number of academic commentators to predict that the reforms would lead to increased litigation about, and a greater use of, detailed specific issues orders allocating particular aspects of responsibility to each parent.46 The Hon Dr Peter Nygh predicted that practitioners might routinely draft and seek specific issues orders 'specifying the range of authority for the “residence provider” to avoid ‘the interventionist non-residential parent’ from making unilateral decisions about the children's care.47 He suggested that the availability of specific issues orders might mean 'the new law will not be more simple and less divisive, but quite the reverse'.48 Dr Richard Ingleby also identified specific issues orders as providing 'warring parents with the opportunity to seek orders relating to the minutiae of each other's care of the child'.49

4.60 In light of the legislative uncertainties and academic predictions, the research sought to investigate the ways in which consumers of the new law have interpreted it in practice.

42 The previous Family Law Act 1975 (Cth) s 63F; In the Marriage of Newbery (1977) 2 Fam LR 11,652 at 11,655; In the Marriage of Talbot (1993) 16 Fam LR 910.
43 Family Law Act 1975 (Cth) ss 61D(2) and 64B(2) and (3).
44 Ibid.
45 Although one commentator argued that the use of the word ‘each’ in s 61C of the Family Law Reform Act implied that parents would not have joint responsibility and therefore are not required to consult each other before making decisions: R Ingleby, ‘The Family Law Reform Act – a Practitioner’s Perspective’ (1996) 10 Australian Journal of Family Law 48 at 50.
48 Ibid.
This included surveys of the perceptions of, and approaches to, the concept of shared parenting by practitioners and parents, as well as an examination of the types of orders being made about parental responsibility by the Family Court and the relevant case law developments.

**Case law developments**

4.61 The Full Court in *B and B* was not required to decide the issue of how parental responsibilities for children should be shared under the *Reform Act*. However, the Court indicated in obiter that while consultation should occur between the parents in relation to major issues (such as major surgery, place of education and choice of religion), there is no need for parents to consult each other in relation to day to day matters unless there are court orders to the contrary:

> In the absence of a specific issues order, we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day-to-day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated. ... As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children.  

4.62 This approach essentially mirrors the pre-*Reform Act* situation in relation to the division of post-separation responsibilities as discussed above.

**Perceptions and practices**

4.63 The research set out to assess the extent to which there have been noticeable shifts in the division of post-separation parenting labour as a consequence of the reforms, as well as how lawyers and judges have interpreted the concept of shared parenting in the *Reform Act*. We attempted to discern this by way of interviews with parents and solicitors, and by issuing questionnaires to parents, solicitors and counsellors. We also looked at the types of specific issues orders being drafted by solicitors and made by the Family Court, and the extent to which these resembled or differed from the kinds of orders made prior to the reforms. Parents' expectations were also gleaned from observations of Duty List matters in a number of Family Court registries.

**Parents**

4.64 Parents' responses to the questionnaires issued in 1999 suggest that men are more likely than women to believe that shared parenting after separation will be a workable arrangement: 61% of the male respondents thought the idea of separated parents sharing the responsibilities for

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51 Ibid. See also Cookev Stehbens (1999) 24 Fam LR 5; (1999) FLC 92-839 for discussion of this aspect of the reforms.
their children would work for them, while only 25% of the women thought it would work for them. Many of the women who responded to the questionnaires were concerned about the scope provided by shared parenting for the non-resident parent to harass the primary caregiver. Several suggested that shared parenting could not be achieved for them because their former partners preferred to use the court system (or threatened to do so) as a mechanism of ‘control’, rather than ‘compromise’. Other reasons given by women for the unworkability of shared parenting included issues of domestic violence, poor communication, lack of trust, and conflicting lifestyles and values.

4.65 Solicitors who were interviewed also commented on the divergence between their male and female clients in relation to their expectations of shared parenting. Many solicitors noted that although some women were happy about the idea when advised about the new law, particularly at the prospect of the father finally having to take some of the responsibility for the children, fathers tended to find the shared parenting idea ‘more palatable’ than mothers. Many women were said to respond with anxiety about the practicalities of such an arrangement, or with fear of ongoing battles with their former partner.

4.66 As noted above in relation to shared residence arrangements, very few of the parents who were interviewed were effectively sharing the caregiving responsibilities for their children, and those parents who were exercising shared responsibilities had not, and had not sought to, come into contact with the legal system: see discussion of parents’ perceptions of shared residence earlier in this chapter.

4.67 A number of contravention applications relating to alleged breaches of parenting orders were observed in the duty lists of several registries, and these provide some insights into parents’ perceptions of the reforms. They suggest that there are certainly non-resident fathers who have interpreted the shared parenting rhetoric as giving them a right to be consulted by the resident parent about day to day matters. In all but one case, the applicant was a self-represented father. Many applications were dismissed because the alleged breach was not made out, or because the breach was of an informal arrangement rather than an order. In some cases, a technical breach was made out, but the judge or judicial registrar considered it to be trivial and no sanction was ordered. Several of those applications were dismissed because the judge considered the application had been motivated by a desire to harass the resident parent, rather than because of genuine concern for the child’s welfare.

4.68 For example, in one case, the contact father had brought a contravention application and sought a specific issues order permitting him to take the parties’ teenage son to a counsellor, because the boy had been discovered reading a pornographic magazine in his bedroom. The father, who was self-represented, argued that the resident parent had breached her ‘parental responsibility’ by failing to consult him about the child’s punishment, that she had ‘no right’ to deal with the issue unilaterally, and that he had ‘a right as a father’ to be consulted about the matter. That argument was put despite the existence of a family violence order which restrained the father from approaching the resident parent ‘save in the presence of a police officer’. The father’s application was not successful.

Solicitors

4.69 Like the female clients who responded to our parent questionnaires, many solicitors who were interviewed in 1997 and 1998 commented on the scope for increased disputes engendered by the shared parenting expectation. Solicitors also talked of the higher level of
The Family Law Reform Act 1995: the first three years

scrutiny of, and intrusiveness into, the resident parent’s life since the shared parenting concept came into operation. The following comments provide examples of practitioners’ views:

‘[The reforms] encourage non-resident parents to imagine they have a significant role in their children’s upbringing, but in high conflict families this can’t work and the resident parent will get sole parental responsibility. This is likely to make the non-resident parent feel more frustrated and embittered than under the previous regime as a perceived right is lost whereas with custody orders, the resident parent automatically had legal authority as to day-to-day matters. The reforms work only for those couples who are able to work with a high degree of co-operation in the interests of their children – these people would have done this anyway.’

‘In practice the reforms have allowed abusive partners to further harass the children’s carer.’

4.70 In responses to the questionnaires, the majority of solicitors (77%) noted that there is a considerable divergence between the theory and the reality of shared parenting, and agreed that most of the day to day responsibilities for children continue to be exercised by one parent (usually the mother) in practice. Most respondents (73%) also said that there is no difference in practice between the current powers and responsibilities of a non-resident parent and those of an access parent prior to the reforms. The following comments were typical on these points:

‘The decision making “powers” of the contact parent are more illusory than real.’

‘Time makes them forget their responsibilities gradually.’

‘Generally one party takes on responsibility so it is trite to say that both retain parental responsibility.’

4.71 Almost half of the solicitors who were surveyed by questionnaire (48%) said that they routinely drafted or sought specific issues orders detailing aspects of parental responsibility. For most respondents (60%) their practice in this respect had not been affected by the passage of the Reform Act. However, it should be recalled that the majority of solicitors who responded to questionnaires believed that residence was essentially no different to custody, and therefore would see no need to draft additional orders about parental responsibility. By the time of the 1999 interviews, the use of detailed specific issues orders had become more commonplace. Many of the solicitors who were re-interviewed said they now routinely include specific issues orders about day to day responsibilities in consent orders, and that their orders have become more detailed. The level of detail appears to depend to some extent upon whether the client is the resident or non-resident parent. This approach was summarised by one practitioner in the following way:

‘It all depends on who you’re acting for. If you’re acting for the [non-resident] father you try to keep things as open and flexible as possible, and if you’re acting for the mother who is in fact the primary carer, you’re trying to keep as much decision making power for her as possible [and limit the father’s responsibilities].’

4.72 The most common issues dealt with by specific issues orders are details about contact changeovers, contact with grandparents, enrolment in school, provision of school reports (who will be responsible for obtaining them and who will meet the cost), and responsibilities regarding sporting activities (who will deliver and who will collect the children etc).
One solicitor said she routinely includes orders requiring the school to notify the non-resident parent about parent-teacher meetings and in case of the child’s sickness, as schools tend to ‘not take any notice of’ the non-resident parent unless ordered to do so.  

**Increase in post-order disputes**

4.73 A number of solicitors who were interviewed said that there had been an increase in post-order disputes between parents since the reforms came into force, with many noting that it had become common for clients to return wanting help to resolve ‘petty disputes’. These views, expressed in 1997, remained the same in 1999. The majority of such disputes were said to involve a challenge by the non-resident parent to decisions made by the resident parent, or entailed criticisms of the resident parent’s care of the children. Some solicitors attributed this phenomenon to fathers having increased expectations of parenting ‘rights’ under the reforms. A number of practitioners expressed this in terms of fathers’ desire for ‘rights without responsibility’, citing examples of men who had orders for generous amounts of contact but expected the mother ‘to do all the work’. The following explanations for the Reform Act’s failure to effect a shift in the division of parenting labour exemplify the comments made by solicitors:

- ‘Practically speaking, the primary resident parent still has to make most decisions for the children, just as the “custodial” parent did.’
- ‘It is unrealistic to encourage both parties to suddenly play a significant role in caring for the children, when the fact is that prior to separation only one of the parents usually performed the central carer role.’
- ‘Although the father gets four or five days a fortnight [with the children], he still acts like a “contact” parent and expects her to do all the washing of the children’s clothes, buy all the clothes and shoes and books etc, provide everything necessary for the children during their contact with him, attend to school requirements etc.’

**Counsellors and mediators**

4.74 The reflections of counsellors and mediators provide a useful gauge of parental attitudes to shared parenting as these practitioners see the parents together (unless contraindicated by family violence concerns). In responses to questionnaires, the vast majority of Court counsellors (96%), private and community counsellors (84%), and mediators (84%) noted that there is a divergence between the ‘theory’ and ‘practical reality’ of shared responsibility for children. Many respondents, as well as most of those counsellors who were interviewed, noted that mothers continue to be the parent who usually takes primary responsibility for caregiving after separation, and that men tend to have the children for limited periods. Some also noted that many men ‘do not consistently make themselves available to children’. The following comments provide examples of their reflections:

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'W hen parents have not exercised responsibility jointly regarding children at separation, usually conflict and unresolved issues prohibit the theoretical concept of joint responsibility to operate in any effective way.'

'The parent with whom the child 'lives' still seems to be left with the major responsibility for parenting and most often this still appears to be the mother.'

'[P]arental responsibility is still closely aligned to the pathology of the previous relationship.'

'Practical reality of separation means children's lives cannot calmly be distributed between two households unless parents have minimum conflict, and maximum ability to communicate. Not common factors in separation!'

'At a practical level shared parenting requires high levels of co-operation, a willingness to share responsibilities and a readiness to shed and delegate parental responsibility. Realistically much of what is required is unable to be achieved from 2 separate households.'

4.75 Some counsellors (both private and Family Court) noted that the reforms had raised the expectations of those non-resident parents who wished to play a greater part in their children's upbringing, and commented that such expectations were sometimes frustrated by the resident parent's resistance. However, like solicitors, many counsellors also reflected that the shared parenting concept had given non-resident parents increased opportunities to harass the resident parent by constantly challenging her care of the children and seeking review of the orders, as the following comment illustrates:

'There are benefits in highlighting parents' need to agree on specific parenting issues, but in circumstances where power and control are motivating forces, every time renegotiation takes place on an order, power is given to the objecting parent. This has become a new tool of control and an endless cycle of court orders.'

Orders made in contested proceedings

4.76 As mentioned earlier, the legislation does not set out the way in which parents' shared responsibilities are to operate in practice. A residence order is narrow in ambit and does not vest or take away decision making authority, other than to the extent 'necessary to give effect to it.' The meaning of this is not clear and there are several possible interpretations. For example, it may mean that although both parents retain their full quotient of responsibilities, each may only exercise their authority while the children are physically in their care. On the other hand, it could imply a duty of consultation that requires the parent to attempt to reach an agreement about decisions affecting the child.58

4.77 As discussed above, the Full Court in B and B suggested that this was not required for day to day decisions but should occur in relation to 'major issues' affecting the children. An additional


confusion about this is created by the absence of what one judge referred to as 'a neat dividing line between day to day and long term' matters. A related aspect of the shared parental responsibility concept that remains unclear is the extent to which the non-resident parent may use their power to make unilateral decisions while the children are in their care which contradict or undermine the decisions of the resident parent. To use the example of the non-resident father (discussed above) who wished to take his son to a counsellor, is he able to go ahead with that plan while the child is in his care even though it is contrary to the wishes of the resident parent?

Confusion about the meaning of 'shared parental responsibility'

4.78 Our survey of orders made in contested proceedings demonstrates that there is a great deal of confusion about the meaning of shared parental responsibility among the judicial officers of the Family Court. A large number of judgments contained no orders about parental responsibility. Some judgments contained orders giving sole day to day (and sometimes sole long term) responsibility to the resident parent. These tended to be made in cases where the non-resident parent was to have no direct contact with the child, or where there was a history of domestic violence or high level of conflict between the parents. A third group of judgments contained orders providing that each parent was to have day to day responsibility while the children were in their care.

