The parliamentary inquiry into a legal presumption of 50:50 joint parenting after parental separation continues to generate intense debate. The Institute's *Catherine Caruana* reports on a recent professional forum.

The "joint custody" debate
Where to now?


Catherine Caruana

After an 11-week whirlwind tour, involving travel to 16 or so locations around Australia, receipt of 1,698 written submissions, endless hours of public hearings and community consultations, hearing from a range of individuals and representatives from private and government organisations (including the Australian Institute of Family Studies – see accompanying box on page 66), the House of Representatives Family and Community Affairs Committee has concluded its deliberations on child "custody" arrangements following parental separation. Its report is due on 31 December 2003.

Continuing the Institute's interest and involvement in the debate (see preceding edition of *Family Matters*, no. 65, 2003, for a range of views on the proposed rebuttable presumption), what follows by way of update is a report on a professional forum held at Victoria Legal Aid in Melbourne on 13 November 2003.

The forum

Titled *Joint Rebuttable Custody: In the Child's Best Interests?,* the forum was hosted jointly by the Australian Family Mediation Association and the new Roundtable Dispute Management unit at Victoria Legal Aid.

Damien Carrick from Radio National's "The Law Report" facilitated the evening's proceedings. The panel of speakers comprised: David Edney, an accredited family lawyer; Michael Green, Queens Counsel and author; Lawrie Moloney, Associate Professor at La Trobe University, and Terry Melvin, Manager of Mensline Australia, a national telephone counselling information and referral service for men.

Before proceedings started there were several initial impressions that, in a way, characterised the passion and (gender) politics of this debate.

The first was of the two disgruntled fathers standing outside the venue handing out flyers emblazoned with DNAB4UPAY to forum attendees. The flyer contained the assertion that: "One in five men who question the paternity of their own child will have their suspicions validated by DNA testing." Then there were the burly security guards to greet you at the door. And, on entering the room, in spite of the fact that a significant majority of the audience were women, the panel of speakers was all male. (In defence of the organisers, it was pointed out that several prominent women who had been scheduled to speak were unable to attend.)

The first speaker, *David Edney*, was opposed to the introduction of a presumption of shared care. He saw it as anomalous that parents coming before the court, and therefore by definition having been unable to agree on arrangements for their children, will be presumed to be in a position to share the physical care of the children – a parenting arrangement that may well require a higher level of communication than in intact families.

Such a presumption, Edney argued, does not accommodate the individual characteristics of families. By way of example, he queried the relevance of such

a presumption to a family with a cultural background that subscribes to more traditional gender roles, or where children are cared for by someone other than a parent. And what of families marked by violence? For women in violent relationships who cannot afford a lawyer and fear that joint residence may be ordered, the risk is that remaining in the relationship may be the only way they feel they can protect the children.

Presenting a contrary view, *Michael Green* saw the government's interest in a shared residence presumption as an "outbreak of common sense". He argued that there currently exists a de facto presumption for an 80/20 split (in the mother's favour) of the care of children after separation. To change this, he believes a revolution in culture and attitudes is necessary – a "tweaking" of the law, as he characterised 1996 reforms, is not enough. He advocates for extensive public education and coordinated support services for separating parents, with easier access to mediation and counselling. In his view, the current system has failed families.

According to Green, parenting disputes should be taken out of the adversarial system. A tribunal presided over by a magistrate where legal representation is not required, would replace the Family Court. In this vision for the future, special police would be employed to investigate allegations of child abuse quickly and cheaply. Separation, Green argued, is a human event, not a legal one, and lawyers are not the best professionals to assist in the resolution of disputes about the care of children.

Lawrie Moloney agreed with Michael Green that there currently exists a culture of 80/20 parenting and that extensive reform is required. However, he sees a proscriptive time allocation to parents as anathema to the best interests of children. He expressed the view that the idea of a tribunal seemed to be gaining currency with the committee. In musing about what such an entity might look like, he suggested that the core question to be asked of parents appearing before it would be: "How do you plan to parent your children now that you've separated, and how does this mesh with your former partner's plans?" This would establish a "future focus" at the outset rather than setting parents up to trawl over past events in an attempt to discredit the other parent.

Moloney provided an interesting account of his experience of appearing before the Family and Community Affairs Committee. He and his colleague Jenn McIntosh, in encouraging the committee to embrace a "child-focused" model as opposed to one based on parents' rights, invited members to view an example of an intervention with children at the Family Mediation Centre in Melbourne. In what turned out to be one of their last consultations, the committee observed Dr McIntosh working with children aged between seven and 13 years who had a range of experiences of parental separation, from shared care arrangements to exposure to violence and high inter-parental conflict.

In Moloney's view, this opportunity gave committee members greater insight into the fact that each child has a "separate and distinct narrative" regarding their experience of parental separation and that the views of children, like those of adults, are not static. Hence the idea that you can make "final orders" when it comes to decisions about children is, to Moloney, ridiculous. Children are active participants in the process of family breakdown

Speakers at the forum (from left): Lawrie Moloney, David Edney, Terry Melvin, Michael Green, and Damien Carrick (Chair).

and to disregard their voice when resolving disputes between parents, as he believes the current system does, is to "commodify" them. In his view, mechanisms used to assist in the determination of what is in the best interests of the child, such as family reports and separate (child) representatives, do little to counter this.

Moloney hoped that this experience had dissuaded the committee from the view that effective child-focused practice can be conducted within the current court structure. He ended by saying that it would be a tragedy if we simply transpose a 50/50 model onto the existing system. Such a move would be a litigator's delight. In his view, we have to acknowledge that it is no longer acceptable to hide behind the mantra of "best interests of the child" and then proceed to oversee a "good barney" between the parents.

