INCLUSION OR EXCLUSION II: WHY THE FAMILY COURT PROTESTS?

ISSUES PAPER NO. 12

By

STUART BIRKS

CENTRE FOR PUBLIC POLICY EVALUATION
2002

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PREFACE

The Father&Child Society is an umbrella organisation for a number of regional groups supporting fathers. Through our member groups we hear numerous stories of fathers feeling that they face barriers. Many of these relate to family law, to the point where many fathers believe that the Family Court is weighted against men.

I have had many years personal experience of working with men in Nelson. I get the signal that, when a marriage or long-term partnership breaks up, and particularly when children are involved, the majority of men feel powerless. They feel that the systems work against them, and that women have all the power and control. They have a strong impression that the court system and society favours women.

Men's socialisation focuses on invulnerability, which of course makes them more vulnerable because there is less support for them, and it is harder for them to ask for help when they need it. When a relationship ends, they are generally the ones who have to move out.

In my experience, and contrary to the stereotype, very few dads are deadbeat dads. I find that, before leaving home, the dads I see have tried everything they can. They also say, "The kids need their mums". They nearly always recognise the value of mothers. Unfortunately, though, through the wider Family Court system and its affiliated network of lawyers and counsellors many dads get very little contact with their children, often only two hours a week. This is not enough to maintain close relationships. When they do get contact, they feel that their parenting is very much under the spotlight.

Today's men recognise the importance of being a real dad. This is not to say that men in the past thought otherwise, but views of parenting by both mothers and fathers change over time, and now fewer fathers than ever are living with their children.

Many fathers say they have given up all hope of relationships with their children for the present. They do cling to the belief that, when children get old enough, they will make up their own minds and be more open to contact. They are often told to expect this by people in the Family Court. We hope that they are right.

While the editorial control for this Issues Paper rests with the Centre for Public Policy Evaluation, the Father&Child Society is pleased to support this work.

Philip Chapman
President
Father&Child Society
May 2002

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Chapter One

INTRODUCTION – INHERENT BIASES?

Issues Paper 9, *Inclusion or Exclusion: Family Strategy and Policy*, was published in November 2000. The collection of papers suggested that men's and fathers' perspectives were not being considered in family research and policy, particularly in the area of family law. Since then, there have been several developments in the consideration of family law. These include: submissions on the review of the laws about guardianship, custody and access being received and summarised; introduction of the new Property Relationships Act; the Child Support Amendment Act 2001; defeat of the Open Family Court Bill; release of the Law Commission's Preliminary Paper 47, *Family Court Dispute Resolution*; and the commissioning of Family Court outcomes research by the Department for Courts. There have also been regular protests outside Family Courts and related venues.

Inclusion refers to inclusion in normal social life. Commonly it is considered in relation to poverty or involvement in broad social and political activities. It should also relate to involvement in families. Has anything changed since Issues Paper 9 was published? It would appear not. In fact, there appears to be a widespread effort by the government, the legal profession and others to deny or downplay many of the problems currently observed in relation to family law. This is clearly evidenced in the description of concerns about the treatment of fathers as the voices of a few "disgruntled dads", or the "fathers' rights movement" (stereotyped in a selection of extreme statements), and in the repeated failure to acknowledge phenomena such as gatekeeping or parental alienation, the parenting role of non-custodial parents and the institutional barriers they face, or the broader impact of the decisions of the Family Court beyond individual cases.

While there are apparent attempts at consultation, with associated calls for submissions, these activities suffer from fundamental weaknesses in terms of research design, selective use of information, inadequate critical assessment, and, once again, failure to acknowledge criticisms that are raised.

This Issues Paper attempts to demonstrate the existence of these weaknesses and, to go some way towards redressing that imbalance.

Chapter 2 presents and discusses statements by some key politicians and lawyers. It illustrates “official” positions and the nature of the law and policy debate as shaped by key players.

The significant content of Chapter 3 is in its six appendices. Five of these are submissions to the Ministry of Justice's Review of Guardianship, Custody and Access. Two are from academics, myself and Paul Callister. They focus primarily on the research content, or perhaps more accurately, the lack of content, of the review. Submissions by Karla Osmers and Angela Phillips illustrate the thoughtful and wide-ranging suggestions that can be found in some submissions, the structured and interrelated nature of which is lost in the review process. The fifth submission, by Don Rowlands of the Christchurch Caring Fathers Group, contains thoughtful discussion and detailed consideration of overseas legal approaches to the issues under consideration. The sixth appendix consists of summary notes of a meeting between representatives of Auckland fathers' groups and the Principal Family Court Judge. But for the speech by Muriel Newman MP in Chapter 2 Appendix 1, there is a big difference in the approaches taken and concerns raised in Chapter 2 and in Chapter 3.

Chapter 4 is a paper presented at the Fourth Child and Family Policy Conference, "Children and Young People: Their Environments", held in Dunedin in June 2001. Much discussion on law focuses on individual situations and decisions, but that is only part of the picture. This chapter considers wider social implications and longer-term ramifications that might be anticipated from society's experience of family law. The view presented in currently common descriptions of history, such as that based on patriarchy, is simplified and inaccurate. Participation in society is associated with various constraints, responsibilities and freedoms for its diverse members. Prevailing attitudes and expectations affect behaviour in numerous ways. The chapter attempts to challenge some accepted beliefs and open up debate on concerns about the implications of present structures for the nature of society and individual behaviour in the future.

The content in the first four chapters suggests that some attention should be given to the political process. Chapter 5 is a paper presented at the New Zealand Political Studies Association Conference in Palmerston North in December 2001. It briefly discusses four recent areas of policy debate and change in the area of family law in New Zealand.