4.79 Orders allocating specific aspects of decision making to each parent were rarely found among the contested matters. Rather, specific issues orders tended to be comparable to orders made in the pre-Reform Act cases, namely, orders that qualified or imposed conditions on one or both parent's authority. Typical of the orders made after final hearings were orders requiring the resident parent to provide copies of school reports and photos to the contact parent, and orders requiring the resident parent to consult the contact parent before making major medical treatment or choice of school decisions.

Rise in the number of specific issues orders

4.80 Our review of a sample of 1998/99 final judgments suggests that specific issues orders are becoming more commonplace. This is supported by Family Court statistics which show that there has been a considerable increase in such applications since the reforms were introduced. In 1996/97 14,253 applications were made, in 1997/98 there were 16,756, in 1998/99 the figure had increased to 18,190 and in 1999/2000, it had increased again to 19,424.

4.81 The review of 1998/99 final judgments also demonstrated that such orders have become more detailed over time, with some judges routinely listing in order those responsibilities that each parent will be responsible for exercising. The following excerpt from a 1999 judgment provides an example of this:

‘...the mother being responsible:

(aa) to ensure [the child]'s safe return from school each schoolday except Friday;

(bb) to assist [the child] with his reading and any other homework set for an evening to be completed during the evenings of Monday to Thursday;

(cc) to ensure that [the child]'s school clothes are properly laundered and tidy;

(dd) to ensure that [the child] either takes his lunch to school or is provided with the necessary lunch money for each day when he attends school from her home;
To enrol [the child] in such weekday sports after school from Monday to Thursday which she, in consultation with [the child], decides, to ensure that [the child] is able to participate in such sport and to develop interests of his own addition to those he shares with his mother, his sister and his father ...

4.82 The review of interim judgments and observations of interim hearings demonstrated that detailed specific issues orders are rarely made at that stage. The most common form of interim order made no reference to parental responsibility but dealt only with residence and contact arrangements.

DISCUSSION

From certainty to confusion

4.83 The reforms have created uncertainty and confusion about the state of the law. Whereas the previous legislative provisions were clear about who had responsibility for the children and how joint responsibilities were to be exercised (before and after the making of court orders), the meaning of the current shared parental responsibility model is not spelt out in the Act. The research suggests that there have been multiple conflicting interpretations of the present statutory scheme by lawyers, judges, registrars, counsellors, parents and Centrelink staff. While the new terms and concepts remain alien to the vast majority of separating parents who continue to think in terms of custody and access, some non-resident parents believe the new shared parenting regime provides them with ‘rights’ to be consulted about day to day decisions affecting the child. The concept of shared parenting has also led some parents, particularly fathers, to believe that the law requires the children to live half the time with each parent. These parents tend to respond with anger and frustration when advised that the Act does not require that outcome. The lack of clarity in the legislation has thus provided fresh ground for disputes between parents.

No evidence of shifts towards shared parenting among the target population

4.84 There is no evidence to suggest that shared caregiving has become a lived reality for the children of separated parents who have engaged with the ‘family law system’ since the coming into force of the Reform Act. Interviews with, and surveys of, lawyers and counsellors suggest that there have been no real changes in practice as result of the reforms. Most respondents agreed that mothers continue to do the bulk of the caregiving work after separation, and that, as one respondent commented, many fathers still ‘do not consistently make themselves available to the children’.

4.85 The research also suggests that parents are entering into workable and flexible shared residence arrangements after separation, but that these arrangements are being reached without legal assistance and without any knowledge of the Reform Act. Our interviews with separated parents who are co-operatively sharing their parental responsibilities, including using a flexible shared residence arrangement, established that such arrangements were not attributable to the Reform Act and that these parents would have chosen to share their parental responsibilities regardless of the principles enunciated in the Family Law Act. Significantly,

59 This is consistent with data from the Australian Bureau of Statistics, Australian Social Trends 1999, Catalogue No 4102.0 (1999) at 42-43.
each of these parents had exercised their responsibilities jointly and co-operatively before their separation, and each of the men had taken an active caregiving role.

4.86 This can be contrasted with the level of disputes and lack of flexibility, particularly the increasing use of detailed specific issues orders, involved in shared parenting for those parents who use the Court or have orders drafted by solicitors under the Family Law Act. As one of the Registrars of the Family Court summarised the problem, ‘[t]he shared parenting concept is totally at odds with the types of parents who litigate’. Our findings reflect earlier US research which demonstrated that the advantages of shared parenting were dependent upon parents having voluntarily agreed to the arrangement, and upon a previous history of co-operation between the parents.60

Increasing incidence of disputes

4.87 Former Family Court appellate judge, the Hon Dr Peter Nygh wrote when the reforms were enacted:

‘For good or for ill, the notion of continuing parental responsibility will empower those who now languish as “access parents”. Whether the system will work if they actually start to exercise that authority remains to be seen.’61

4.88 Our research suggests that the reforms have created greater scope for an abusive non-resident parent to harass or interfere in the life of the child’s primary caregiver by challenging her decisions and choices. As one counsellor noted, the concept of ongoing parental responsibility has become ‘a new tool of control’ for abusive non-resident parents. This also means constant disputes and ‘an endless cycle of court orders’.

4.89 A related consequence has been an increase in the number and detail of specific issues orders qualifying and quantifying the resident parent’s authority and responsibilities. This can create even more areas of possible dispute and bases for challenge of the carer by non-resident parents. Specific issues orders have now started to become more commonplace than in the early days following the coming into force of the Reform Act, and much more detailed, differing in nature from the kind of orders made before the reforms. Now they tend to delegate particular areas of responsibility to parents (for example, who will take the child to sport this week), and even impose standards of caregiving expected of the resident parent (eg that she must ‘ensure that [the child]’s school clothes are properly laundered’). Previously, these were mostly used only to ensure that the resident parent forwarded copies of the children’s school reports to the non-custodial parent every year.

4.90 Some judges and practitioners see the use of detailed orders as a way of averting future disputes. However, the willingness of the parents to be flexible is probably the greatest indicator of whether or not detailed specific issues orders will reduce or increase opportunities for dispute. Dewar and Parker have described specific issues orders as a ‘two-edged sword’, allowing more flexibility in negotiations over children and enabling agreements to be drafted in understandable language, but also giving non-resident parents


power to assert a degree of control over the resident parent that does not reflect actual parenting practices.\textsuperscript{62}

**Resistance to new terminology**

4.91 One of the stated reasons for moving away from the language of custody and access was to disrupt the ‘win-lose’ mentality that was seen to accompany that language.\textsuperscript{63} However, it seems that the change of language has not permeated the consciousness of those using the Act, and of those who comment on it: the vast majority of parents have never heard of ‘residence’ and still ask for custody. Media discussions confirm this. For example, an article in The Australian in August 2000 headed ‘Fears for father missing with children’, said that the mother had been recently given ‘custody’ of the children and that the father had collected them for ‘access’ when he went missing.\textsuperscript{64}

4.92 Even those people who work within the system on a daily basis have found it difficult to change their terminology, and in some regions solicitors have agreed to continue working with the language of custody. Early in our research, we surveyed solicitors about the meaning of the new terminology: it became clear through that and also through their use of ‘residence/residence’ orders to ‘placate’ non-resident parents, that some solicitors misunderstand the legal notion of residence and believe that it involves the same legal concepts as custody. This is also apparent in the way residence contests are run in the Family Court, and in the continued use by judges of language such as ‘awarding’ residence to a parent.

**‘Best interests’ principle compromised at interim hearings**

4.93 In deciding whether to make an order in relation to a child, a court must regard the best interests of the child as its paramount consideration.\textsuperscript{65} This principle governs the making of interim residence and contact orders just as it does the making of final orders.\textsuperscript{66} However, the evidence available at an interim hearing to determine the child’s interests will be far more limited than that relied upon at the final hearing.\textsuperscript{67} In particular, there will not normally be a Family Report to assist the court to make its decision. Our research suggests, confirming Dewar and Parker’s study,\textsuperscript{68} that children’s welfare is being compromised in the approach to interim decision making that has developed since the coming into force of the Reform Act. This is evident in the making of interim residence orders.

4.94 The Full Court of the Family Court has consistently held that a child’s best interests will normally be met by interim orders that ensure stability in the child’s life pending a full hearing of the relevant issues in dispute, and that such stability will usually be promoted by


\textsuperscript{63} Family Law Council, Patterns of Parenting After Separation, April 1992.

\textsuperscript{64} ‘Fears for father missing with children’, The Australian, 11 August 2000, at 3.

\textsuperscript{65} Family Law Act 1975 (Cth) s 65E.

\textsuperscript{66} In the Marriage of Cilento (1980) 6 Fam LR 35 at 37.

\textsuperscript{67} In the Marriage of C (1995) 20 Fam LR 24 at 32 and 36.

\textsuperscript{68} “There is a real possibility that arrangements are being sanctioned at the interim stage that would not withstand closer scrutiny”: J Dewar and S Parker, ‘The impact of the new Part VII Family Law Act 1975’ (1999) 13 Australian Journal of Family Law 96 at 109.
an order that maintains the pre-existing caregiving arrangements, unless there are ‘strong or
overriding indications to the contrary’.69 The threat of violence in the caregiver’s household
would, for example, justify a change of residence under this principle.70 Our research suggests
that the existing arrangements principle has sometimes been displaced by judicial concerns
about parental equality (ie, about not creating a status quo in favour of one parent) since the
reforms were enacted. The findings demonstrate that interim residence orders have been
made on the basis of ensuring that one parent does not obtain a tactical advantage over the
other before the final hearing, rather than by an assessment of the child’s best interests or by
application of the ‘stability’ principle from Cowling’s case. That is, decisions are being made on
the basis of the parents’ interests (or more accurately, the interests of the parent who is not
the existing primary caregiver), rather than on the basis of the child’s welfare. The current
delays in the Family Court in reaching a final hearing have contributed to this practice.

**Shift in approach to making residence orders at final hearings**

4.95 There has been a second shift in the practice of making residence orders as a consequence of
the Reform Act. Prior to the introduction of the reforms, the Family Court rarely made joint
custody orders in contested proceedings for reasons discussed earlier. The research demonstrates
that residence orders giving each parent equal time with the children have been made in
contested proceedings since 1996, and in circumstances where there is a high level of conflict
between the parties. Such arrangements have been ordered over the strong objections of one
parent, usually the mother, including in cases where they have been tested (as interim orders)
and one parent has found them unworkable.71

**Interaction of child support and shared residence arrangements**

4.96 The research suggests that the desire to reduce child support liabilities is frequently a
motivating factor for seeking and making shared residence arrangements. The majority of sole
parent families in Australia are female-headed,72 and for many of these families, social security
payments and child support are the major (and often sole) sources of income, particularly in

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69 In the Marriage of Cilento (1980) 6 Fam LR 35; in the Marriage of Cowling (1998) FLC 92-801 at 85,006. While
there is no presumption in favour of the ‘status quo’, the Court has suggested that trial judges should give
clear reasons if they wish to disturb a long standing and satisfactory settled arrangement: In the Marriage of
Bennett (1990) 14 Fam LR 397.

70 In the Marriage of Merryman (1993) 116 FLR 87 at 89.

71 Note that the 1992 Joint Select Committee Inquiry into the Operation of the Family Law Act
recommended against shared parenting reforms because, among other things, of the potential damage to
children that might result if they were imposed on unwilling parents: Joint Select Committee, The Family Law
Act 1975: Aspects of its Operation and Interpretation, (1992, AGPS, Canberra) at 106 and 111. Compare the
discussion by Barbara Bennett Wooldhouse who notes, referring to recent research in the US: “Most
worrysome, courts tended to award joint custody in the most highly conflicted and vigorously litigated
cases. ... It seems as if judges had grown tired of the fighting and saw joint custody as a compromise
solution”: see ‘Child Custody in the Age of Children’s Rights: The Search for a Just and Workable
Standard’ (1999) 33 Family Law Quarterly 815 at 824-25. She argues that “the stress of an enforced
cooperation, with the child functioning both as the intermediary between the warring sides and the focal
point of their conflict, can hardly promote the child’s welfare” and that the use of joint custody in ‘high-
conflict’ battles, “risks treating children like an item of parental property to be split fifty-fifty at
dissolution.” (at 825)

the early post separation period. The findings of previously conducted Australian research which showed that women caring for dependent children are particularly vulnerable economically once a relationship ends, and are also more likely than men to experience financial hardship subsequently, have been confirmed more than a decade later. Children living in such households obviously share the financial disadvantages experienced by their carers. The Child Support (Assessment) Act ('CS(A)A') currently provides that the amount of child support otherwise payable is reduced where a parent has contact with a child for at least 30% of the nights in a child support year (the 109 nights requirement). At the time the CS(A)A was amended in 1993 to include this variation, it was predicted that it would ‘result in significant pressure being placed upon carers by liable parents simply to secure a reduction in the rate of support.’ Our research suggests that pressure to agree to a shared residence arrangement that meets the 109 nights requirement has been exacerbated by the shared parenting reforms.

RECOMMENDATIONS

1. The Family Law Act should be amended to clarify what is meant by ‘shared parental responsibility' (s 60B(2)(c)), and to make it clear that there is no presumption of shared residence. The Act should also specify that there is no duty of consultation (with the other parent or parents) when exercising day to day parental responsibility.

2. It is essential that in making decisions based upon the child’s best interests, the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings. For this reason, the Court needs to have available to it enough information to make these assessments. Ideally, family reports should be available in each case that involves an issue of a child’s welfare, though this obviously would have considerable resource implications for the Court.