Terry Melvin's work with men who had experienced family breakdown had led him to the same conclusion – that a new system is needed. He argued that men are disadvantaged and alienated by the "institution of separation". He saw clear evidence of institutionalised gender bias against men and the tacit acceptance of a "deficit model of fatherhood". He echoed calls for greater support services for parents experiencing the aftermath of separation.

Some possibilities

As noted, the report of the House of Representatives Family and Community Affairs Committee is due on 31 December 2003. While not seeking to pre-empt the committee's report, a brief analysis of some of the possible options for structural change generated in this debate is included here.

As is evident from the comments made above, and from many of the submissions made to the committee, dissatisfaction with the current family law system goes well beyond that suggested by the

INSTITUTE'S RESPONSE TO THE "CHILD CUSTODY" INQUIRY

The Australian Institute of Family Studies submitted a response to the Australian Government's Inquiry into "Child Custody" on 19 August 2003. Dr Ann Sanson and Mr Bruce Smyth appeared before the Committee on 13 October 2003 to give evidence.

The following summary encapsulates the core points in the Institute's submission on a rebuttable presumption of joint "custody". The submission and evidence drew heavily from a review of the available research literature in Australia and overseas.

- The diversity of families and children's situations reinforces the conclusion that no single post-divorce arrangement is in the best interests of all children.
- Most studies indicate that the interests of children post-divorce are generally best served when children can maintain ongoing and frequent contact with both parents who co-operate and communicate with low levels of conflict.
- Despite a pre-occupation with allocations of parenting time (the *quantum of time*) by many parents, legal professionals and courts, the research literature suggests that it is the *quality of relationships* between parents, and between parents and children, that exerts a critical influence on children's well-being. Of course, an emotionally close and warm relationship requires some minimum amount of parent–child contact to sustain it.
- Parental separation is a leading cause and correlate of child poverty. Most studies indicate that the single factor most likely to lead to poor child outcomes (be they poor educational performance, emotional problems, anti-social or other behavioural problems, or health and developmental problems) is poverty.

Taken together, the research literature suggests that the best interests of children are strongly connected to co-parental cooperation, parenting capacities and skills, and practical resources.

Joint residence, where children spend roughly equal time in two homes, is a demanding post-divorce arrangement that requires psychological and practical resources that may be available to only a small select group of families.

The Institute's submission (No 1055) can be downloaded from: www.aph.gov.au/house/committee/fca/childcustody/subs.htm

The Hansard of the Institute's evidence (13 October 2003) is available at: www.aph.gov.au/house/committee/fca/childcustody/hearings.htm

inquiry's terms of reference – namely, concerns about gender bias in residence and contact orders, contact for grandparents, and the equity of the child support system.

Calls for change are not new, of course. Wider issues such as the appropriateness of adversarial processes to resolve family disputes, accessibility of primary dispute resolution services, expense, delay and the ability to enforce orders obtained have been raised in previous inquiries such as: the Joint Select Committee on Certain Aspects of the Family Law Act (1994); the Family Law Pathways Advisory Group 2000; and the Litigants in Person in the Family Court of Australia (Dewar, Smith and Banks) 2000. These are issues with which governments around the world are grappling.

At the time of writing it is unclear what the scope of the committee's recommendations will be. A reading of transcripts from the hearings suggests that the committee may be advocating more wide-ranging reforms to the family law system than simply a change in the substantive law. The report may well recommend that a decision-making body be established as an alternative to, or in addition to, the Family Court. In formulating any such recommendations the committee will need to be mindful of the constitutional constraints implicit in any exercise of federal jurisdiction outside the court system.

A number of options have been formulated in a paper entitled *Proposal for a New Process for Dealing with Post-Order Contact Disputes,* produced by the Family Law Council in November 2003 in response to questions taken on notice from the committee.

One suggestion is to extend the availability of arbitration processes, currently only available in property matters, to disputes concerning the care of children. Arbitration is a process whereby parties to a dispute present arguments and evidence to the arbitrator and agree to be bound by the arbitrator's determination if they are unable to reach resolution. Arbitrators are generally, but not necessarily, lawyers. Arbitration is currently only available under the Family Law Act where the parties consent. However it may be that, as long as parties have the ability to seek a *de novo* rehearing of the matter, courts could order arbitration without the consent of parties. To break from adversarial processes and to avoid undue formality, participants in such a process may not be bound by the rules of evidence.

Another suggestion is to create a separate structure within the court in the form of a multi-disciplinary panel or tribunal, the members of which exercise delegated power to make decisions in children's matters, with supervision or involvement of judicial officers.

A third option is to appoint "assessors" to investigate parenting disputes and make recommendations to judges, who then make the final determination. This model has been used extensively in other jurisdictions. Provision for the appointment of assessors already exists under Order 30B of the Family Law Rules, which came into effect in 1992. Under the current provisions the court is not bound by any opinion or finding of an assessor; however, their recommendations would have a higher status than the family report currently used in the Family Court. Like Family Court Counsellors, the assessors could have a background in the social sciences rather than law.

For further coverage of the debate, watch this space.

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

NEW AIFS POST-SEPARATION PARENTING BIBLIOGRAPHY

Australian Institute of Family Studies researchers working on the *Caring for Children after Parental Separation* project have started making available some of the topics from a bibliography created for the project.

The bibliography is a work in progress which is being added to and updated as new material emerges. To date, topics covered include: shared parenting; the child contact/child support nexus; fathers and divorce; father absence; father–child relationship; remarriage/repartnering; relocation; and grandparents.

The bibliography, which draws largely on published studies in North America, the United Kingdom, Canada, New Zealand and Australia, has been made available in the interests of sharing knowledge and improved scholarship on issues related to divorce and separation.

The bibliography can be downloaded from the Institute's website: www.aifs.gov.au/institute/info/bib/separation.html