Chapter Two

POLITICIANS' VOICES, LAWYERS' VOICES

An indication of attitudes and the level of public debate on family law can be found from Ministers' speeches and Law Society press releases. It is worth considering these in the current climate, where some people are repeatedly and publicly asserting that there is a bias against fathers.

2.1 POLITICIANS VOICES

2.1.1 Laila Harre

On 19 September 2001 Laila Harre presented a Suffrage Day speech. In her introduction, she said:

> *It is on days like this that I feel deeply privileged to serve as Minister of Women's and of Youth Affairs. Both roles carry a responsibility to bring people who have been marginalised from the big decision-making processes into the heart of them.*

There are some interesting underlying sentiments in this statement. In his submission for the Review of Guardianship, Custody and Access, included in this volume, Paul Callister questioned the appointment of the same person to be both Minister of Women's and of Youth Affairs. It should not be assumed that there is automatically a common interest among "women and children". Rather, that standpoint reflects what has been described as "gatekeeping" by women.[1]

While she refers to the marginalisation of people, as Minister of Women's Affairs she is promoting New Zealand's version of gender analysis. This requires consultation with women, but there is no such requirement with respect of men.

It is worth elaborating on this point. In response to written questions lodged in Parliament on 11 April 2002, Margaret Wilson, Associate Minister of Justice stated that:

> *"Gender analysis involves looking at the effects of policy on both men and women. Where there is a proven pattern of gender inequity the policy tool of gender analysis helps identify policy options for redressing the inequity."* (question 4076)

[1] See chapter 4.2 of this publication.

and:

> *The framework for gender analysis involves evaluating existing policy and options for reform from the perspective of both men and women, to assess whether the policy and options advantage or disadvantage men or women. For this reason the use of this framework is more likely to redress, rather than "produce", any gender inequity or bias in the Family Courts."* (question 4087)

These answers are surprising, given that gender analysis is described as follows on the Ministry of Women's Affairs web site:

- It "aims to achieve positive change for women" (http://www.mwa.govt.nz/pub/gender/whatisga.html);
- It is intended to improve policy advice so it "better addresses the needs of women" (http://www.mwa.govt.nz/pub/gender/whtga.html);
- The gender analysis model is intended to "further the Government's *Outcomes for Women*" (http://www.mwa.govt.nz/pub/gender/model/gam_st1.html);
- Policy questions should be framed "to ensure the issues for women will be addressed" (http://www.mwa.govt.nz/pub/gender/model/gam_st2.html);
- Steps should be taken "to reduce or eliminate any negative impacts on women" (http://www.mwa.govt.nz/pub/gender/model/gam_st3.html);
- Policy options should be assessed to see how they "impact on women in population groups affected by the policy" (http://www.mwa.govt.nz/pub/gender/model/gam_st4.html);
- All implementation decision criteria are specified in terms of women only (http://www.mwa.govt.nz/pub/gender/model/gam_st5.html); and
- The consultation process only specifies consultation with women and the Ministry of Women's Affairs (http://www.mwa.govt.nz/pub/gender/b_guide.html)

As Issues Paper 9 indicated, there are areas where men are being marginalised.

One clue as to Laila Harre's position can be found in a speech of 6 February 2002 in which she said, *"If we are advocating economic independence through paid work, then it is simply unacceptable to turn a blind eye to the inequality that results for those with care-giving responsibilities."*[2]

The term "economic independence" is significant. It is also used, without the "through paid work" qualification, in the Ministry of Women's Affairs', briefing for the incoming minister, 1999, in the statement, *"Economic independence is the most important issue for women because it is the necessary condition for social and economic well-being."* There does not seem to be much room for mutual cooperation and support between men and women in this view of society.

In the same speech, she says:

> *"Paid leave after the birth of a child and other steps to address the needs of working parents are ramps of a different kind. Without them, full and equal participation in paid employment remains a distant goal for mothers, and we are unlikely to see the really big shifts we would like towards fathers taking on greater care-giving work within the family."*

I wonder whether "full and equal participation in paid work" is a goal that mothers have, or one that Laila Harre wishes to impose on them. More equal sharing of parenting is called for in Article 5 of CEDAW (The Convention on the Elimination of All Forms of Discrimination Against Women), which refers to "*the recognition of the common responsibility of men and women in the upbringing and development of their children"*.

In a speech on 9 March 2001, she does acknowledge that barriers exist for men also:

> *"Paid leave after the birth of a child and other steps to address the needs of working parents are ramps of a different kind. Without them, full and equal participation in paid employment remains a distant goal for mothers, and we are unlikely to see the really big shifts we would like towards fathers being able to take on greater caregiving work within the family.*
>
> *Acknowledging that society has built-in barriers to women's equal participation in paid work and indeed men's equal participation in unpaid caring work, is hard for some people to do."* [3]

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[2] Hon Laila Harre, Keynote speech to the 16th Annual Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), 6/2/2002, http://www.executive.govt.nz/speech.cfm?speechralph=37278&SR=1

[3] Hon Laila Harre, Speech to Work/Life Summit, 9/3/2001, http://www.executive.govt.nz/speech.cfm?speechralph=33847

There is little indication that she intends to address the barriers faced by men, however. Rather, she prefers to introduce favourable policies for women in the workplace, while maintaining barriers to men's increased participation in the home. This is evident in her speech for the second reading of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Bill on 21 March 2002, in which she never uses the word "father", and uses "mother" 12 times, and for the third reading on 28 March 2002 in which she again never uses "father", and twice refers to parental leave as "maternity leave".[4]

In a speech on 7 September 2001 to the Social Policy Forum 2001, she suggests that social change is required (despite her working in the opposite direction), rather than changes to family law, before fathers can expect support from her: *"...if we genuinely share this goal of having both parents engaged in a rich primary caregiving relationship with their children then far more influential institutions than the Family Court, such as the family itself and the workforce, need to change first."*[5]

Some fathers, objecting to the barriers they face, have protested outside Family Courts in New Zealand. Laila Harre went on to dismiss them in a particularly insensitive way:

> *"It doesn't escape some of our attention that the growing harassment at our family courts looks much like the gauntlet women still have to run to access legal abortions. And much of the rhetoric used demonstrates a similar analysis of women's experience."*

Fathers do not appear to be part of her constituency.