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74 P McDonald (ed), Settling Up: Property and Income Distribution on Divorce in Australia (Melbourne, AIFS and Prentice Hall of Australia, 1986).

75 R W eston and B Smyth, ‘Financial Living Standards After Divorce’ (2000) 55 Family Matters 10 at 15; S Shaver, ‘Poverty, Gender and Sole Parenthood’, Chapter 14, in R Fincher and J Nieuwenhuysen (eds), Australian Poverty: Then and Now (Melbourne University Press, 1998) at 290: “Gender is clearly central in the continuing high levels of poverty of sole parent families. This reflects the obvious fact that these are very largely families headed by a woman, but the poverty of sole parents stems as much from their situation as sole carers of dependent children as from their sex.”

76 Child Support (Assessment) Act 1989 (Cth) ss 8(3) and 48.

77 CCH Australian Family Law Child Support Handbook at 13,301.

78 Note also that the 2000 Budget announced proposed changes that would reduce the number of nights in the year to one tenth, after which the amount of child support payable by the liable parent would reduce: see Commonwealth Department of Family and Community Services, “Budget 2000–01 ‘W hat’s New, W hat’s Different’” (May 2000) available at: http://www.facs.gov.au/Internet/FaCSInternet.nsf/aboutfacs/budget/budget2000-w-nwd_e.htm.
INTRODUCTION

A ‘right’ of contact?

5.1 One of the key aims of the Reform Act was to establish a guiding principle that ‘children have a right of contact, on a regular basis, with both their parents ...’. This was part of the normative shift toward ‘shared parenting’ that the legislation was designed to bring about. During the course of the debates leading up to the enactment of the Reform Act, a number of commentators and lobby groups expressed concern about the potential for this to become, in effect, a presumption favouring contact, which would represent a major shift away from the existing legal situation. Prior to the passage of the Reform Act, the case law had established that there was no parental right of access to a child, nor any presumption that access was in a child’s best interests. Although there had been a consistent judicial tendency to give great weight to the importance of maintaining the parent-child relationship following separation, whether or not access should take place was determined in each case by an investigation into the best interests of the child.

Protection from family violence

5.2 The Reform Act included a number of changes that were designed to ensure that the need to protect children and their parents from family violence is taken into account when parenting orders are made. They include a reference to ‘the need to ensure safety from family violence’ among the general objectives of the Family Law Act, and new references to ‘family violence’...
and to ‘family violence orders’ as relevant considerations when determining the best interests of the child.\(^8\) A further provision requires judges to ensure that parenting orders do not expose a person to an ‘unacceptable risk’ of family violence.\(^9\) In addition, a new Division 11 in Part VII cautions judges against making orders for contact that are inconsistent with existing family violence orders.\(^10\) Despite these precautions, commentators predicted that the new ‘right of contact’ principle could have serious implications for women seeking to escape a violent relationship.\(^11\) One commentator argued:

‘[T]he exhortation in the proposed s 60B(2)(d) that “parents should agree about the future parenting of their children” is, on one level laudable, encouraging, and supportive of healthy parent-child and ongoing family relationships. However, apply it to a case of power imbalance, in particular in the many cases involving domestic violence, and it may be used in subtle and not so subtle ways to pressure the vulnerable parent.’\(^12\)

**Children’s interests not parental rights**

5.3 Importantly, another central goal of the legislation was to ensure that the focus moved away from notions of parental rights and instead was squarely aimed at children’s interests. Yet the confusion surrounding the insertion of a ‘right’ to contact led to concerns that this would be understood, particularly by non-residence parents, as giving them ‘rights’ they did not previously enjoy. Accordingly, a principal aim of our research was to explore how the ‘right’ of contact was operating in practice and whether it had altered day to day practices as well as parental expectations. The research also explored the interaction between the provisions in s 60B(2) and the provisions designed to protect children and their caregivers from the negative effects of domestic violence (particularly s 68K).

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8 Family Law Act 1975 (Cth) ss 68F(2)(i) and (j).
9 Family Law Act 1975 (Cth) s 68K.
10 When a judge or magistrate intends to make an inconsistent contact order, she or he must now comply with a number of requirements, including an obligation to explain the reasons for the order to the parties (s 68R) and magistrates are empowered to vary or suspend a contact order when making a family violence order (s 68T).

So far as s60B(2)(c) and (d) are concerned, these are relevant insofar as decisions about schooling are a duty and responsibility of both parents and, in this case, there is common ground that there was a prior agreement between the parents on such matters. We agree with the respondent ... that s 60B(2)(d) does not restrict the Court’s jurisdiction and does not create a presumption which forecloses the inquiry as to what is in the best interests of the child at the time a decision is sought. Prior agreements in relation to schooling and other parenting matters are a consideration, but only that, which a trial judge should take into account.
THE CASE LAW

The effect of the ‘right of contact’ principle

5.4 The first post Reform Act case dealing with the right of contact principle is B and B, decided by the Full Court of the Family Court in June 1997. This was a relocation dispute involving a mother who wished to move with the children from northern Queensland to Victoria against the wishes of the father. The father argued that the reforms had created a ‘sea change’ in the law, and in particular, that the right of contact principle had affected relocation disputes. His position was that the child’s right of contact with both parents would be incapable of being exercised if the mother were permitted to move. That view was not supported by the Full Court, which held that the new ‘right’ had not created a presumption in favour of contact, and that the best interests principle remains the final determinant when making parenting orders. On the other hand, the Court stated that the right of contact had provided an additional ‘context’ for the consideration of the child’s best interests, and that the principles in s 60B(2) must be included in the decision making process. Other than that, the reforms were held to have made little difference to the way relocation applications should be decided.

Contact and relocation

5.5 Since B and B, there have been a number of further Full Court decisions, as well as one High Court case, dealing with relocation disputes. The most recent of these, A and A: Relocation Approach, revisited the issue of relocation and laid down a detailed procedure for determining applications. The decision overrules B and B in so far as it suggests that the Court should evaluate each of the relevant matters in s 60B in the same way as the matters set out in the ‘best interests’ checklist in s 68F(2) must be considered. The Full Court in A and A stressed that while Parliament has stipulated that the s 68F(2) factors ‘must’ be considered, there is no equivalent requirement with respect to s 60B. The relocation decision should be made ‘having regard to the whole of the evidence’, and ‘no single factor’ (such as the ‘right of contact’ principle), will be decisive. A further aspect of B and B had been displaced by the

14 Ibid at 693.
15 Ibid at 733.
16 Ibid at 735.
17 Ibid at 733 and 735.
18 Ibid at 676.
22 See Family Law Act 1975 (Cth) s 68F(1).
24 Ibid at para 107.
High Court’s ruling in AMS v AIF,\(^\text{25}\) so that the court can no longer require an applicant to demonstrate a bona fide or ‘compelling’ reason for the proposed relocation.\(^\text{26}\)

**When contact poses a risk of harm to the child’s welfare**

5.6 The Full Court in B and B commented that the pre-Reform Act case law dealing with access disputes continues to be applicable to contact applications.\(^\text{27}\) This includes the High Court’s decision in M and M,\(^\text{28}\) which held that access should not be ordered where it would expose the child to an ‘unacceptable risk’ of harm,\(^\text{29}\) as well as a series of 1990’s cases in which the Court decided that an unacceptable risk of harm to the child might be established by evidence of domestic violence, even though the child him or herself was in no danger of being physically assaulted and had not witnessed the violence.\(^\text{30}\) A further relevant pre-Reform Act case is In the Marriage of Bieganski,\(^\text{31}\) which extended the ambit of the unacceptable risk test to emotional and psychological harm, and provided that the impact on the child of the caregiver’s ‘genuine’ fears about contact was a relevant consideration in deciding whether access should take place. Since the reforms, the Full Court has decided several cases dealing with these issues. Continuing the approach developed before the reforms, the Court in Re Andrew\(^\text{32}\) and A and A\(^\text{33}\) held that the effect of contact upon the resident parent’s ability to care for the child remains a relevant consideration in determining whether contact should be ordered, and confirmed the continued relevance of the ‘unacceptable risk’ test to cases involving a history of domestic violence.

**SHIFTS IN APPROACH TO CONTACT IN PRACTICE?**

**Parents’ perceptions**

5.7 We interviewed a number of parents to find out how they felt about the contact arrangements they had. We also interviewed solicitors and counsellors, who were asked to comment on their clients’ experiences. We also reviewed unreported judgments and scrutinised submissions about contact made by self-represented applicants. The findings suggest there have been shifts in expectations about the amount of contact that should take place, and about the circumstances in which contact will be appropriate. However, there seems to have been no change to the stability of contact arrangements since the reforms were passed.

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\(^{29}\) M and M (1988) 166 CLR 69 at 78.
\(^{30}\) In the Marriage of JG and BG (1994) 18 Fam LR 255; In the Marriage of Patsalou (1995) 18 Fam LR 426; In the Marriage of Jaeger (1994) 18 Fam LR 126; In the Marriage of Irvine (1995) 19 Fam LR 374; In the Marriage of Grant (1994) FLC 92-506.
\(^{31}\) In the Marriage of Bieganski (1993) 16 Fam LR 353.
\(^{32}\) Re Andrew (1997) 20 Fam LR 538.
\(^{33}\) A v A (1998) FLC 92-800 at 84,996.
Increased expectations of non-resident parents

5.8 The interviews with lawyers and counsellors indicated that male clients are tending to seek more liberal contact arrangements than was usual before the reforms. Many of the legal practitioners who were interviewed said that the desire to reduce child support payments was often a motivation for increased contact. Others attributed the trend to non-resident parents being ‘more prepared to pursue their rights’ since the reforms. For example, one solicitor noted:

‘Fathers are now coming in saying they know they have a “right” to see their children more than just on the weekends.’

5.9 These themes – a parental ‘right’ to contact and the issue of child support payments – remained constant throughout the period of the project. In the words of one solicitor interviewed in 1999:

‘I think the whole shared residency thing has caused dads to fight for more days to reduce child support. They ring up the Child Support Agency and come in asking for an extra night in the off-week.’

5.10 The increased expectations of fathers were also evident in a number of interim contact applications in the early stage of the reforms. For example, in one case the father (who was self-represented) submitted that the Reform Act had increased the legal ‘rights’ of fathers in relation to contact. The Court said:

‘He made it plain that the main event which had triggered the present application was the massive amendments to the Act in June 1996. He expressed the view that the new provisions relating to children entitled him to a greater degree of contact. It transpired that he had not actually read the Act but had gained this impression by newspaper reports and other anecdotal evidence.’

5.11 Family Court judges who were interviewed also said that they had noticed a shift in the extent of contact being sought by self-represented litigants since the reforms had come into operation.

5.12 Many of the solicitors who were interviewed commented that fathers were often pursuing applications for contact in circumstances where they would not have been encouraged to do so prior to the reforms, such as when there had been a history of domestic violence. This aspect is discussed in detail below.

Contact arrangements remain prone to constant variation

5.13 The interviews with parents suggest that the stability and workability of contact arrangements has not been improved by the reforms, and that in some circumstances, such as where violence is a concern, the reforms may have contributed to the creation of unsafe (and therefore unworkable) contact arrangements. The issue of safety is discussed in more detail below.

5.14 For the majority of the parents interviewed, contact with the children was no longer taking place as set out in the orders or agreement, and for most, the arrangements had changed within a very short time of the orders or agreement being made. This was as much the case for those parents who had an amicable and co-operative relationship with their former partner.

34 Unreported decision of July 1997.
as it was for those who were in conflict or had concerns about violence. All those interviewed had operated under several different contact arrangements since their agreement or orders about contact were made, and for most there had been four or five variations. The following comments by parents illustrate some of their concerns:

‘He often decides he doesn’t want contact just before his weekend. It’s very de-stabilising for my son. But if I ever try to change the arrangements he makes trouble.’

‘He doesn’t always stay with them during contact and he has changed the times for contact to suit his transport and social needs for the weekends, and he kept not turning up. Basically he changed things straight away [after the orders were made].’

‘He sees them three out of four weekends. He’s supposed to see them one night per fortnight [under the orders]. I’m giving him more because of guilt. I give in to what he wants because I feel guilty for leaving. But he takes, takes, takes, and I give, give, give. It never did work [according to the orders], not once.’

‘My ex-wife has moved 3 hours away so now I usually only see them 1 weekend a month [instead of every second weekend]. But my eldest daughter is now in boarding school nearby so I see her whenever I like. I see her most weekends.’

5.15 The fluidity of contact arrangements was commented on by one of the counsellors who was interviewed:

‘I tell people that they can’t expect that the orders that are made now when the kids are 3 and 4 are still going to work when they’re 7 and 8.’

**Increased amounts of contact time being ordered**

5.16 Our surveys and interviews with solicitors suggest that many practitioners have begun to think and act differently in relation to contact applications since the reforms came into operation. One aspect of this relates to the ‘standard’ amount of time non-resident parents spend with their children. Many of the solicitors who were interviewed in the early stage of the project said that interim contact orders for more than the former ‘standard access period’ of two days per fortnight were ‘frequently’ being drafted.35 The increase in the extent of contact since the reforms was represented most commonly by orders for weekend contact to extend until Monday morning instead of finishing on Sunday evening, and/or for an additional night with the children mid-week. These responses remained essentially the same over the three years.

**Some non-resident parents still fail to exercise contact**

5.17 Despite the increased opportunities for contact, the interviews and surveys of practitioners suggest that the workability of contact arrangements has not been improved by the Reform Act. A number of solicitors commented that they frequently receive complaints by resident parents about the contact parent’s failure to exercise the contact he had sought and obtained, just as had happened before the reforms. As one practitioner explained:

‘People ask for the world and end up taking very little.’

