
The Parliament of the Commonwealth of Australia

Every picture tells a story

Report on the inquiry into child custody arrangements in the event of family separation

**House of Representatives
Standing Committee on Family and Community Affairs**

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Foreword

One of the highlights of committee work for parliamentarians is the people we meet. During this inquiry our greatest delight was hearing from the nine children and five young adults at our final meeting of the inquiry. These children and young adults were a microcosm of what this inquiry was all about.

These 14 young people talked about the important issues of the inquiry - what it was like for them when their parents were separating and how their living arrangements were decided. These children and young adults were articulate, open, funny, serious and sometimes sad. They told us their stories and as a result the real meaning of this inquiry was clearly understood.

Another young boy, Jack, who we were unable to meet with, told us his story through his four drawings. We are so grateful to Jack for the pictures which we have used on the cover and inside cover of our report. Jack's story is a simple and complex one at the same time. It is a story we can all identify with in some way.

'Every picture tells a story'.

Jack's pictures tell us:

Jack shares his time between mum's house and dad's house.

He loves his mum and he loves his dad.

He doesn't like it when his mum and dad argue.

He's happy when they talk to each other.

It is a tough story because dad lives in one city and mum lives somewhere else.

He likes to see them both all the time but he can't because the distance makes it too hard.

Jack's pictures encapsulate the most important voice of all - the voice of the children.

It has been the committee's task to find a way to make the family law system better for all the children and young adults who find themselves, through no choice of their own, in a situation where their parents cannot live together any

more and must separate. Despite this, their parents are still their parents and should continue to share responsibility for them.

We are convinced that sharing responsibility is the best way to ensure as many children as possible grow up in a caring environment. To share all the important events in a child's life with both mum and dad, even when families are separated, would be an ideal outcome.

Over the past six months many people have assisted the committee with its work. Over 2000 people have contributed to this inquiry through tasks such as making submissions, appearing at a hearing, making a community statement, facilitating the committee's visits to the courts and mediation centres and providing exhibits.

On behalf of the committee I thank all of you for your efforts. We have heard you through these contributions and have appreciated the opportunity to speak with some of you.

During the inquiry there were many tears shed by the general public, witnesses, their families and even by the committee members. It has been an emotional experience for everyone.

We believe that the conclusions and recommendations outlined in the committee's report point to solutions that will make the family law system, including the child support scheme, fairer and better for children in separated families and thereby for both their parents and extended family members, including grandparents.

The outcomes of the report are not revenue neutral however they are offset against the current costs associated with family breakdown, costs of people avoiding child support and the huge expense of entering into the legal system. Estimates of these range from \$3 billion to \$6 billion a year with no accounting for the social and emotional toll.

As the chairman of the House Family and Community Affairs Committee I always think that every inquiry is the hardest that we have undertaken. However, I can say that this definitely was, and will be the most difficult inquiry any member will ever have to undertake. The committee devoted all of their individual electorate time outside of the parliamentary sittings, to travel to the hearings right across Australia. This meant that many people in the electorates of Riverina, Fowler, Mitchell, Throsby, Aston, Chifley, Dickson, Blair, Makin and Franklin were inconvenienced for much of the past six months. On behalf of your members I thank you for your understanding and patience while we have been away.

Initially there was a divergence of views amongst us that led to some robust debate. However, I have never felt so proud of a group of members of parliament who put political differences aside and worked together to ensure a united outcome. Each member has sincerely and responsibly contributed to this report, and as chairman I thank you for the honour of working with you.

I thank the Australian community, the many professionals who gave freely of their valuable time, the committee members, the committee's secretariat and the many other staff of the Department of the House of Representatives, and its Clerk and Deputy Clerk, who assisted the committee's work. Your hard work and support on this inquiry has been inspirational. It could not have been done without your cooperation. It has been a demanding task all of the time, for all of us. We have worked together and completed the first step - the report. We must now continue to work together to ensure it is implemented.