Further clues to Laila Harre's position can be seen in the Alliance Party policy on women for the 1999 election.[6] Here are some extracts:

> *"We aim to repair the damage to women's position in society that has been done by previous governments."*
>
> *"...the Alliance supports the continuation and development of the Ministry of Women's Affairs until women attain equity with men both in opportunity and substantial outcomes."*

---

4 http://www.executive.govt.nz/speech.cfm?speechralph=37713&SR=1 and http://www.executive.govt.nz/speech.cfm?speechralph=37783&SR=1 respectively

5 Hon Laila Harre, Speech to Social Policy Forum - Children in families as reflected in statistics, research and policy, 7/9/2001, http://www.executive.govt.nz/speech.cfm?speechralph=35933&SR=1

6 http://www.alliance.org.nz/info.php3?Type=Policy&ID=318

"As well as recognising and redressing gender inequality, the Alliance also recognises and respects women's difference, particularly the vital contribution made by women as mothers."

"Effective employment equity legislation will be introduced. The pay provisions of this will: provide for the determination of wages in accordance with the principles of equal pay for work of equal value..." [note that "equal value" is not determined through demand and supply]

"Violence is the single greatest cause of women's physical illnesses and the cause of the greatest medical costs." [This depends on how widely or narrowly other causes are defined. The result can be achieved by subdividing any other, larger categories. According to the Ministry of Health, in 1998/9, *"For females, self-inflicted injury was more common than injury inflicted by another person (4.4 and 1.4 percent, respectively [of female hospital discharges involving injury and poisoning])."*[7]]

"The Alliance will investigate tagging (as practised successfully in Sweden) for people who breach protection orders. Tagging means that offenders will be tagged with a bracelet that cannot be removed and which alerts the police if tagged abusers enter an area determined as a safe area for victims). This strategy would need to be used in conjunction with counseling, anger management programmes, and rehabilitation."

"The Alliance will move to ensure that girls and women have equal education, training and employment opportunities inside and outside the formal education system." [Note that Ministry of Education data show that, as at July 2001, women made up approaching 60% of degree level students.]

2.1.2 Steve Maharey

Some of Steve Maharey's general statements appear to recognize the problems faced by, and are very supportive of, fathers. For example, the following was in two speeches by Steve Maharey, one given to the Social Policy Forum on 26 October 2000, and one given a few days later to the New Zealand Association of Children's Supervised Access Services conference.[8]

"Our current Guardianship Act was passed over 30 years ago.

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[7] P.13 of Ministry of Health (2001) *Selected Morbidity Data for Publicly Funded Hospitals 1998/99*

[8] The speeches are on the web at: http://www.executive.govt.nz/speech.cfm?speechralph=32813&SR=1 and http://www.executive.govt.nz/speech.cfm?speechralph=32834&SR=1

I suggest that it no longer meets New Zealand families' needs. It certainly does not meet the needs of fathers who become separated from their children because their relationship with the mother of their children has disintegrated. Neither does it meet the needs of children who want, need - and deserve to develop with the friendship and guidance of their father.

The evidence both here and overseas is overwhelming - that children deprived of loving fathers are disadvantaged children, whatever their socio-economic circumstances.

This Government is committed to change things for children in New Zealand - to ensure that there is no unjustified impediment to continuing family involvement by fathers, or any member of a child's extended family, if the primary relationship between their father and mother fails."

Also in the first speech, he says:

"We think that a refocus on the rights of the children might clear the thinking of adults who are self-absorbed in the hurt and misery of their relationship breakdown. This is a situation where people can forget the consequences for the children in their determination to score points against their ex-partner.

We want to change the law to ensure that the best interests of the children are the prime focus.

** The imbalance of parental rights and responsibilities - while the law says that both parents (usually) have equal rights and responsibilities regarding major decisions for their children, the reality is that the children usually live with one of the parents for most of the time.*

In this situation it is often easy for the custodial parent to plead pragmatism - "you weren't available" - "I had to make a decision today" - to exclude the other parent from important decision-making on behalf of the children."

On 15 August 2000, speaking at the launch of the discussion paper, *Responsibilities for Children: Especially When Parents Part*, he said:

Children thrive in strong families and in strong communities. Family relationships are very important to children's wellbeing, socialisation, development, and their future participation in their country's prosperity.

> *We need to encourage and support one another to develop strong family relationships, especially between children and parents, and between parents and other carers of children.*
>
> *There needs to be greater emphasis placed on parent's responsibilities to their children. A parent's responsibility should never end simply because they do not live full-time with their child. This is a particularly important message for fathers of children from broken relationships. Children need the support and love of both their father and their mother and the law should ensure that this is possible unless there are compelling reasons otherwise.*
>
> *Government wants to achieve this through promoting parental responsibility, positive parenting and increasing parenting skills, supporting relationships, and acknowledging the importance of cultural values, attitudes and practices."*[9]

While these are admirable sentiments, his more specific statements are less helpful. In the above speech on 15 August 2000, he also said:

> *"The family situation prior to parents parting, and the ongoing parental relationships following separation are often very stressful times for all concerned. The impact of such conflict has been shown to be a key factor in how well children adjust to their parents parting."*

Conflict, even if generated by one parent trying to exclude the other, is often considered sufficient justification for the Family Court to accede to that exclusion. This may well encourage parents to more vigorously pursue such exclusion strategies.