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Solicitors also noted an increase in post-order disputes about contact since the reforms came into operation. This aspect is discussed in detail later in this chapter (see ‘Contravention applications’).36

Family Court judges’ perceptions

The interviews with judicial officers of the Family Court suggest that many of those who make interim orders are less likely to suspend contact at an interim hearing than they had been prior to the reforms. In the words of one judge who was interviewed in 1999:

‘We’re more inclined to give contact at interim now. It would take a lot at an interim hearing to say no contact.’

The judicial approach to the amount of contact that would be ordered was mixed. While some judges indicated that they have been more inclined to depart from the ‘alternate weekend’ format whenever possible since the reforms, others stressed that they had always attempted to give children as much time with each parent as practicable, and had never felt constrained by the ‘alternate weekend access’ regime. This diversity of approaches was still apparent in 1999. Several judges said that their approach to relocation applications had been affected by the reforms, because of the implications for contact.

Shifts in outcomes of interim hearings

The review and comparison of unreported interim judgments shows that there has been a shift in the extent of interim contact ordered since the Reform Act came into operation. In 53 of the 62 surveyed cases from 1995 in which defined access was ordered, the amount ordered was two or fewer nights per fortnight. The batch 3 cases, which were heard in 1998/99, included many instances in which the amount of time ordered with contact parents had increased: Twenty-seven of the 74 cases in which contact was ordered involved contact for three or more nights per fortnight.

The review of judgments also confirms the perceptions of judicial officers that contact is less likely to be refused at an interim hearing than before the Reform Act came into operation. In our sample of surveyed cases, we found that the rate of orders suspending contact until trial has declined dramatically since 1996. Of the 84 Batch 1 1995 judgments, 22 resulted in an order for ‘no access’. By comparison, only 4 of the 84 Batch 2 1996/97 judgments resulted in an order for ‘no contact’ as did 10 of the 84 Batch 3 1998/99 judgments.

Shifts in amount of contact ordered at final hearings

The amount of contact time spent with the non-resident parent has increased in final orders. The common form of order in the 1995 judgments was for access to occur ‘each alternate weekend’, encompassing two nights per fortnight with the access parent (usually every second Friday and Saturday nights). Although this remains the most common arrangement in final orders, there are now many cases in which contact is for longer periods (for example, to include Sunday night or a mid-week night). Orders framed as symbolic residence/residence

36 Note that the Full Court in B and B: Family Law Reform Act (1997) 21 Fam LR 676, in discussing whether contact parents could be prevented from relocating, pointed out that so far as it was aware, no order had ever been made against a contact parent who failed to actually have contact: see paras 10.62-10.65.
arrangements tend to contain more extensive contact periods than those framed in terms of residence and contact. Most of the surveyed symbolic residence/residence orders provided for the children to live with the ‘contact parent’ for more than two nights per fortnight, and usually for four or more nights per fortnight. As noted in the previous chapter, child support implications flow from these increases.

**CONTACT ARRANGEMENTS WHEN DOMESTIC VIOLENCE IS AN ISSUE**

**Non-resident parents expect contact regardless of violence**

5.24 As we noted above, solicitors and counsellors suggested that the reforms have created expectations among some fathers that they, rather than their children, have been given a ‘right’ of contact. These views remained unchanged when re-interviewed them in 1999. Solicitors also suggested that fathers are pursuing contact in circumstances where they would not have been encouraged to do so before the reforms, including where there has been a history of domestic violence. During the later interviews, several practitioners suggested that men no longer expect that admissions of violence will preclude their contact with their children. In the words of one solicitor:

‘They’re a bit sheepish about it sometimes, but they still think they should have contact.’

**Pressure on resident parents to agree to contact despite safety concerns**

5.25 The parents we interviewed in 1999 all had orders (including court-ordered and consent orders) or agreements about contact. Contrary to the rhetoric of ‘hostile’ or ‘bloody minded’ resident parents who attempt to thwart contact, most of the mothers who were interviewed had been initially willing to facilitate contact, even when there had been a history of domestic violence. Despite their anxieties about the contact parent’s violence, almost all of the women had been willing to facilitate the children’s contact with the father, but had sought ‘safe’ arrangements. The majority had asked that contact be supervised and that there be no overnight stays with the father. Most said they had raised their concerns about the father’s violence with their solicitor at the time of seeking the orders, and 12 of the women had existing family violence orders at the time the orders were made.

5.26 However, in almost all cases the orders made did not reflect the wishes of the resident parent. Only 12 of the 27 parents whose orders had been made ostensibly by consent said that they represented what they had wanted. That is, the majority had agreed to arrangements, or were subject to court orders, that they believed did not provide a level of protection that enabled them to feel that they and their children were safe.

5.27 Most commonly the divergence between the parent’s wishes and the orders was represented by a lack of supervision. Although most of the women said they had wanted contact visits to be supervised and for contact to take place during the daytime only, many had ‘agreed’ to unsupervised overnight contact with some form of ‘neutral’ hand-over arrangement.

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37 45 parents had court orders, of which 27 were consent orders and 18 were the result of contested proceedings. The remaining 20 parents had private agreements or informal arrangements.

38 See also Family Law Council, Child Contact Orders: Enforcement and Penalties, June 1998, at 42.

39 Of the 27 parents with consent orders, only two had sought an order for ‘no contact’, and in only 4 of the 18 contested matters had the mother sought an order for ‘no contact’. 

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**chapter 5**
The reasons for these compromises centred on pressure from their own solicitor to agree to that arrangement, sometimes coupled with a fear of the father’s response if they did not agree to that. In many cases these pressures were combined with a lack of financial resources with which to ‘fight’ the matter in court. The following case studies represent these pressures:

‘One resident parent (“Sally”) had asked that the father’s contact be supervised and that he not have the child (who was 2 years old) for overnight contact. Sally believed there was a real risk to the boy’s safety if the father had unsupervised contact because of the father’s violence: “He’d beaten me with my son in my arms. The child is still very young.” Nevertheless, she had agreed to consent orders giving the father unsupervised contact each alternate weekend with a neutral hand-over arrangement. Sally said she had been pressured into agreeing to that arrangement: “My solicitor told me the court would give him that.”

5.28 Another resident parent (‘Donna’) had also asked for supervised contact because of the father’s violence. She said:

‘The kids are scared of what daddy will do to mummy. He says things to the kids like ‘I should have shot her when I had the chance’, and he shot [the family pet] in front of the children. He’s threatened to kill me with a gun held to my head.’

5.29 Donna agreed to consent orders giving the father unsupervised overnight contact with a neutral hand-over arrangement. She said:

‘I was pressured by my solicitor, who said that was reasonable, and so did the child rep who was intimidated by [the father].’

5.30 A third resident parent (‘Angela’) who had asked for supervised contact told the following story:

‘I’d moved to escape his violence. I left the house under police protection and went to a refuge and then I moved away. But he found me through a Centrelink payment into our old joint account, and he got a court order to have me move back near him.’

5.31 Angela said she had agreed to unsupervised daytime contact with a ‘neutral’ hand-over arrangement because:

‘My Legal Aid solicitor threatened me with “If you don’t sign the orders you could lose the kids.”’

5.32 The majority of women with consent orders said that the father had also compromised in reaching their agreement about contact. Many of the fathers had either sought shared residence of the children or more extended contact than that agreed to.

5.33 A number of the women with court-ordered contact also said the orders involved arrangements they considered to be unsafe. In some cases this entailed supervised contact at a contact centre for a limited period leading ultimately to unsupervised contact. Many of the women with these orders were happy with the protection afforded by the contact centre but were fearful of what would happen to their children when that protection ceased.

High breakdown rate of contact arrangements where violence is an issue

5.34 At the time of the interviews, the contact parent in 30 of the 45 cases involving court orders (both made by consent and otherwise) was no longer complying with the arrangements set out in the orders. According to the resident parent, the arrangements had either broken down entirely or had become unworkable within a very short time. Many of these cases were
characterised by the contact parent's ongoing violence. The following comments illustrate
the problems described by the women who were interviewed:

‘He still makes phone calls to the house and he shouldn’t [because of a family violence
order]. From day one [contact] didn’t work because he followed me right from the start
[contrary to the contact orders that involve a neutral hand-over].’

‘He comes to my house whenever he wants and he’s not supposed to come near me.
He’s supposed to collect the children from my mother’s house but she doesn’t want to
have anything to do with him any more. She’s terrified of him.’

‘He doesn’t turn up pretty regularly, and he asks the girls questions about where I’m
living [contrary to the orders].’

5.35 Several of the women commented that the father had frequently breached the family violence
orders that were in place, but that the police would not intervene because of the Family
Court contact orders.40 These issues are also discussed below.

Concerns about lack of safety

5.36 A number of the women expressed concerns about the ‘family law system’ which touch on
the interaction of the ‘right of contact’ and the ‘safety from violence’ aims of the reforms.
Many spoke of the system as being ‘weighted in favour of fathers’. One aspect of this, which
was common to many of the women who were interviewed, was their experience of being
threatened with legal action for alleged ‘breaches of contact’ by the contact parent, while his
own breaches of family violence orders were not taken seriously by the police. The following
comment is representative:

‘He brought an application against me for 8 alleged breaches of contact. But he’s
breached the domestic violence order all the time. I did nothing about it, but now I’ve
finally gone to the police. But they didn’t end up charging him because he told them it
was a “family law matter”’.

5.37 Others noted the ‘unfriendly’ atmosphere and lack of understanding about violence they had
encountered throughout the system. For example:

‘I found the Family Court processes very abrupt and uncaring. It made me feel very
helpless and depressed. They don’t understand how violent he is. He dragged me through
the house by my hair when I was 7 months pregnant. I really want him to have no contact
but I’ve been advised that the court won’t agree to that.’

‘The counselling system is traumatising. He’d threatened to kill me and held a gun to my
head. The police were involved and I had a protection order. But the counselors put us
together in same room. They said, “We just want to see the two of you together”, and of
course it got out of control.’

‘The Family Court is not a “safe haven” for women. I was terrified of him. He came over to
me at the Court and said “as long as you breathe I own you”.’

40 This view is supported by recent research into police response to breaches of family violence orders in
New South Wales: H Katzen, ‘How Do I Prove I Saw His Shadow?’: Responses to Breaches of Apprehended Violence
Orders, Northern Rivers Community Legal Centre, January 2000. See also H Katzen, ‘It’s a Family Matter,
'I’m angry and fed up. I’ve had enough. I just want us to be able to get on with our lives. He’s threatened to kill me, he’s punched and kicked me in front of the kids. I moved away but he tracked me down and I was ordered back and made to give him unsupervised contact. The kids come home traumatised because he hurts the dogs in front of them and loses his temper with them. He’s wielded a baseball bat around to threaten them. I’ve just had enough.'

Solicitors

5.38 As noted above, many of the solicitors surveyed in 1997 commented that fathers were frequently pursuing applications for contact where they would not have been encouraged to do so prior to the reforms, such as when there has been a history of domestic violence. Similar comments were made during re-interviews with practitioners in 1999, with comments that, unlike the situation before the reforms, fathers no longer expect that a history of family violence should affect their contact with the children.

Advice to clients affected by the Court’s changed approach at interim hearings

5.39 For practitioners who were surveyed in the early stage of the research, the Court’s approach to contact when domestic violence allegations are raised represented the most significant shift in practice associated with the reforms. This related particularly to orders made at interim hearings. Some attributed the change in practice directly to the ‘right of contact’ principle, which was blamed for having ‘turned back the clock’ to the days before the Full Court’s decisions about family violence. A number of solicitors spoke of the irony of having legislation which explicitly makes domestic violence a relevant factor for the first time, together with a principle that the child has a right to contact. In the words of one practitioner:

‘Domestic violence is now down-played like 10 years ago. Unless it affects the children, he’ll still get contact.’

5.40 Many noted that they advised women with concerns about domestic violence that they were unlikely to obtain an order suspending contact unless the violence was ‘exceptional’ or directed at the children. By the time of the later interviews, these and other solicitors spoke of being reticent to seek an interim order suspending contact for fear that their client would appear to be ‘hostile’ to contact, and might thereby jeopardise her application for residence.

5.41 A number of solicitors suggested other reasons for their practice of rarely asking for contact to be suspended when there has been a history of domestic violence. Some said that their shift in approach was due to the greater range of options now available in such circumstances, such as orders for supervised contact at a Contact Centre and orders for the father to attend anger management classes. Most however noted that their concerns about asking for contact to be suspended were related to the long delays in reaching a trial date in the Family Court. As one noted in relation to orders for suspended contact:

‘By the time the trial comes around in 18 months, the relationship with dad is gone.’

41 In the Marriage of JG and BG (1994) 18 Fam LR 255; In the Marriage of Patsalou (1995) 18 Fam LR 426; In the Marriage of Jaeger (1994) 18 Fam LR 126; In the Marriage of Irvine (1995) 19 Fam LR 374.