Kay Hull MP
Chair



Membership of the Committee

Chair Mrs Kay Hull MP

Deputy Chair Mrs Julia Irwin MP

Members Hon Alan Cadman MP

Mrs Trish Draper MP

Mr Peter Dutton MP

Hon Graham Edwards MP (until 19/08/03)

Ms Jennie George MP

Mr Chris Pearce MP

Hon Roger Price MP (from 19/08/03)

Mr Harry Quick MP

Mr Cameron Thompson MP



Terms of reference

On 26 June 2003 the former Attorney General, the Hon Daryl Williams MP and the Minister for Children and Youth Affairs, the Hon Larry Anthony MP, jointly referred the following inquiry to the committee.

Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the Committee should inquire into, report on and make recommendations for action:

- (a) given that the best interests of the child are the paramount consideration:
 - (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and
 - (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.
- (b) Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.
- (c) With the Committee to report to the Parliament by 31 December 2003.



List of abbreviations

ABS	Australian Bureau of Statistics
AIFS	Australian Institute of Family Studies
ALSWA	Aboriginal Legal Service of Western Australia
CSA	Child Support Agency
CSCG	Child Support Consultative Group
CSS	Child Support Scheme
FaCS	Department of Family and Community Services
FCoA	Family Court of Australia
FCWA	Family Court of Western Australia
FLA	Family Law Act 1975
FLC	Family Law Council
FLS	Family Law Section of the Law Council of Australia
FMC	Federal Magistrates Court of Australia
FRSP	Family Relationships Services Program
FTBA	Family Tax Benefit Part A
HILDA	Household, Income and Labour Dynamics in Australia survey
HREOC	Human Rights and Equal Opportunity Commission
NADRAC	National Alternative Dispute Resolution Advisory Council
NATSEM	National Centre for Social and Economic Modelling Pty Ltd
NWRN	National Welfare Rights Network

Pathways report Family Law Pathways Advisory Group report entitled *Out of the maze: Pathways to the future for families experiencing separation*

SPRC Social Policy Research Centre, University of New South Wales

UN United Nations

List of recommendations

2 A rebuttable presumption

Recommendation 1

The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making. (para 2.82)

Recommendation 2

The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse. (para 2.83)

Recommendation 3

The committee recommends that Part VII of the *Family Law Act 1975* be amended to:

- provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;
- define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;
- clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;

- in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and

- in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents. (para 2.84)

Recommendation 4

The committee recommends that Part VII of the *Family Law Act 1975* be further amended to remove the language of ‘residence’ and ‘contact’ in making orders between the parents and replace it with family friendly terms such as ‘parenting time’. (para 2.85)

Recommendation 5

The committee recommends that Part VII of the *Family Law Act 1975* be further amended to:

- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;

- require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;

- require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and

- require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer. (para 2.86)

Recommendation 6

The committee recommends that the Commonwealth Government develop a wide ranging, long term and multi level strategy for community education and family support to accompany legislative change and to promote positive shared parenting after separation, as was recommended by the Family Law Pathways Advisory Group. (para 2.87)

3 Facilitating shared parenting

Recommendation 7

The committee recommends that in support of the legislative presumption for shared parenting recommended in Chapter 2 the government review the

community's current access to services which can assist those who cannot achieve and sustain shared parenting on their own to:

- develop the skills to communicate effectively around their children's needs and to manage co-operative parenting;
- enable them to resolve their on-going conflict and develop a long term ability to share their parenting responsibilities in the interest of their children; and
- include the perspective and needs of their children in their decision-making, with and without assistance from the family law system. (para 3.70)

Recommendation 8

The committee recommends in particular the significant expansion of the contact orders program beyond the level addressed in the Government's Response to the Pathways Report, to enable separated families in long term conflict to have access to like services in all states and territories and in regional areas. (As a minimum there should be one of these services in each location where there is a Family Court registry.) (para 3.71)

Recommendation 9

The committee recommends that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal. (para 3.72)

Recommendation 10

The committee recommends that the funding for the Family Relationships Services Program be increased following a review with respect to the appropriate targeting and adequacy of resources for the service types which will provide the most benefit to families' positive family relationships, before during and after separation.