We also see the pattern of viewing men on the one hand and "women and children" on the other, expressed in the context of family violence in speeches on 7 November 2001:

> *"…early intervention to provide assistance when we get warning signs of trouble - such as family violence services offering timely assistance to women and children…"*[10]

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[9] http://www.executive.govt.nz/speech.cfm?speechralph=31977&SR=1
[10] http://www.executive.govt.nz/speech.cfm?speechralph=36587&SR=1

and 14 March 2002:

> *"We know, in particular, that a substantial number of women and children in this country experience, or are potentially 'at risk' of experiencing, some form of family violence during their lifetime."*[11]

It is not clear what specific steps Steve Maharey intends to take to support the wider principles he espouses.

2.1.3 Margaret Wilson

Contrary to the evidence that women initiate separations at a much higher rate than men[12], on 29 February 2000 she said in her speech to the House on the Matrimonial Property Amendment Bill:

> *"This Government is determined to move with considered haste to make sure that the bill more fairly reflects the concerns of those who took the time and the trouble to make submissions. In particular, we are concerned about the whole issue of economic disadvantage for non-earning spouses. At times it is difficult to realise and understand the distress that many women---and their dependent children---experience when they have performed the role and function of spouse to their husband,* ***and then have been discarded for a newer and younger model*** *at the very time when they are most in need of some reciprocity in terms of the partnership arrangement they thought they had entered into."*[13]

Note also the expression, "women and their dependent children".

The proposed legislation later reappeared in the context of Supplementary Order Paper No. 25. On 13 November 2000, Margaret Wilson spoke again in the House:

> *"Research demonstrates that undeniable poverty results for many woman and, sadly, their children when relationships break down. The living standards of many women and children are inevitably lowered more than that of men when relationships end."*[14]

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11 http://www.executive.govt.nz/speech.cfm?speechralph=37613&SR=1

12 See, for example, New Zealand data on page 59 of Birks S (1998)

13 http://rangi.knowledge-basket.co.nz/hansard/han/text/2000/02/29_043.html, my emphasis.

14 http://rangi.knowledge-basket.co.nz/hansard/han/text/2000/11/14_017.html

Not only does she overlook the research of people such as Braver and O'Connell (1998), but she stresses the cases of non-working women and relationships of 35-40 years. Policy based on such stereotypes is hardly likely to fairly reflect the situations and decisions of many of the population.

2.1.4 Tariana Turia

In a speech to the Family Law Conference on 6 October 2001, Tariana Turia made reference to criticisms of the Family Court:

> *"While I know that there have been criticisms of the Family Court particularly but not exclusively by groups representing fathers I am also aware that many within the Family Court system have been complimented by whanau, who have appeared before it.*
>
> *I know for example, that many of the Family Court judges have referred families to appropriate forum to try and arrive at an indigenous solution and report that outcome back to the Court.*
>
> *I also know that on occasions when the Family Group Conference process within the Child, Young Person and their Families Act 1989 has not arrived at a resolution, Family Court judges have encouraged whanau to go away and try again.*
>
> *I find this aspect of the Family Court most satisfying."*[15]

This is notable in that the praise for the Court is based on the Court NOT being involved. Of course, many of those with complaints about the Court have more than fleeting contact with the institution.

2.1.5 Muriel Newman

It would be inappropriate to omit mention of one opposition MP, Muriel Newman of ACT. She stands out as having campaigned vigorously and virtually single-handedly among MPs to highlight problems with family law and the Family Court, as well as with more general policies as they affect families. She was responsible for the Shared Parenting Bill, discussed in Birks (2000), the Open Family Court Bill, and the Guardianship (Shared Parenting) Amendment Bill. Unlike the MPs discussed above, she considers how fathers might be affected by the legislation, and some of the associated costs for society as a whole. Her speech, "Family Law Exacerbates Fatherlessness", June 1, 2001, is reproduced in Appendix 1 of this chapter.

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[15] 6 /10 /2001 Hon Tariana Turia, Speech to Family Law Conference, "Whanaungatanga and the Family Court" http://www.executive.govt.nz/speech.cfm?speechralph=36291&SR=1

2.2 LAWYERS' VOICES

The Law Society web site lists three media releases on family law in June and July 2001. The first, dated 7 June 2001 was by Anita Chan, Chair of the Family Law Section of the New Zealand Law Society; the second, dated 19 July 2001, reported Wellington lawyer Simon Maude, speaking as Deputy Chair of the Family Law Section; and the third, dated 20 July 2001, was signed by the above two, plus a further 19 senior family lawyers. They are included as letters 1 to 3 in Appendix 2 to this chapter.

2.2.1 Letter 1

In the first letter, the chair of the Family Law Section addresses claims of bias against men. She describes these as claims by men's groups, suggesting that criticisms are based on anecdotal evidence. While some criticism is anecdotal, she ignores other material of which she should be aware. For example, to take only some of my own work, there is a published critique of conferences papers on family law (Issues Paper 3), and of Law Commission research (Issues Paper 2).

She appears to put forward an informed view when she states that:

> *"Research also tells us that some children do better if they have one stable home base (ie, with one parent for most of the time); that major upheavals for children (eg, changes in their environment including care giving arrangements) should be avoided unless there are compelling reasons requiring change; and that it is important for the emotional wellbeing of children that they should be with the parent with whom they have the closest psychological bond."*

She does not give her sources, but there are challengeable presumptions in her statement. In particular, she assumes the need for "physical stability" rather than "emotional stability". In other words, they should have a stable home base, rather than stable relationships with both parents. She mentions changes in environment, but the number of shifts needed in a custody-access situation could be similar to the number of shifts in a shared parenting arrangement. A custodial parent could move or repartner, creating changes in the home environment, and children's lives involve participation in several environments, such as grandparents' homes, school, church, and social groups. The sole custody presumption is reinforced with the statement about the "closest psychological bond". There is an assumption not only that the children will be with only one parent, but also that children's future parenting needs are reflected in the level of psychological bonding at the time of involvement by the Family Court. As a result, it is assumed to be acceptable to forego a psychological bond with one parent.