42 Similar attitudes have been documented in the UK: see A Barnett, ‘Disclosure of Domestic Violence by Women involved in Child Contact Disputes’ [1999] Family Law 104.
The issue of violence at interim hearings

5.42 As noted in the Interim Report, practitioners complained about the difficulties involved in showing there is a ‘serious’ risk to the child’s welfare at an interim hearing, because there is no opportunity for allegations to be tested, and there is usually no Family Report or expert opinion touching on the issue. In most registries, the scope of the material put before the court is further limited by Family Court guidelines that provide the maximum time allocated to any interim matter is two hours (‘the 2 hour rule’).43

5.43 Particular problems were noted in relation to legally aided clients and clients of Community Legal Centres, and especially for those who do not speak English. For example, solicitors noted the difficulties in drafting an affidavit which will sufficiently convey the details of the father’s violence when their client does not have ‘the right language’, and when legal aid will not cover the amount of time it would take to get all the relevant details or fund an interpreter. Others reported that women were rarely obtaining legal aid funding to oppose an application for contact, even when there had been a history of domestic violence by the applicant father, unless there was proof of distress to the children supported by medical reports. One Community Legal Centre solicitor noted that the majority of her family law clients are now men, because:

‘[w]hat they want is contact, and legal aid will fund that, but they won’t fund a woman who wants to contest contact because of domestic violence.’

5.44 If anything, these difficulties had become more entrenched by the time of the 1999 interviews.

5.45 All of the solicitors who were re-interviewed highlighted the importance of being able to ensure that interim decisions are based on a proper consideration of the child’s welfare. Most agreed that reports are a necessary part of this at the interim stage when violence is an issue, particularly in view of the current delays. One practitioner summarised this by noting that:

‘[O]therwise, you might be leaving an unsatisfactory situation in place for 2 years.’

Domestic violence allegations are common in interim matters

5.46 During 1997, judges and judicial registrars who determine interim hearings noted the prevalence of violence among children matters, and several commented that cases which do not involve allegations of violence are rare.

5.47 By mid-1999 many of the judges and judicial registrars interviewed in 1997 were no longer hearing interim contact disputes, as the new senior registrars had commenced work. However the views of those who had continued to hear interim matters remained essentially unchanged in most respects. Domestic violence was still said to be prevalent among the cases. Asked to make a ‘guesstimate’ of the percentage of matters involving allegations of violence, many suggested it was ‘more than half’ or ‘5 or 6 out of 10 cases’.

5.48 Two judges said they took an overtly cautious approach to allegations of violence because of what they saw as their ability to be used ‘strategically’ to limit contact. As against that, most judges said they thought very few instances of domestic violence allegations were tactical. One judge expressed it this way:

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43 Order 30, Rule 2A (1C) Family Court Rules.
'Women [with domestic violence concerns] usually want contact, either because they
genuinely want the children to see him, or because they know he won't get off their back
otherwise. So you're struggling to find a way to allow contact where the woman is not
going to be exposed to vicarious violence. I want to hear what her suggestion is about
contact, what will make her feel good. Often she doesn't have any proposals worked out.
If there's violence or a high level of conflict, then I might look at whether there's a third
party who's willing to participate to keep the parents apart. I've used the school as pick-
up and drop off point if she's willing to allow that. But basically I'm looking at how I'm
going to structure this changeover so the mother is not going to be exposed to violence.
So if it's in the interests of the children to have contact, I'm always exploring how she
sees the landscape.'

Judges rarely suspend contact at an interim hearing

5.49 Most judges conceded that they now make relatively few orders for 'no contact'. The most
common response to allegations of violence that suggest a risk to the child was said to be
supervision. Where the allegations suggest a risk to the resident parent, rather than to the
child, this was usually dealt with by use of a supervised hand-over arrangement or exchange
of the children in a public place.

5.50 In contrast to the comments of solicitors, several judges suggested that the shift in approach
to domestic violence concerns was a consequence of a change in lawyers' practices, rather
than changed judicial practice. In the words of one judge:

   'No one is prepared to say no contact any more.'

5.51 However, as mentioned above, a number of judges said that they were more likely to allow
contact at interim hearings than they had been before the reforms and that the delays to final
hearing were a factor in this shift.

Systemic problems with interim hearings

5.52 Like the solicitors, judges noted that allegations of family violence present a 'real problem' for
decision makers at interim hearings because of the lack of material upon which to undertake
a genuine assessment of risk. One judge noted in this respect:

   'What we do in interim matters is highly artificial. We present it as a judicial exercise
but it's more artful dodging.'

5.53 Some judges admitted that the level of detail in the affidavit material is 'pretty important'
at an interim hearing, as 'bold assertions are terribly hard to assess', but most referred to the
difficulty of assessing risk on the basis of affidavit material alone.

5.54 Most judges said that their principal concern is to ensure the interim arrangements are safe
for the resident parent and child. In order to do that, the judges and judicial registrars in a
number of registries will adjourn the matter for a short period (usually 6-8 weeks) if there are
'serious' allegations, and appoint a child representative to obtain a report assessing the
allegations and the impact on the child. Judges tended to define 'serious' allegations as those
that 'raise the spectre' of an immediate risk to the child. Even in those registries where this
approach is practised, its use is strictly limited because it is dependent upon the availability
of legal aid funds for child representatives. Judicial officers conceded that the vast majority of
interim matters are decided 'on the papers' and well within the 2 hour rule.
5.55 As mentioned above, judges noted that the delays in getting to final hearings had affected their practice in interim contact hearings. As one judge suggested:

‘[I]f you stop contact it could be 2 years before child sees father.’

**Interim children’s matters are often ‘child protection’ matters**

5.56 There was a great deal of commonality among the views of the Registrars who were interviewed. All said that a high proportion of interim children’s matters involve allegations of risk to the child, encompassing child abuse, domestic violence, parental drug and alcohol abuse, and parents with psychiatric conditions and personality disorders. Most also commented that the type of cases they are dealing with frequently involve matters which would once have been, and might more appropriately be, dealt with as a child protection matter, (that is, dealt with under State or Territory child welfare laws).44

5.57 Registrars in all regions noted the difficulties in trying to secure the intervention of the state child protection authorities in a ‘Family Court matter’. Several indicated that the relevant department rarely intervened, and that a notice sent requesting intervention was usually ‘a waste of time and administrative energy’. Registrars also said that in a ‘good percentage’ of cases, they were ‘not happy with either parent caring for the kids’ and a third party is needed to facilitate contact or care for the children. One interviewee put this category as high as 70% of cases, and another suggested that most cases now require ‘some third party assistance to facilitate contact’. In the words of a third registrar:

‘Thank god for grandmothers!’

**Approaches to contact where domestic violence is an issue**

5.58 The registrars were asked specifically about their approaches to contact orders where domestic violence is alleged. A number of the registrars suggested that they routinely invoke s. 68K of the Family Law Act, which requires the Court to ensure parenting orders do not expose a person to an unacceptable risk of family violence. In part, this approach, which was not mentioned by any of the judges who were interviewed, stemmed from the training given to the registrars in April 1999, which incorporated extensive discussion of the interim findings of this research.45

5.59 Neutral and supervised hand-over arrangements were said to be a common feature of orders, often involving police stations or contact centres. Orders for ‘no contact’ were said to be made where the report indicated there was a real concern for the child. Supervision of contact, either by an agreed upon family member or by a Contact Centre, was also relied upon by most registrars to a significant extent. A number of registrars expressed concerns about the limitations and long-term effects of supervised contact, and about the pressure to use such arrangements because of the long delays in reaching final hearings. The following comment sums up this concern:

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45 A session on this research was also provided to the Federal Magistrates who attended training auspiced by the AIJA in June 2000.
'I worry about the long-term effects on kids of them seeing their parents in an artificial environment [such as a contact centre], but if I said ‘no contact’, it would be for two years. So I say “contact centre”. What we are seeing is a result of delays.'

The importance of reports at interim hearings

5.60 The practice noted by judges of adjourning interim matters to obtain a family report for the Court was also used by many of the new Senior Registrars where there were allegations of domestic violence. Family reports are most commonly sought by child representatives, and their frequency therefore varies according to the availability of legal aid funding for child representatives in different areas. For example, at the time of the interviews in late 1999, this practice was more common in Adelaide and Brisbane than elsewhere, because of the relatively greater availability of legal aid funds for this purpose in those areas.46

5.61 The presence of a family report was considered invaluable by those Registrars who rely on them in difficult cases to decide contact arrangements. Like the judges, Registrars noted the difficulties, and artifice, of assessing the child's welfare on the basis of affidavit material. Several noted that assessing the likelihood of risk from an affidavit risk usually ‘boiled down to assumptions’ about violence. For this reason, Registrars saw the ability to obtain reports as vital to making proper contact arrangements. In the words of one Registrar:

‘Without them I couldn’t sleep at night.’

FAMILY COURT ORDERS

Interim hearings

5.62 Our review of unreported interim contact disputes, in which there is a high incidence of allegations of domestic violence in contact disputes, showed a shift in approach to determining contact orders since the passage of the Reform Act, as well as changes to the outcomes of contested matters.

Shifts in outcomes

5.63 It should be noted at the outset that women seeking to contest contact on the basis of domestic violence will have difficulty demonstrating a relevant risk to the child’s welfare at an interim hearing, because there is no opportunity at that stage for allegations to be tested, and generally no Family Report will be available to the Court. In most registries, the scope of the material put before the court is further limited by Family Court guidelines that provide the maximum time allocated to any interim matter is two hours (‘the 2 hour rule’).47

5.64 The outcomes of interim contact hearings that involved allegations of violence were surveyed. The following figures represent a comparison of the breakdown of orders about contact in the Batch 1 (pre-Reform Act) and Batch 3 (1998-99) judgments.

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46 More recently in the face of cutbacks to the Family Court’s counselling service Victoria Legal Aid has provided additional funding which has allowed the appointment of some externally provided experts in the Melbourne and Dandenong registries under Order 30A Family Court Rules.

47 Order 30, Rule 2A (1C) Family Court Rules.
5.65 The figures indicate a trend for the rate of orders made for unsupervised contact in cases involving allegations of domestic violence to increase since the reforms came into operation. That trend needs to be understood in the context of the delays presently affecting the hearing of children's matters in the Family Court. The increased proportion of interim orders for unsupervised contact has implications for the safety of children and resident parents, as any unsafe contact arrangements are likely to be in place for lengthy periods. It is likely that this factor is implicated in the greater numbers of contravention applications relating to contact that have been made since the reforms.

**Shift in approach to interim contact**

5.66 The analysis of judgments also disclosed a shift in the approach taken by judges to deciding contact applications at interim hearings since the reforms came into operation. In the pre-Reform Act cases the principal issue was whether contact should take place in the period before trial, whereas the issue for consideration in the post-reform cases tended to be how to maintain contact until the final hearing. In part, this is a result of the reforms. However, the current delays in reaching final hearing dates also appear to have contributed to the post-Reform Act increase in orders for unsupervised contact. The judgment review indicates that judges and judicial registrars are often reluctant to suspend contact for such lengthy periods on the basis of untested allegations, whereas there was a greater willingness to suspend access in such circumstances prior to the reforms when the period awaiting trial was much shorter. For example, in the 1995 cases it was not uncommon to find comments such as the following:

I make no findings today, but having regard to the matters that are before the Court, I am of the opinion that the Court should be conservative in its approach.\(^{48}\)

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\(^{48}\) Case decided 6/7/95.
I think the concerns the mother now voices are both relevant and weighty ...[I]n the circumstances, I am not satisfied that I would be acting in the child’s best interests and the welfare of the child ... by now determining to allow access to the father.”49

5.67 By comparison, the usual response in the post-Reform Act judgments to allegations of violence was to ensure continuance of contact between the father and child until trial. The most commonly used methods of dealing with untested allegations of violence in the judgments were to put in place a hand-over regime that does not require face to face contact between the parties (such as collection of the children from, and delivery to, the children’s school) or to provide for contact hand-overs to occur in a ‘neutral’ public place under the scrutiny of a third person (such as at a police station or a Contact Centre). However, the most recent batch of interim orders, collected from the Senior Registrars in 1999, suggest the approach to maintaining contact where violence is an issue is to use supervision. The judgment review shows that the rate at which supervision was used did not alter significantly as a result of the Reform Act’s introduction, but that there appears to have been a dramatic shift away from unsupervised contact by the Registrars where violence is alleged.

Final hearings

5.68 The survey of pre- and post-Reform Act final judgments in contact cases did not uncover any comparable shift in outcomes, and the extent of change in approach was less marked than at the interim stage.

Outcomes where violence is alleged

5.69 The rate at which orders refusing access because of domestic violence (pre Reform Act) were made was compared with the rate of orders for no contact (post Reform Act). By contrast with the situation at interim hearings, the rate of refusal of contact in final hearings remained relatively stable at around 23% of cases.

5.70 In the Batch 2 (1996/97) final judgments, orders for supervised contact were generally used only as a temporary measure. The relatively few instances of the use of supervision as a long-term measure in these cases mirrored the profile of the pre-Reform Act (1995) cases. In each of the pre and post reform cases where it was ordered, there were findings that the mother was genuinely anxious about contact and the rationale for its use was to allay her fears. The Batch 2 cases in which supervised contact was used also contained orders giving the resident parent sole day to day responsibility for the children.

5.71 The following figures represent the breakdown of orders about contact found in the Batch 3 (1998/99) judgments.

49 Case decided 9/6/95.
5.72 Of the 52 cases involving allegations of violence, 34 resulted in findings that the violence had occurred and/or that contact with the perpetrator posed an unacceptable risk to the child. However, only 13 cases resulted in a suspension of contact. In many cases, the trial judge’s finding of domestic violence did not rule out contact but played a role in formulating a workable contact regime to ensure the parents did not come into contact with one another. In most cases, the trial judge’s reasoning showed an attempt to maintain some form of contact between the child and non-resident if at all possible, even when the mother’s allegations of violence were proved. This was sometimes achieved through the use of a temporary regime of supervised contact visits, eventually leading to overnight unsupervised contact. Of the 7 orders for supervised contact, almost all involved supervision as a temporary measure that would lead to unsupervised overnight contact within a defined period.