In this review the committee recommends that consideration be given particularly to a significant further expansion of children's contact services nationally. (para 3.73)

4 A new family law process

Recommendation 11

The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing

Commonwealth body with national geographic spread and infrastructure, with the following functions:

- provision of information about shared parenting, the impact of conflict on children and dispute resolution options;
- case assessment and screening by appropriately trained and qualified staff;
- power to request attendance of both parties at a case assessment process; and
- referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan. (para 4.156)

Recommendation 12

The committee recommends that the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:

- It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.
- Members of the Families Tribunal should be appointed from professionals practising in the family relationships area.
- The Tribunal should first attempt to conciliate the dispute.
- A hearing on the dispute should be conducted by a panel of three members comprising a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member.
- Legal counsel, interpreters or other experts should be involved in proceedings at the sole discretion of the Tribunal. Experts should be drawn from an accredited panel maintained by the Tribunal. (para 4.157)

Recommendation 13

The committee recommends that all processes, services and decision making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them. (para 4.158)

Recommendation 14

As discussed in paragraph 4.102, the committee recommends that in the period immediately following separation:

- there be a 6 week moratorium before any obligation to pay child support arises;

- parents be required to access the single entry point and begin the process of mediation (including the commencement of a parenting plan); and
- during the first 6 weeks parents be able to access their full entitlement to social security benefits without penalty, to ensure neither they nor their children are financially disadvantaged. (para 4.159)

Recommendation 15

The committee recommends that all family law system providers, but most particularly the single entry point service, should screen for issues of entrenched conflict, family violence, substance abuse, child abuse including sexual abuse and provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal. (para 4.160)

Recommendation 16

The committee recommends that an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience.

It should be clear that the role is limited to family law cases and does not take away from the States' and Territories' responsibilities for child protection. (para 4.161)

Recommendation 17

The committee recommends that after establishment of the Families Tribunal, the role for courts in disputes about parenting matters should be limited to:

- cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse which parties will be able to access directly once the issues have been identified;
- enforcement of orders of the Families Tribunal when the dispute cannot be resolved by a variation of the order of the Tribunal so far as possible by judicial delegation to Registrars;
- review of decisions of the Families Tribunal only on grounds related to denial of natural justice or acting outside its power or authority. (para 4.162)

Recommendation 18

The committee recommends that in parallel with the establishment of the Families Tribunal the current structure of courts with family law jurisdiction be simplified. This should ensure there is one federal court with family law jurisdiction with an internal structure of magistrates and judges to support the delivery of judicial determination in the best interests of the child. (para 4.163)

Recommendation 19

The committee recommends that a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs. (para 4.164)

Recommendation 20

The committee recommends that there should in future be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in social sciences and or dispute resolution methods. (para 4.165)

Recommendation 21

The committee recommends the immediate implementation of the following additions to contact enforcement options:

- a cumulative list of consequences for breaches;
- reasonable but minimum financial penalties for first and subsequent breaches;
- on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and
- retaining the ultimate sanction of imprisonment. (para 4.166)

Recommendation 22

The committee recommends that in the lead up to the implementation of the recommendations in this chapter to create a Families Tribunal there should be a public awareness campaign to inform the community about the reform and its benefits. (para 4.167)

5 A child's contact with other persons**Recommendation 23**

The committee recommends that the Commonwealth Government amend subsections 68F(2)(b) and (c) of the *Family Law Act 1975* to explicitly refer to grandparents. (para 5.65)

Recommendation 24

The committee recommends that the Commonwealth Government:

- include information on grandparents' status in a wider public education campaign on the *Family Law Act 1975*;
- ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan; and

- develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and family counselling activities when it is in the best interest of the child, in particular the development of a wider family conferencing model. (para 5.66)