Her statement mentions only "some" children, so it might be imagined that there would be many cases where the Court determines that shared custody is best. In practice, the Court is unlikely to order shared custody, and is even ineffective in supporting orders for access. She goes on to state that, *"the research also tells us that children sustain potentially severe psychological damage by exposure to ongoing hostility between their parents"*. Unfortunately she does not address the issue of the Court's failure to discourage hostile action or parental alienation by a custodial parent. In fact, the policy of the Court towards custody and access actually rewards such behaviour by condoning or actively supporting the exclusion of the other parent.

2.2.2 Letter 2

This release presents the views of the Deputy Chair of the Family Law Section of the Law Society. It describes criticisms of the family Court as, "the very vocal claims of some disgruntled men". Simon Maude's language is less guarded than that of Anita Chan, above. He speaks of a "campaign to disparage the whole Family Court system". He also attempts to dismiss criticism by suggesting: *"Of course there will always be some litigants who feel unfairly treated but comments arising out of individual grievances don't reflect the vast majority of cases"*.

Unfortunately he fails to include points of substance. On the contrary, he repeats the often-made claim that the adversarial nature of the Court does not generate conflict between parents. His reasoning is that very few cases are resolved at hearing, and in those cases there is already conflict. This argument is based on an underlying assumption, sometimes made explicit, that hearings only affect those directly involved. It is surprising that a senior lawyer is apparently unaware of the shadow of the law. Parents are negotiating custody and access in the knowledge that the matter could be resolved in Court if they fail to reach an agreement. If the Court holds the belief, stated in letter 1 above, that the children should be with one parent, namely the one to which they have "the closest psychological bond" (as determined by the Court), then that is likely to have a significant effect on any "voluntary" agreement entered into. It is unlikely to make a favoured parent amenable to a shared arrangement.

2.2.3 Letter 3

This letter is from 21 "senior family lawyers", including the above two. It states that: *"We view with concern the recent attacks upon the Family Court and the Judges appointed to the Court, much of it ill-founded and ill-informed."* This suggests that some of the criticisms are informed and well-founded, but that is conveniently forgotten.

They claim that: *"The expertise of the Courts' Judges has been well recognised in several judgments of the Court of Appeal and the High Court…"* "Recognised" is perhaps the wrong word. Rather, it is asserted, but that is not the same as saying that the expertise really exists.[16]

[16] See Birks (2001), p.63

It is disappointing that they dismiss criticism by resorting to personal attack with statements such as: "for some, pain is most easily relieved by criticizing the institution which happens to be at the end of the line"; "The Court is criticized as being "secret", thereby by implication hiding some sinister truth from the public. The accusation is **a useful obsession** for some"; "deserves careful, not **knee-jerk, reaction**"; and "The criticism is **unfair and self-serving**."

Rather than responding to specific points of criticism, they assert generally that the Court has been wrongly criticized: "mischievous and misleading statements being published in the media", and, "unmeasured and melodramatic statements which amount to misrepresentation and which serve no useful purpose."

They also say: "In every custody/access case which comes before the Family Court there is scope for consideration of a shared parenting regime." It is true that there is scope for such consideration. There is nothing in law to prevent shared parenting, but their assertion is misleading. The sentiments expressed in letter 1 suggest that it would not be favourably considered, and there are more extreme examples from Judges' decisions on pages 66-67 of Birks (2001).

2.3 SUMMARY

In brief, political debate on the role of fathers and the impact of family law is generally poor. The underlying assumptions merit close scrutiny. There are repeated assertions of points and sentiments that have frequently been publicly challenged as misleading. In the case of Laila Harre, it is to be wondered if the New Zealand public is aware of the agenda being followed.

Similarly, the statements from lawyers are disappointing. They do not demonstrate that they are well informed, nor do they appear to be taking criticisms seriously. They are largely dismissive of, or ignorant of, the concerns that have been raised about family law and its operation. The reliance on personal put-downs rather than scholarly debate is particularly worrying. It does raise the question: If this is how these senior family lawyers are prepared to show themselves in public, what are they doing behind the closed doors of the Family Court?

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APPENDIX 2.1

FAMILY LAW EXACERBATES FATHERLESSNESS

Dr Muriel Newman

Speech to a Whangarei public meeting on Family Law Reform, June 1, 2001
http://www.act.org.nz/item.jsp?id=20395

Fatherlessness, described as the major cause of many of society's ills - child abuse, crime, drug addiction, suicide, educational failure, unemployment - is being exacerbated by our present family laws. Yet rather than tackling the problem, the government has paid lip service to it and swept it under the carpet.

In response to my calls for law changes to shared parenting that would help to turn around the problem of fatherlessness, the government instigated another review. In fact, during their term of office they have spent literally millions and millions of dollars on reviews, commissions of enquiry, advisory panels, official's committees, discussion papers, and so on, often simply to give the appearance that they are taking an issue seriously.

The Guardianship Act Review now languishes on the Minister's desk. As I understand it there are no specific plans to fundamentally change family law, although I suspect that there will eventually be some window dressing word-changes to make the Act 'sound' more child friendly. Meanwhile, in spite of the irrefutable evidence that our present family laws are damaging children as well as the social fabric of society, the government will sit on its hands.

Let me share with you a story that outlines some of the realities of our present family law system and then I will ask you to be the judge as to whether there is a need for change.

Brian is a truck driver. He is married to Wendy and has two children; Rebecca aged 5 and Daniel 7. Some months ago Brian arrived home from an overnight job to find his house empty and his family gone. That day the police came around and served him with an ex-parte protection order from his wife. That order essentially meant that he was no longer able to have any contact at all with his children. His wife had told the lawyer that although Brian had never been violent towards her or the children, she was concerned that he might become violent when he found her gone.