**Approach to contact where domestic violence was found**

5.73 In some instances, orders for unsupervised contact were made because of assumptions about the long-term benefits of contact to the child’s welfare, and that this outweighed the present detrimental effects of the father’s violent behaviour. This approach was not evident among the surveyed pre-Reform Act cases.

5.74 Findings that the allegations of domestic violence were proved did not necessarily result in a conclusion of unacceptable risk for the purposes of contact. In line with the pre- and post-Reform Act case law principles, the effect of the proposed contact on the resident parent was often considered separately, and this aspect was sometimes decisive. For example, contact was suspended in one case because ‘the mother would be very greatly stressed if that was to be take place’, whereas unsupervised contact with a neutral hand-over arrangement was ordered in another case because there was ‘sufficient in the circumstantial evidence as well as

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51 Unreported decision of 18/5/98.
The expert evidence ...to persuade [the trial judge] that the respondent will be able to cope with a contact order'.52

5.75 On the other hand, it was clear that the Reform Act's emphasis upon protection of the child and resident parent has sometimes been undermined by a lack of judicial awareness of, or misunderstandings about, the nature and effects of domestic violence. The following extract from a 1998 case illustrates this point. The trial judge in this case accepted the mother's evidence that the father had been violent towards her during the marriage. He then made these findings about the mother's conduct in escaping from the father's violence, and about its relationship to contact:

‘Certainly the mother was not compelled in any way to put up with the father's conduct. I suspect that her generous nature (indicated when she went back to her husband after his nervous breakdown in 1983 because she “felt sorry” for him) induced her to stay during the happy times and induced her to tolerate the bad times. I find that totally to her credit. Similarly when she could bear it no longer, she left. It was her right to do so at any time. But in the absence of any physical violence over [the ensuing years] I find it extraordinary that [the father] should have been denied for long periods any knowledge as to where his wife and children had secreted themselves. I will not speculate on the reasons for that. But to separate a father and son for long periods who were as close and devoted as this father and son was, to say the least, insensitive and indeed reprehensible.’53

5.76 This case resulted in orders for actual shared residence of the child. Similar approaches were found in other surveyed cases among the Batch 3 judgments, in which unsupervised contact was ordered (with a neutral hand-over regime) despite accepting evidence about the father's violent conduct and findings that the mother's anxiety or fears were genuine and justified by the violence she endured during the relationship.54

‘CONTRAVENTION’ OF CONTACT ORDERS

Parents' perceptions

5.77 Our interviews with parents who have entered into consent orders for contact revealed that most resident parents were supportive of contact between the children and the non-resident parent. As discussed above, contrary to the idea of mothers attempting to ‘thwart’ contact between the father and child, almost all the women interviewed had not sought to deny contact to their former partners, even when there had been a history of domestic violence. Rather, most had asked for some form of safety measure, such as supervision of the contact, rather than for contact to be denied altogether.55 However, many had agreed to arrangements that did not provide them with the level of protection they had sought, either because they had felt coerced into agreeing to those arrangements by their lawyer, (even though they had raised concerns about the father's violence), or because they felt there was no other option...
the father would agree to and they had no resources or were unwilling to ‘fight’. For example, many had agreed to unsupervised contact on alternate weekends with a neutral hand-over arrangement even though they had wanted supervised contact.

5.78 The majority of these arrangements had broken down or become unworkable within a very short time of the orders being made, and for most parents we interviewed, there had been numerous variations to the contact arrangements since that time. Fourteen of the women said they would like to have the contact orders changed. Several had wanted the contact to be supervised by a reliable supervisor, but said that they now wanted the father to have no contact at all. Nevertheless, very few (6) said they would try to have the orders changed. The main reason given for not attempting to change the present contact orders was a lack of financial resources with which to commence proceedings, although again, some of the women said that they were too frightened to seek a variation. One mother said:

‘He’ll kill me or the child if I try to change them. He’s told me the child won’t come back from [the father’s residence] alive.’

5.79 Seventeen of the women had been respondents to a contravention application brought by the father, and several others said that the father had threatened to bring contravention proceedings but had been talked out of it by his solicitor. Only 3 of the 17 cases that had proceeded to court had resulted in a penalty. In 5 cases the father’s complaint was dismissed, three contact parents withdrew their applications on legal advice, and in another three cases the parties agreed to vary the orders.

5.80 Most of the women said that the father often breached the terms of the contact orders. The following comments are examples:

‘He takes them away interstate and I can’t afford to do anything about it. But if I take the child on holidays, he brings an application to bring me back.’

‘He threatens the kids, brings them too many presents, denigrates me to them, doesn’t pay for my fare down until it’s too late and I’ve had to pay for it [father is supposed to purchase tickets for the mother and children 7 days before contact]. All along he’s constantly pushing the orders to their limit.’

5.81 Several of the women commented that the father had frequently breached the family violence orders that were in place, but that the police would not intervene because of the Family Court contact orders.56 The following is an example:

‘He kept breaching the [family violence] orders and the police wouldn’t intervene. Contact never really worked. We had about 5 or 6 contact sessions and then he didn’t show up any more for a while and didn’t see [the child] regularly after that.’

**Solicitors’ perceptions and practices**

5.82 Solicitors were interviewed in 1999 about contact contravention applications. Most said that they tried to discourage such applications as much as possible and to resolve the problems by negotiation and (often) by varying the contact orders. As one said:

'I've had very few [contravention] applications because you can usually work them through without needing to go to court. They're either an issue that will blow over, or if there's a permanent problem, you'll vary the orders, for example, if one parent has moved or the children have gotten older and want changes.'

5.83 Another practitioner commented:

'Issuing a [contravention application for contact problems] is like using a sledge-hammer to crack a nut.'

Judges and Registrars of the Family Court

5.84 Family Court statistics show that there was a marked increase in the number of contravention applications filed after the Reform Act commenced operation.57 The 1997 interviews with Family Court judges and judicial registrars suggested that this increase was largely represented by 'trivial' complaints brought by contact parents as a way of harassing the resident parent, rather than an attempt to re-establish contact with the child.58 They also suggested that the applications were being brought predominantly by self represented fathers who interpreted the Reform Act as giving them 'more rights than they have'. Several noted that such applications were frequently frivolous and were a 'waste of the Court's time'. One judge commented that 'a significant number' of applications were brought by 'a controlling male hanging on to something that may technically constitute a breach' but which is 'not meritorious'.

5.85 A few judges spoke of making detailed specific issues orders when they anticipated the possibility of further litigation if arrangements for the children were not 'properly spelt out'. This approach was seen as 'heading off' future contravention applications that might result if too much flexibility was given within the order.

5.86 By 1999, most of those judicial officers who determine contravention applications continued to express exasperation with the high rate of 'trivial' and 'inappropriate' applications, and by the large amount of court time and resources used to deal with them. One concern raised was the perception that a high proportion of contravention applications arose out of what had previously been consent orders. One judicial registrar noted:

'So many of these come out of consent orders, it makes you wonder if they know what they're consenting to. I think often they agree to it because they don't want to fight with their solicitor.'

5.87 There was also concern about the inappropriateness of using contravention applications to restore contact, when the changing nature of children's arrangements over time would suggest that variation applications would be more effective.59 Most interviewees agreed that the success rate of using contravention applications to get contact to resume was 'at best one in three'. One judicial registrar had been employing a particular strategy to deal with this problem:

57 See Chapter 6.

58 The Family Law Act provides for the imposition of penalties where a parent has breached a parenting order without reasonable excuse: Family Law Act 1975 (Cth) s 112AD.

59 The Family Law Amendment Act 2000 passed the Senate and House of Representatives in early November 2000. This allows for a further parenting order to be made in certain enforcement proceedings.
'Many [applications] are in the wrong form. They're not really contravention applications, or at least the problem of contact is not going to be resolved by a penalty. The problem is the arrangements are impracticable. I say to them, "What do you want to achieve today?", and if what they want is to have contact with their children, I say "Why don't you consider withdrawing your application and we can vary the orders". Sometimes they just want the mother to be punished and they're not interested, but often they will withdraw their application and make an oral application for variation.'

**Family Court orders**

5.88 We surveyed 110 unreported contravention judgments from 1998/99 and the findings confirm the judges' perceptions discussed above. The review showed that 95% of the contravention applications in that period were brought by non-resident parents alleging a failure by the resident parent to make the children available for contact. In 89% of those cases the non-resident parent was the father, and in 52% of cases the applicant was unrepresented. The analysis of outcomes showed that the majority of cases (62%) were considered to be without merit. The application was dismissed in 45% of the cases, and in a further 17% the breach was considered 'trivial' or 'of a minor nature' and no penalty was given. Trivial matters included complaints about the resident parent being 15 minutes late delivering the children for a contact visit, complaints about telephone contact that did not occur at the stipulated time, and numerous cases in which the child's or the non-resident parent's circumstances had changed and required a variation of the contact arrangements. Additional contact to compensate for missed contact visits was not frequently sought by applicants, and 'make-up' contact visits were ordered in only 10% of the cases. Some cases contained numerous alleged breaches extending back over the previous 1-2 years, again suggesting that restoration of contact was not the sole aim of the application.

5.89 A number of the applications were dismissed on the ground that the respondent had a 'reasonable excuse for contravening the order' because of the contact parent's violent behaviour or harassment of the resident parent. In these cases the resident parent had usually ceased to facilitate contact because of fear of the father's violence, including his 'uncontrollable anger', 'bullying', or assaults on his former partner and/or the children during contact visits or at the contact hand-over. Arguably the contact orders in these cases should never have been made. Many of the orders that were the subject of such findings had been made by consent.

5.90 The applicant was self-represented in 65% of the cases that were dismissed or given no penalty, while applicants with legal representation brought only 35% of the unmeritorious cases. This suggests that solicitors play an important 'gatekeeping' role in diverting trivial complaints away from the court system. This point was also reflected in the comments of those resident mothers who were interviewed in the final stage of the project.

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60 A recognizance was ordered in 21% of cases, a fine in 3%, a jail sentence in 1% and a community service order in 1%. Determination of the penalty was adjourned in the remaining cases.

61 Family Law Act 1975 (Cth) s 112AD(1A)(b).

62 See also the Australian Law Reform Commission, For the Sake of the Kids: Complex Contact Cases and the Family Court Report No 73, (Sydney, ALRC, 1995) at 64.
RELOCATION

Parents' perceptions

5.91 As noted earlier in the discussion of case law, relocation has been seen as an issue arising out of the Reform Act. This was one of the matters discussed with professionals in the system. Many solicitors and counsellors who were surveyed in the early stages of the project suggested that the reforms had made an impact upon parents' expectations about relocation. Those perceptions were summarised in the following comment by a Family Court counsellor:

'A lot of men think the reforms mean they have more rights eg, the right to have the children half the time. A lot of women think the changes mean they can never move.'

5.92 Two of the parents in our 1999 interviews had also experienced the effects of relocation after separation. One resident parent had left the family home, with the assistance of the local police, to escape from a violent partner. She had moved with the children to a town that was approximately 5 hours drive from their former home. The father had successfully obtained a Location Order and, subsequently, an order that she and the children return to their 'home town' to facilitate the father's (supervised) contact with the children. This mother suggested that a father's 'rights' of contact are treated by the courts as being more important than the children's safety. By contrast, one of the contact parents who was interviewed said that he had 'been forced to' relocate to be near his children after the mother had 'suddenly' moved interstate. This interviewee was having supervised contact with his children at a supervised contact centre (according to Family Court orders), and was angry that he was not permitted to know where his former wife and children were living.

Solicitors' perceptions and practices

5.93 The first questionnaire which was distributed to lawyers in May 1997, before the Full Court's decision in B and B was handed down, asked solicitors to nominate particular situations they thought would produce a different legal outcome as a result of the reforms. One quarter of the respondents nominated relocation as such an issue with comments to the effect that resident parents had become subject to greater restrictions of movement, and that it had become easier to obtain an injunction to prevent the resident parent from moving.

5.94 In subsequent surveys and interviews that took place after B and B was decided, many solicitors remained of the view that permission to relocate was more difficult to obtain than prior to the Reform Act. By late 1999, a few solicitors thought that the 'harshness' of the early days of the reforms on resident parents' freedom of movement had 'softened a little', and that it had become easier to obtain permission from the Court and from the 'other side' to relocate. However, relatively few practitioners had experienced relocation disputes during the preceding year.

Judges and Registrars of the Family Court

5.95 Judges and judicial registrars were also asked about relocation cases. Most agreed that the reforms had made a 'slight' difference 'on the ground', despite the decision in B and B, and that permission to move had become more difficult to obtain. This was attributed to the need to
consider the child’s rights of contact and to know and be cared for by both parents,\(^\text{63}\) which had not been specified prior to the Reform Act. In the words of one judge:

‘There was no right to be cared for by both parents back then.’