6 Child Support

Recommendation 25

The committee recommends that the *Child Support (Assessment) Act 1989* be amended as follows:

- to increase the minimum child support liability payable under section 66 from \$260 per year to \$520 per year (that is, from \$5 per week to \$10 per week);
- to reduce the ‘cap’ on the income of the paying parent on which child support is calculated under section 42 to ensure high income payers are not contributing child support at a rate in excess of cost of children by reducing the cap to twice average weekly earnings for full time employees or changing the base to 2.5 times average weekly earnings for all employees;
- to eliminate any direct link between the amount of child support payments and the time children spend with each parent, amend sections 47 to 49 removing the changes to the formula in relation to levels of care of their children (‘109 nights’) by non-resident parents, and replacing it with a new parenting payment to non-resident parents with above 10% care;
- amending the way the payer’s child support income is determined by halving the formula percentage applying to income earned from overtime and second jobs worked above a set working week of 38 hours. In the event of a person working more than one job, either part time or casual, only the first 38 hours can be combined to achieve the 38 hour limit; and
- to give the following additional enforcement powers to the CSA to improve their collection of child support:
 - ⇒ amend Child Support Agency garnishee powers so they can be used to collect current child support from non-salary and wage earners;
 - ⇒ compulsory notification to Child Support Agency from insurers re settlements;
 - ⇒ collection from realised compulsory preserved superannuation;
 - ⇒ possibility of being able to access joint accounts;
 - ⇒ credit reference agencies – use to obtain information;

- ⇒ cancellation of drivers/other licences;
- ⇒ deeming the transfer of assets; and
- ⇒ access to extraordinary lump sum payments and receipts which are not normally included in the child support income base, be included when there is an option of using them to satisfy outstanding debt.

The committee also recommends that section 71C of the *Child Support (Registration and Collection) Act 1988* be amended by raising the limit on prescribed non agency payments from 25% to 30%. (para 6.213)

Recommendation 26

The committee recommends that a detailed re-evaluation of the Child Support Scheme be undertaken by a dedicated Ministerial Taskforce.

■ The objectives of the re-evaluation should include:

- ⇒ establishing the costs of raising children in separated households at different income levels that adequately reflect the costs for both parents having significant and meaningful contact with their children;
- ⇒ adequately reflecting the costs for both parents of re-establishing homes for their children and themselves after separation;
- ⇒ ensuring that the Child Support Scheme and the social security system work consistently to support and encourage both parents to continue to be involved in parenting their children after separation and does not act as a disincentive for workforce participation for each parent;
- ⇒ ensuring the Child Support Scheme appropriately reflects significant developments in the taxation system since 1988 including company tax, trusts etc; and
- ⇒ ensuring as a matter of principle that exempt and disregarded income are adjusted to bring them closer together to reflect the changing work and parenting patterns now evident in the community.

■ The re-evaluation should be completed by 30 June 2004. (para 6.214)

Recommendation 27

The committee recommends that a Ministerial Taskforce be established to undertake the re-evaluation set out above. The Ministerial Taskforce should include:

- clients of the Child Support Agency;

- child support payer and payee representative groups ;
- researchers with expertise in the costs of children such as National Centre for Social and Economic Modelling, University of Canberra (NATSEM) and the Social Policy Research Centre of the University of New South Wales (SPRC);
- social policy researchers such as the Australian Institute of Family Studies; and
- representatives of relevant government departments and agencies. (para 6.215)

Recommendation 28

The committee recommends that the Child Support Agency, in conjunction with the Commonwealth Ombudsman:

- undertake a review of its strategies for communication with individual clients and the effectiveness of information flow to clients; and
- take whatever steps are required to ensure that clients fully understand all the options available to them in meeting their child support obligations and are enabled to act upon them. (para 6.216)

Recommendation 29

The committee recommends that the Child Support Agency decisions be subject to external review. This could be done by an arm of the Families Tribunal, the Social Security Appeals Tribunal or any other appropriate tribunal. (para 6.217)