Brian sought the help of a lawyer. The end result was an $8,000 bill, a permanent protection order against him, a nine month period in which he wasn't allowed to see his children at all, a court appearance which resulted in him having two hours of supervised access a fortnight, costing $50 a time, at a Barnardos residence, and compulsory attendance at a violence prevention course.

His parents who are in their eighties, could not see their grandchildren either, tried to talk to Wendy. For their efforts, they ended up with a trespass order against them.

Wendy was able to use legal aid in her legal fight against Brian. He used his retirement savings and then went into debt.

Once she and Brian are divorced Wendy will be the real winner - sole custody of the children, a secure income in the Domestic Purposes Benefit with a child support top-up, a cheap state house, and half of the value of the assets. Brian will be a loser, having to pay the full amount of child support yet only seeing his children for the equivalent of just over 2 days a year, as well as being heartbroken and broke.

The children will be the biggest losers, however, effectively having lost a dad, grandparents, uncles, aunts and cousins. Further, the nature of their family environment will put them into a high-risk category. Statistics tell us that a sole parent household headed by a single woman is the most dangerous family environment in which to raise children. Such children are 32 times more likely to be abused and 75 times more likely to be killed than if they were living in a family with their natural parents who were married.

That is not to say that individual parents fail to do their best, it is just that the statistics are overwhelming in saying that children are at risk in households headed by a sole mother, with no father around.

It has further been estimated that for every 10% increase in family breakdown there is a 17% increase in violent crime, with children from such single parent households being in danger of falling off the rails, experimenting with booze, sex, and drugs, dropping out of school, becoming involved initially in petty crime to pay for the drugs, eventually leading to serious violent crime.

In spite of New Zealanders up and down the country calling for a tougher approach to violent crime in the 1999 referendum, supported by 92% of the population, the government has ignored calls to get to the heart of the problem, to turn around the incentives in our laws that are causing the breakdown of the home and the family. In fact, the government has turned its back on a problem, which is clearly going to get worse, since if present trends continue, by the year 2010 three quarters of Maori and a half of non-Maori children will be living in families where there are no fathers.

Meanwhile, recent changes to family law have made the problem worse, by significantly contributing to increasing fatherlessness. The 1995 Domestic Violence Act, which replaced the 1982 Domestic Protection Act, broadened the definition of violence to include "psychological" abuse. This is in spite of there being no evidence to link psychological abuse to physical abuse.

In the last three years, some 28,755 applications for protection orders were made, covering 42,959 children. Because 89% of the orders were made ex-parte and less than 20% were defended, many of those children will only see their fathers for two hours a fortnight in a supervised setting. Some dads fight in the courts, while others simply walk away saying that it is impossible to maintain a proper relationship with their children under those circumstances.

The Domestic Violence Act changed the basic legal assumption that someone is 'innocent until proven guilty', and that guilt must be proven 'beyond reasonable doubt', to being guilty by accusation, leaving the accused to have to try to prove their innocence. In fact the burden of proof required to initiate a protection order is non-existent. It all effectively depends on whether the custodial parent 'feels' that they and their children will be unsafe.

The court now errs on the side of caution to such an extent that a series of insults can be treated the same as repeated, sustained beatings leading to hospitalisation. The result is that thousands of ordinary, loving fathers are prevented from having any meaningful relationship with their children, further exacerbating the growing problem of fatherlessness.

Sir Michael Hardie Boyes, our former Governor General expressed his concerns about fatherlessness in this way:

> *"Fatherless families are more likely to give rise to the risks of being abused, of being emotionally, even physically scarred; of dropping out of school; of becoming pregnant; of living on the streets; of being hooked on drugs or alcohol; of being caught up in gangs, in crime; of being unemployable; of having no ambition, no vision, no hope; at risk of handing down hopelessness to the next generation; at risk of suicide".*

I ask you to be the judge, as to whether there is an urgent need for family law reform. I believe the necessity for change is overwhelming and I would like to outline what I believe we need to do to turn the situation around.

Firstly, we need to ensure that when family breakdown does occur, children retain the full support of both their mother and their father. Replacing the present family law system, which gives preferential sole custody of children to mothers, with a shared parenting would go a long way towards ensuring such an outcome. Other countries that have legislated for shared parenting have seen that children do better.

The reality is that children need the love, protection and support of two parents. Our present family law, that awards sole custody, alienating the non-custodial parent and causing many to lose all effective contact with their children, is wrong.

I believe the Guardianship Act should be amended to introduce a presumption of Shared Parenting. My new private members' bill, the Guardianship (Shared Parenting) Amendment Bill, which will be submitted into the next members' ballot, seeks to ensure that in the event of separation, children have frequent and on-going contact with both their mother and their father, grandparents and extended family as well. Under shared parenting, both parents are equally responsible for the well-being of their children. That means neither one can take the child off the other, unless it can be proved that they are not fit to be a parent. Further, under my bill, any parent that is obstructive runs the risk of losing the right of access to the children.

Without the ability to fight for custody of the children, parents will be required to focus on their proper role - agreeing on what sorts of living arrangements and daily routines will be best for their child. Mediation services and parenting plans will help to guide the parents in devising the most beneficial arrangements. By removing the warfare out of what is already a difficult and stressful event for both parents and children, shared parenting seeks to keep the child's rights to both a mother and a father sacrosanct, even after family breakdown has occurred.

Secondly, I would ensure that children have the protection of open justice in the unlikely event that custody and access cases were referred to a family court. Secrecy in that court is an anomaly that must be changed. In countries that have opened up their family court, acrimonious litigation was seen to decline reinforcing the view that justice is not done unless it is seen to be done. My Guardianship (Shared Parenting) Amendment Bill models the Australian legislation by providing for such openness.