**Family Court orders**

5.96 Our survey of unreported judgments included a number of post-Reform Act relocation cases, and a comparison of those with pre-Reform Act decisions. The survey suggests that there was an increase in relocation litigation immediately after the reforms came into operation, and that permission to move had become more difficult to secure as a result of the reforms, particularly at interim hearings in that period. However, the review of Batch 3 cases (1998/99) tends to confirm the solicitors’ perceptions that the initial restrictiveness on the freedom of movement of resident parents has eased. The results of the review also illustrated one of the trends that we found arising out of the interpretation of the reforms, namely a disparity between the case law and day to day practice, confirming the findings of Dewar and Parker.\(^\text{64}\)

5.97 Overall, the review of post-Reform Act judgments contained 56 cases in which relocation was an issue, including 35 trial judgments and 21 interim cases. The resident parent was restrained from moving in approximately half of those cases (25 of the 56). The review of Batch 2 (1996/97) interim judgments demonstrated that permission to relocate was rarely given at interim hearings during that period. This is consistent with the views expressed by Family Court judges who were interviewed at that time (see above). By contrast, the resident parent was successful in obtaining permission to move in approximately half of the Batch 3 interim applications. However, it is not possible to make any comments about relocation cases solely on the basis of outcomes, as the sample of judgments in our survey was quite small.

5.98 We were also unable to measure the effects of the reforms upon outcomes because of the paucity of pre-Reform Act judgments containing relocation issues. To the extent that applications to restrain the resident parent’s relocation were absent from the unreported cases prior to the reforms, it may be that the reforms, and particularly the media attention given to the relocation aspect, encouraged contact parents to bring proceedings to restrain intended relocations where they would not have done so before. However we can only speculate about this, and it may be that relocation applications, and particularly at the interim stage, were not generally the subject of written judgments before the reforms.

5.99 Although the Full Court in B and B held that the reforms had made little difference to the principles governing relocation decision making,\(^\text{65}\) the review of 1996/97 judgments suggested that the section 60B principles had in fact had an impact upon the practice of relocation decision making. We detected a greater emphasis upon the child’s ability to maintain a relationship with the non-resident’s parent than in the earlier cases, and the child’s right of contact in section 60B(2)(b) was frequently referred to in this regard. In particular, judgments in which permission to relocate was refused usually mentioned either the ‘right of

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\(^{63}\) Family Law Act 1975 (Cth) s 60B(2).


\(^{65}\) Note that the Full Court has subsequently downgraded the relevance of the section 60B principles in relocation decision making, expressly over-ruling B and B to the extent that the former case suggests otherwise: A and A: Relocation Approach (2000) FamCA 751.
contact’ principle or the child’s right to ‘be cared for by both parents’ as an important or decisive consideration, suggesting that the reforms had affected relocation decision making. Also evident was an increased level of examination of the resident parent’s proposals for contact should her relocation application be successful, as well as greater examination of the details of the contact parent’s present relationship with the children than is evident in the pre-Reform Act cases. These investigations are also apparent in the reported cases: see for example Martin v Matruglio.66

DISCUSSION

Shift in approach to making contact orders at interim hearings

5.100 Prior to the passage of the Reform Act, the case law established that there was no parental right of access to a child, nor any presumption that access was in a child’s best interests.67 Nevertheless, the Family Court generally regarded continuity of contact between parents and children as being beneficial to a child’s development, and there had been a consistent judicial tendency to give great weight to the importance of maintaining the parent-child relationship following separation.68

5.101 The Reform Act introduced the notion of children having a ‘right’ of contact with both parents, but the legislation makes it clear that this right only operates to the extent that contact is found to be in the child’s best interests.69 The Full Court in B and B confirmed that the child’s best interests remains the court’s paramount concern when determining contact orders,70 and that it was not displaced by the new ‘right of contact’ principle.71 The Full Court also held that the child’s interests are not to be determined by assumptions about contact, but by consideration of the matters listed in section 68F (2).72 The principles in section 60B, including the child’s ‘right of contact’, were said to provide a ‘context’ for the consideration of the child’s best interests.73 More recently, the Full Court has held that the section 60B principles do not carry as much weight in the decisional process as the checklist of ‘best interests’ factors in section 68F (2). The Full Court in A and A: Relocation Approach74 stressed that, while Parliament has stipulated that the latter factors ‘must’ be considered,75 there is no equivalent statutory requirement with respect to s 60B.76

68 See for example, In the Marriage of Horman (1976) 5 Fam LR 796 at 799; In the Marriage of Sedgley (1995) 19 Fam LR 363 at 371. See also comments of the High Court in M v M (1988) 166 CLR 69 at 76.
69 Family Law Act 1975 (Cth) s 60B(2).
70 Family Law Act 1975 (Cth) s 65E.
71 B and B (1997) 21 Fam LR 676 at 730.
72 Ibid at 735.
73 Ibid at 735.
75 See Family Law Act 1975 (Cth) s 68F (1).
5.102 Despite the rulings in B and B, our research confirmed Dewar and Parker’s findings that there has been a shift in the focus of interim contact hearings, from asking whether access should be ordered, to how to maintain contact until the final hearing.\(^{77}\) Decision makers are often assuming that the best interests of the child will be met by maintaining contact rather than that being an issue for determination. In other words, there is now effectively a ‘presumption’ (although not a legal one) operating in favour of contact with the non-resident parent, despite the conclusion of the Full Court in B and B and despite the express requirement in s 60B(2) that contact must be in the best interests of the child.\(^{78}\)

**Shifts in approach to contact orders at interim hearings where domestic violence is alleged**

5.103 The research shows that, despite the new legislative provisions dealing with family violence, the safety of children is often compromised in interim contact hearings. Our comparison of the types of orders made in a random sample of 1998/99 interim matters that contained allegations of spousal violence, with similar interim cases heard before the reforms (1995 and early 1996), demonstrated a trend away from suspending contact until the allegations are tested, and a preference for the use of a neutral hand-over arrangement as an interim safety measure.

5.104 The reforms were drafted at a time when the issue of violence, and its incidence in the population of those involved in family law disputes had become a matter of increasing public discussion. For example, in 1994 the Australian Law Reform Commission had published its first report on its reference, *Equality Before the Law: Justice for Women*.\(^{79}\) In the chapter on Family Law, the Commission had noted the large number of submissions from women who had claimed that the violence they had experienced in the context of family law disputes had not been taken into account as a factor when their cases had been decided. A high proportion of those who made submissions to the ALRC inquiry did so in relation to family law and specifically on the issue of violence, and the Commission made a number of recommendations including amendments to the child related provisions of the *Family Law Act*. Around the same time, the National Committee on Violence Against Women published reports also containing recommendations about dealing with violence in the context of family law and a number of articles were published drawing attention to the body of research involving the impact of violence on children.\(^{80}\) Significantly, that research demonstrated that it is not just violence directed at a child that causes harm: violence against a child’s caregiver can also have a significant impact on a child’s well being.\(^{81}\) It was pointed out that the issue of violence was of particular relevance to a jurisdiction that dealt with family law disputes as the separating population was especially likely to contain a high proportion of people who had been targets

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\(^{78}\) Ibid.

\(^{79}\) Report No 69, Part 1, chapter 9.


The Family Law Reform Act 1995: the first three years

of violence. Moreover, research has demonstrated that the period immediately after separation is the most dangerous for women who have been the targets of violence.82

5.105 In recent years, local research has shown that the ‘core business’ of the Family Court in children’s matters now comprises cases involving violence or child abuse.83 It is clear that these cases are the ones most likely to be litigated, and least likely to settle.84 It is sometimes suggested that allegations of violence are used for strategic purposes in litigation. However, the same research has shown conclusively that only a small proportion of such allegations fail to be established.85 It is significant that the overwhelming majority of the 30 judicial officers interviewed for this project believed that most allegations of domestic violence were well-founded.

5.106 In the early 1990s, the Family Court made a number of decisions that dealt specifically with the impact of violence on children in the context of disputes over what was then ‘custody’. In several cases decided in 1994 and 1995, the Court held that an unacceptable risk of harm to the child might be established by evidence of domestic violence even though the child him or herself was in no danger of being physically assaulted and had not witnessed the violence.86 This case law represented a departure from the approach taken by the Family Court to evidence of domestic violence in the earlier days of the Court’s history when the court used the no-fault philosophy to suggest that violence against a spouse was not necessarily a relevant consideration in determining a child’s best interests.87

5.107 The 1990s recognition by the Family Court of the broad impact of domestic violence upon children’s welfare appears to have been superseded by concerns about maintaining contact. The most common response in the surveyed post-Reform Act judgments to allegations of violence was to allow unsupervised contact between the father and child, using either a collection point that did not require face to face contact between the parties (such as collection of the children from, and delivery to, the children’s school) or by directing that the contact hand-over occur in a ‘neutral’ place under the scrutiny of a third person (such as at a police station or a Contact Centre). There was a steep rise in the proportion of orders for unsupervised contact between the pre-Reform Act and post-Reform Act samples, while the rate of orders for supervised contact remained constant as between the samples. As with other orders being made at interim hearings, the delays in reaching a final hearing in the Family Court...
Court have contributed to this shift, with judges and registrars being concerned about disrupting the child's relationship with the father for a lengthy period on the basis of untested allegations.

5.108 By contrast with the outcomes of interim hearings, when we examined final judgments, our findings were that the rate of orders made for ‘no contact’ had remained substantially unchanged from the pre-Reform Act rate. Importantly, this is the stage at which the allegations about the contact parent’s violent behaviour are subjected to examination, and a Family Report of the children’s welfare is available to the decision-maker. The findings suggest that there is a significant proportion of cases where it can be shown, with hindsight, that the interim contact arrangements are not in the child’s best interests, and may well be unsafe for the child and the carer.88

5.109 In this context, the current approach to interim contact orders represents a retreat from the Family Court’s acknowledgment in the 1990s of the adverse psychological effects of spousal abuse upon children’s welfare.89 That recognition and case law appear to have been effectively displaced by the new emphasis upon the child’s ‘right of contact’. In other words, the research suggests that, contrary to the aim of drawing attention to the rights and needs of the children, the ‘right of contact’ provision has seen the development of a move toward increased attention on the rights of contact parents. It is ironic that that body of case law developed without any express reference in the Act to the impact of domestic violence on children’s welfare, yet one of the Part VII reforms was to include in the legislation a number of statutory references to the need to ensure the safety of children.

Increasing incidence of disputes about breaches of contact orders

5.110 The Family Law Act provides for the imposition of penalties where a parent has breached a parenting order without reasonable excuse (‘contravention applications’).90 One of the most significant findings of the research is the large increase in the numbers of contravention applications brought by non-resident parents alleging breaches of contact orders. The research suggests that many of these applications are being pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact, and that many are ultimately found to lack merit. A substantial number of the unmeritorious claims are pursued by unrepresented litigants, and are particularly time and resource consuming for the Family Court. The research indicates that solicitors play an important gate-keeping role in diverting unmeritorious claims away from the Court system through negotiation and variation of unworkable contact orders. The findings also suggest that many of the problems with alleged breaches of contact orders result from the making of inappropriate contact orders in the first place, and particularly from consent orders.

90 Family Law Act 1975 (Cth) s 112AD.
Increased pressure on women who fear violence to provide contact

5.111 Most of the resident parents interviewed as part of this research had expressed concerns about domestic violence when their contact arrangements had been made. Most of those women had not sought to deny contact to the father, but had asked for some form of safety measure in the contact arrangements (usually supervision). Nevertheless, most of these women had not succeeded in securing acceptably safe contact arrangements, and many had ultimately ‘agreed’ to unsupervised contact with a neutral hand-over arrangement, often upon the advice of their solicitor.

RECOMMENDATIONS

3. The need to ensure the safety of children should be included in s 60B, as a principle underlying the objects of the Act. An understanding of the deleterious effects of domestic violence on children is an essential part of the background knowledge a decision maker must bring to bear on deciding children’s ‘best interests’ issues. This should involve moving the caution in s 68K, that a court not make an order that exposes a child to an unacceptable risk of family violence, to a more prominent place in the Act, specifically to s 60B.

4. The procedure for dealing with contravention applications should be modified to ensure that those hearing the applications can amend the orders the subject of the dispute without requiring a separate application. At present, the court may only do this where there is a specific application for variation before the Court (but see now Family Law (Amendment) Act 2000, Schedule One).
INTRODUCTION

6.1 This chapter discusses some of the trends that have emerged from the available data about litigation and agreements involving children since the introduction of the Reform Act. The statistical information is presented at the end of the chapter.

6.2 One of the underpinning principles of the Reform Act is to encourage parents to rely on private agreements, rather than litigation, when resolving disputes over the arrangements for their children. The introduction of registrable parenting plans and an emphasis on primary dispute resolution (PDR) methods such as mediation were both intended to facilitate this move toward private ordering. However, there has been a considerable increase in the number of applications for parenting orders as well as applications for enforcement of such orders since the reforms were introduced. There have also been increases in the numbers of child related orders made over that period. Simultaneously, very few parenting plans have been registered and the small numbers appear to be declining from what was in any event an initial low base.

6.3 Mediation and other primary dispute resolution (PDR) services are provided by the Family Court as well as by a large number of community agencies. As there are no centralised statistics recording their usage there can be no objective measurement of the extent to which these services are relied on, or whether their use has increased or declined. However, interviews with services providers, parents and lawyers indicate that there has not been any increased reliance on PDR since the Reform Act came into operation.

6.4 In earlier chapters, we have identified several areas of confusion and dissatisfaction amongst parents and legal practitioners about the interpretation and effects of the legislative changes. The data in this chapter, which generally shows increases in applications and orders, suggests that that confusion and dissatisfaction appears to be encouraging, rather than discouraging, parents to litigate.

PARENTING APPLICATIONS

Residence and specific issues orders

6.5 There have been significant increases in the numbers of applications for residence and specific issues orders in the Family Court since the Reform Act was introduced, as Figure 1 shows.