Thirdly, the Domestic Violence Act needs to be amended introducing a more testing burden-of-proof provision for protection orders. If such orders are served ex-parte, it should be mandatory that a defended hearing be scheduled within 48 hours, in order that the evidence can undergo proper scrutiny by a judge.

Fourthly, I would return the DPB to its original role of supporting parents during the difficult period of separation by helping them find their feet in the workplace. All evidence shows that it is detrimental to children to live in a family where there is no role model of a parent who is working for a living. The DPB needs to be considered as a temporary benefit, which specifically provides support and assistance to sole parents as they move into paid work. Such assistance may include child-care help, as well as support to overcome the individual barriers that the parent faces to accepting paid employment. Further, with both parents in the workforce, the incentives for parents to co-operate under the provisions of shared parenting are greatly enhanced.

Finally, the present child support act is a vexed issue. Widely regarded as unfair, it was introduced to ensure that non-custodial parents accept their responsibility to contribute financially to the upbringing of their children. Under a shared parenting regime, any child support payments would be made to the family, not the IRD, although such an agency may be involved in collection. Countries that have introduced shared parenting have found that there is widespread compliance with child support requirements.

What I have outlined to you tonight are five key steps to change the present incentives in family law that promote family breakdown, parental alienation, and fatherlessness. ACT is committed to these policy initiatives and will be actively campaigning on them at the next election. In view of the National Party's strong support of my shared parenting bill last year, there is an excellent chance that with an ACT-National Government after the next election, family law reform will be high on the agenda with shared parenting becoming the law.

Equally what we know absolutely conclusively is that under a Labour-Alliance-Green-New Zealand First Government, shared parenting will never see the light of day, and the need for family law reform to turn around the growing problem of fatherlessness and the associated social crisis, will be ignored.

APPENDIX 2.2

LAWYERS' LETTERS

Letter 1

Dated 7 June 2001

http://www.familylaw.org.nz/media/NandS070601.asp

Letter to the Editor, North and South - Family Court bias

Lauren Quaintance's article "Court of Injustice" (June issue) was timely and topical, and raised questions that need to be asked. Men's groups claiming that the Family Court is biased against men have indeed generated a growing tide of dissatisfaction about the Family Court. For Family Court lawyers (and other professionals working in the court on a daily basis) it is self-scrutiny time - if the Family Court is indeed biased then we need to speak up. Failure to do so would make us part of the problem.

So, is the Family Court biased against men?

The personal stories used in the article illustrate very well, and I would think accurately, the acute pain suffered by individual men who have experienced first the pain of family break-up and then considerable further pain when they have failed to obtain the results from the Family Court that they consider to be fair.

But tempting as it may be to sympathise with those who have suffered genuine emotional anguish, it would be dangerous to simply accept these anecdotal examples as conclusive evidence that the Family Court is biased against men. Anecdotal evidence provides some insight into the effect of the system on the lives of some individuals but it is not a reliable measurement of performance. There are always two sides to every story. In the Family Court there are usually at least three. Children are the innocent victims in any conflict between their parents.

In New Zealand statute law specifically requires that no matter how unjust it may be to one or both parents, the Family Court must put the best interests of children ahead of any competing interests of their parents. This is a good law and few would argue against it. Upholding this law, however, makes it inevitable that, in many cases, one or both of the parent parties will feel aggrieved by the court's decisions.

It is entirely natural to feel empathy for the party granted less contact with his or her children than they want and may even deserve. However, local and international research provides some insight into why courts make decisions that aggrieved parties (both men and women) complain about.

Overwhelmingly, the research confirms, for instance, that it is indeed best for children to have as much positive time as possible with both their mothers and their fathers. However, the research also tells us that children sustain potentially severe psychological damage by exposure to ongoing hostility between their parents. In such cases it is the court's job to balance the individual child's need to have contact with the non-custodial parent against the need to protect that child from the potential damage caused by frequent exposure to parental conflict. In reaching its decision in such cases the court would normally have the benefit of the evidence of at least one child expert who has assessed the particular needs and risks of the individual child in the case.

Research also tells us that some children do better if they have one stable home base (ie, with one parent for most of the time); that major upheavals for children (eg, changes in their environment including care giving arrangements) should be avoided unless there are compelling reasons requiring change; and that it is important for the emotional wellbeing of children that they should be with the parent with whom they have the closest psychological bond. The 'mother principle' referred to in your article has no currency whatsoever and indeed fell into disuse many years ago.

Any court system is at best an imperfect system designed to achieve justice in as many cases as possible, where individuals have been unable to do so privately.

So what is the strike rate of the New Zealand Family Court?

There are men's groups. There are women's groups. The two sides have one thing in common. Both complain bitterly that the system falls far short of serving the interests of their particular group's members. That is their job. Both sides can provide equally convincing evidence including emotionally moving anecdotal evidence to support their arguments.

As lawyers we have no interest in pushing the barrow for any particular class of litigant. We represent men, women and children in the Family Court. One of the key roles of the NZ Family Law Section (with a membership of over 700 family lawyers) is to act as a non-partisan proactive lobby group for families and, in particular, children, in the area of family law. Why? Because as a profession, lawyers are in a unique position to do so from an independent point of view. It is disappointing that North & South did not interview the Family Law Section when researching the article.

What is the truth? Is the Family Court biased against either men or women?

As a professional working in the Family Court on a daily basis, I have seen little evidence to support this claim. What I do see on a regular basis is a system in which judges strive to encourage parties to achieve the best possible result for their families within the framework of the legislation. In doing so, they are careful to take guidance from research findings as well as from expert psychological evidence on the particular needs of the particular children in the case before the court.