6.6 In chapter 2, we outlined the changes made to the legal framework of ‘parental responsibility’ by the Reform Act. Given the differences between custody/guardianship, on the one hand, and residence/specific issues on the other, it is not possible to make any direct comparisons.
between the pre and post Reform Act application figures. An application for a specific issues order may relate to an order for 'general' parental responsibility to accompany a residence order (giving a similar effect to what used to be a custody order), or it may seek detailed orders about particular aspects of parental authority (for example, education and medical treatment decision making). Nevertheless, the data does indicate a consistent overall increase in applications for child related orders.

Contact
6.7 The pre and post Reform Act increases are most clearly illustrated in the area of contact, where the legislation changed the terminology but did not change the substantive law. The changes are demonstrated in Figure 2 which shows that applications for contact increased from 12,464 in 1995/1996 (the year prior to the introduction of the Reform Act) to 24,681 in 1999/2000.

The Children Act
6.8 A similar, albeit delayed, trend was documented in the UK after the introduction of the Children Act 1989. It has been suggested that the increase in Children Act applications reflected 'a change in parental attitudes – especially, perhaps, a change in fathers' attitudes – contributing to a growing tendency to assert the importance of their role in their children's lives'. Practitioners' comments in our research about the increased expectations of fathers since the introduction of the reforms suggest that a similar phenomenon has occurred in Australia.

Implications
6.9 Increases in the number of parenting applications have several direct and indirect implications for the parties themselves and for the legal system as a whole. The Family Court's Case Management System imposes a number of particular requirements on the pathway to litigation, such as conciliation and pre hearing conferences, at which settlements are actively encouraged. For a variety of reasons, only about 6% of those who file an application actually have their matter determined by a judge. However, entering into the litigation system by filing an application immediately involves additional expense as well as providing opportunities for parties to become more polarised in their views and therefore fail to reach a settlement. These disputes, even if they do not proceed to a hearing, are unlikely to be in the best interests of the children involved.

6.10 For the Family Court particularly, and to a lesser degree for legal aid authorities and community mediation providers, more disputes, as measured by more applications for orders, means additional workloads. In the case of the Family Court, this has the potential to increase delays and hostility towards the system generally, and often towards the Court specifically.

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1 However, by way of reference, Family Court statistics show that in 1995/96 a total 11,430 applications for what is classified as 'custody/guardianship' were made.
2 However, note that a significant proportion of solicitors in our first survey (1997) responded that in their view, access and contact were qualitatively different: See Interim Report, 1999, 20-21.
4 Ibid at 617.
PARENTING ORDERS

6.11 In both England and Australia the numbers of child-related orders actually made (as compared with the number of orders sought) have also increased. In England, the introduction of the Children Act and its inclusion of a no order principle (that is, a statutory presumption against any order being made in a dispute involving a child) appears to have held the numbers down for a few years after the Act came into operation. Although the number of contact orders in the first year of the Children Act’s operation in England (1992) was far fewer than were made before the Act’s passage, the incidence of such orders rose by 117% between 1992 and 1996.5

CONTRAVENTION APPLICATIONS

6.12 Family Court statistics show a steady increase in the number of applications for contravention of parenting orders between 1995/96 and 1999/2000 (see figure 3). The Family Law Act provides for the imposition of penalties where a parent has breached a parenting order without reasonable excuse.6 Over the period 1995/96 to 1999/2000, the number of applications filed increased from 786 to 1976.

6.13 Although contravention applications are typically brought by non-resident parents alleging a failure by the resident parent to make the children available for contact, our research suggests that applications have also been made in relation to other alleged breaches. The reforms appear to have created an additional area for contravention disputes, namely, an alleged failure by the resident parent to ‘share parental responsibility’ for the children by making unilateral decisions about their care. The Reform Act does not specify whether shared parental responsibilities should be exercised consultatively or independently: see chapter 4.

6.14 In interviews with solicitors, a number said there had been an increase in this kind of post-order dispute between parents since the reforms were enacted. Examples included disputes about the resident parent’s choice of medical practitioner, the method of treating a child’s health or educational problems, as well as disputes about the details of contact arrangements. The majority of such disputes were said to be instigated by non-resident fathers. Some solicitors said this was a result of the ‘unrealised hopes’ of fathers who had expected to obtain greater parenting ‘rights’ or time with the children under the reforms. Others said the increase in disputes stemmed from abusive non-resident parents who still expected the resident parent (usually the mother) to do ‘the lion’s share of the work’, but who ‘took every opportunity’ to challenge their care of the children. Solicitors talked of the high level of scrutiny and intrusiveness into the resident parent’s life, with, for example, contact parents being known to make daily phone calls to the resident parent’s home and place of work.

6.15 It appears that one consequence of such disputes for these solicitors has been an increased workload, particularly in drafting detailed orders in an attempt to pre-empt attempts by the ex partners of their clients to bring such applications. A number of practitioners said that they now routinely draft orders about things such as medical treatment decision making, and stipulate the exact times for contact, rather than leave it as ‘from after school Friday’, to reduce the scope for dispute. Specific issues orders are discussed in more detail in chapter 4.

5 Ibid at 615.
6 Family Law Act 1975 (Cth) s 112AD.
As part of the research, we observed hearings at a number of different registries of the Family Court in which contravention applications were made. In all but one of these, the applicant was a self-represented father. Many of the applications were dismissed because the alleged breach was not made out, or because the breach was of an agreement between the parents rather than an order of the Court. In some cases a technical breach was made out, but the judge or judicial registrar considered it to be trivial and effectively no sanction was ordered, although the orders were sometimes varied by consent so as to remove the problem for the future. Several judges and judicial registrars who were interviewed commented that contravention applications frequently had no merit and were often pursued as a way of ‘controlling’ the resident parent’s life, rather than representing a genuine grievance about missed contact. Judges also complained about the extent to which the Court’s resources were being diverted to deal with the large number of unmeritorious applications brought by unrepresented parents.

In the majority of the contravention applications surveyed in 1998/99, the complaint was dismissed or the breach was considered to be too minor to justify a penalty: this is discussed in more detail in chapter 5.

CONSENT ORDERS AND PRIVATE AGREEMENTS

Parenting Plans

Before the Reform Act came into operation, child agreements could be registered by parents without their contents being scrutinised by the Court, and upon registration these became legally enforceable. Under the Reform Act, child agreements have been replaced by parenting plans. However, parenting plans become enforceable as orders only if they are registered. Before a plan can be registered, the contents must be scrutinised and sanctioned by a judicial officer. This involves an examination of its contents and the filing of a certificate indicating either that independent legal advice has been obtained or that the plan has been developed following consultation with a child and family counsellor. As figure 4 shows, there was a marked decrease in registrations when parenting plans replaced child agreements in 1996/97. Since that time registrations have averaged 320 per year, declining to an all time low of 273 in 1999/00. Instead of opting for registration of parenting plans, it seems that lawyers are recommending to their clients that they seek consent orders. We discuss some of the issues arising out of the increased incidence of consent orders below.

The Family Law Council and the National Alternative Dispute Resolution Advisory Council (NADRAC) have recommended to the Attorney-General that the registration provisions be repealed.

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7 Former section 66ZD(3).
9 Section 63E(2)(b).
10 Letter of Advice to the Attorney-General, 16 March 2000.
Increasing significance of consent orders

6.20 While parenting plans, given much attention prior to the introduction of the reforms, have not proved popular, our research has indicated an increase in the use of consent orders in children's cases.

6.21 Some lawyers we interviewed reported seeing clients who had agreed to equal time arrangements in counselling and mediation sessions and who wanted these made into consent orders. The lawyers sometimes responded by questioning their clients about the practicalities of these arrangements and by suggesting the inclusion of a number of specific issues to avoid problems over decision making in the future. These responses mirror the comments made by both lawyers and mediators which are noted in chapter 4. Some parents also told us that they had equal time residence arrangements that they thought were effective. In chapter 4, we noted that these were parents who had not sought legal advice and indeed, were unaware of the changes made to the law. In other words, the Reform Act had had no effect on the arrangements they made for post separation parenting.

6.22 We also noted earlier that the Reform Act was introduced at a time when funding for legal aid was declining. As a consequence, despite the increased numbers of applications being filed, there is now less opportunity for parents to obtain legal representation to pursue their matters through the Court. The inability to obtain legal aid puts pressure on parties to make private agreements, even where the agreement may not be in the best interests of the child. A number of the parents interviewed told us that they felt that they had had no option but to agree with proposals put to them by solicitors, counsellors or the other parent and felt that the situation gave them no real input into the arrangements made for their children.

6.23 Interviews with judges and senior registrars also raised concerns about the fact that consent agreements may be obtained under pressure from lawyers where clients feel unable to challenge the agreement or do not understand what they are agreeing to. They particularly expressed concern about the situation where one or both of the parties is unrepresented.

6.24 The Senior registrars interviewed were most direct in expressing their concerns: one commented that it takes an average of twelve minutes to approve and register a Form 12A (which is the form used for consent orders) and therefore no attention can be paid to the best interests factors in the legislation.

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12 This trend cannot be substantiated by Family Court statistics, as the application numbers apply to both children's and financial matters and no record is kept of consent orders made.


14 Section 68F(3) provides: “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 regards to all or any of the matters set out in subsection (2).” Section 68F(2) is the provision that sets out the factors for a court to take into account when making a determination of the child’s best interests.
However others indicated that where one or both parties were unrepresented they checked the material, in case there was a misunderstanding about what was being agreed to.

I often ask them “Do you understand this?” because solicitors sometimes diddle them

6.25 Some also suggested if there was a domestic violence order on the file they would look more closely at the agreement. In general, registrars said there was no capacity to discover ‘what was behind a consent order’ for residence and contact.

‘It might be the father has threatened her, or the solicitor has pressured her. We don’t know.’

GENERAL CONCLUSIONS ABOUT LITIGATION/AGREEMENTS

6.26 The judges re-interviewed in 1999 said they continue to use the same tactics as previously to promote settlements and foreshorten hearings, such as giving some indication during the trial of the likely orders. However, they believed that this approach works best when litigants are represented by lawyers who can convey the often subtle messages to the parents.

6.27 Unsurprisingly, judges have found that self-represented litigants, who are increasingly a feature of the family law system, are less amenable to settlement strategies. The increase in self-represented litigants also leaves judges relying heavily on the child representatives to promote settlements, but not all cases involve child representatives.

6.28 By and large, the legal profession has not embraced mediation or private agreements to any greater extent than before the reforms, and indeed, some solicitors were delighted with the increased opportunities for dispute that had been provided by the changes. We found no evidence of any increase in the use of primary dispute resolution services by lawyers, and many said they are unfamiliar with mediation. Others suggested that their clients were reluctant to use mediation because they prefer a lawyer – someone who is ‘on their side’ – to negotiate for them.

6.29 Others remarked that mediation was unsuitable for women who were concerned about family violence and for some this accounted for a high proportion of their clientele, although it was also suggested that ‘litigation leads to less communication’ between parents, and the Reform Act had done nothing to change that situation.

6.30 Workers from domestic violence and women’s legal services interviewed indicated that their clients have had problems trying to vary agreements for contact where they were concerned about safety issues, because of the unavailability of legal aid. Legal Aid solicitors confirmed this in interviews, saying that evidence of serious violence and risk to the child had to be established before aid would be granted. The following is an example of a case related to the researchers:

Mrs C who lives in New South Wales agreed to contact in a local park supervised by her between the father and the daughters (aged 20 months). At the first contact visit the father assaulted her. She sought legal aid for an interim hearing to revoke the previous consent agreement and for supervised contact. The Legal Aid Commission refused funding and her solicitor (a community legal centre) asked for a review of the decision and provided evidence of a 7 year history of violence by the father – The Commission wrote back, after rejecting the application for review:
6.31 One of the consequences of fathers' expectations of the reforms has been increased litigation rates, both in initial applications for residence and contact orders (including in circumstances where men were not encouraged to apply for orders before the reforms) as well as in post-order disputes about alleged breaches of parenting orders. This latter aspect has been exacerbated by the lack of clarity in the legislation about how decision making responsibilities should be 'shared' between parents. The right to contact emphasis also seems to have emboldened some fathers to make use of post-order contravention applications to have the other parent penalised.

**Family Law Amendment Act 2000**

6.32 While the research was still under way, in 1999 the government introduced the Family Law Amendment Bill 1999. One of the key aspects of that legislation was the creation of a new compliance regime introducing a three tiered approach to the enforcement of parenting orders. Before the Act was passed in November 2000, we expressed our concern that this research indicated that the proposed changes would be unduly rigid and did not take account of the fact that many 'contraventions' of orders are either trivial, or result from the making of inappropriate and unworkable orders. Fortunately, the government responded to these concerns by amending the bill before it was finally passed in November 2000. The legislation now permits a decision-maker hearing a contravention application to adjourn the proceedings so that a further parenting order may be made. The Act provides a list of factors to guide the decision-maker in deciding whether to adjourn: these factors include whether the order was made by consent; whether the parties were legally represented; how long the order has been in place, and any other relevant matter.

6.33 We hope that any further changes to Part VII of the Family Law Act will take account of the findings of this research.
FIGURE 1: Applications for custody/guardianship and residence/specific issues orders, Family Court of Australia, 1993/94 to 1999/00

FIGURE 2: Applications for access/contact orders, Family Court of Australia, 1995/96 to 1999/00
FIGURE 3: Applications for contravention of child orders, Family Court of Australia, 1995/96 to 1999/00

FIGURE 4: Numbers of Child Agreements/Parenting Plans registered, Family Court of Australia, 1994/95 to 1999/00

Source of all statistical material: Family Court Annual Reports