However, the Family Law Section does believe that legislative change is required to ensure the Family Court can more effectively uphold every child's right to enjoy positive and meaningful relationships with each of its parents. The Attorney-General has signalled a thorough review of the laws affecting the care of children. In the meantime the Section has called for immediate changes so that:·

- where the court makes an ex parte order (ie, an order made without prior notice to the other parent) that detrimentally affects the access of one parent, then upon application the case must come back before the court within 14 days so that the court can consider the access arrangements in terms of the child's best interests;
- Family Court judges are given much wider and stronger powers to enforce access;
- people other than the parents (including counsel for the child, any other parties to the proceeding and the judge) can ask for a mediation conference;
- the court can direct counselling for children (currently it can direct only parties to attend counselling).

By the time a case gets as far as the Family Court, all members of the family are hurting. The Family Court, though imperfect, severely under-resourced and seldom thanked, is, on the whole, doing its best to assist these families and, above all, to protect and promote the best interests of the children. It has the unenviable job of balancing the competing interests of parties, piecing together the clues left by social scientists and interpreting and applying the legislation. It has no vested interest in favouring any one class of litigant over another. Yet whatever decisions it makes, it opens itself up to attack by one group or another.

Criticism is healthy and necessary but there is also a need to guard against accepting, too readily, arguments advanced by those suffering emotional anguish, no matter how genuine they may be. Just because a litigant did not obtain their desired result from the court or even a result that would be fair to them, does not mean that the court is biased against them. The court is required by statute to be "biased" in favour of children, to hold their best interests paramount. It is also required to apply the laws passed by Parliament - including laws that specifically require the court to restrict access to supervised access where a parent has been violent (until satisfied - usually after hearing evidence - that the child would be safe if access was unsupervised).

As the recent television documentary illustrated, Family Court judges in this country expend a great deal of energy assisting families to resolve their conflicts in a conciliatory and 'holistic' fashion. In addition to their own personal endeavours to assist parties, they utilise a wide range of other tools including court-directed counselling, judge-led mediation, court-directed input from counsel for the child and court-ordered assessments and reports from child experts. It would be far easier, I would suggest, for Family Court judges to simply hear the evidence and impose decisions without first exhausting the opportunities to assist and encourage parties to approach family conflict in a constructive and child-focused way. Thankfully Family Court judges in this country have not reached this stage of despondency and cynicism. Let's try and keep it that way!

Anita Chan, Chair, Family Law Section, New Zealand Law Society

Letter 2

Dated 19 July 2001

http://www.familylaw.org.nz/media/famct190701.asp

Media Release from the Family Law Section

Family Court not biased, say lawyers

Despite the very vocal claims of some disgruntled men, the Family Court is not biased, say family law specialists who regularly practise in the court.

Wellington lawyer Simon Maude, speaking as Deputy Chair of the Family Law Section of the New Zealand Law Society, which represents over 700 family lawyers around New Zealand, says:

> *"We represent men and children as well as women so we have no interest in favouring one group over another, and our experience is that there is no gender bias in the court. If there was, we would be speaking out about it as it would be disadvantaging our clients.*
>
> *"The only bias, if it can be called that, is the one set in legislation which requires the court to make the interests of the child paramount and, in our experience, that is what Family Court Judges do.*
>
> *"We are very disturbed by the current campaign to disparage the whole Family Court system. The hard evidence indicates that the Family Court is working for the vast majority of people who use it.*
>
> *"The claim that the Family Court is adversarial in nature and therefore causing parents to fight simply doesn't stand up. It ignores the fact that the Family Court is not just about an actual court hearing. Its processes include counselling and mediation with the assistance of judges, and over 90% of all cases are solved through these processes.*
>
> *"Very few cases - perhaps only about 3% - actually go to a court hearing and those cases are the ones where the parents can't agree - that is why they ask the court to sort it out, and it is quite wrong to blame the court for that already-existing conflict.*

"As so few cases actually go to a court hearing, people may not realise that where there is a conflict that can't be resolved, the children have their own lawyer. It is not a case of just the two parents fighting it out, and the judge deciding for one or the other. The judge has to decide on the basis of what is best for the children and if that was not being done, as lawyers for those children we would not be supporting the system.

"The Family Court is subject to the same judicial standards as any other court. Its judges have to provide reasoned written decisions which may be published and which can be appealed to the High Court - tellingly, very few are.

"Of course there will always be some litigants who feel unfairly treated but comments arising out of individual grievances don't reflect the vast majority of cases.

"And they don't reflect the experience of lawyers representing men, women and children in the court every day."

Letter 3

Dated 20 July 2001

http://www.familylaw.org.nz/media/famct200701.asp

Open Letter to the Editor

Family Lawyers Write in Support of Family Court

We are a group of senior family lawyers who practise throughout New Zealand. We view with concern the recent attacks upon the Family Court and the Judges appointed to the Court, much of it ill-founded and ill-informed.

On 1 October this year the Family Court will have been in existence as a specialist jurisdiction for 20 years. In that time it has established an enviable reputation, not only in New Zealand but internationally. It deals with wide and diverse areas of jurisdiction. It is perhaps significant that it is only in respect of custody and access of children - that criticism is leveled.

Each of us has had lengthy experience acting as counsel for men, women and children in the resolution of custody and access disputes before the Court. We are members of a specialist bar who of necessity work closely with psychologists, psychiatrists and other professionals in our day-to-day working lives.

A Family Court Judge is appointed after the most rigorous investigation. It is not our experience that those appointed have preconceived ideas or biases that interfere with their decision-making. Of course there will be occasions when we, as counsel, feel aggrieved about the nature of a decision that we may feel is wrong. That falls far short of a suggestion that the presiding Judge was improperly motivated.

The expertise of the Courts' Judges has been well recognised in several judgments of the Court of Appeal and the High Court and led directly to a change to the manner of hearing appeals two years ago. Previously the High Court was required to rehear the case in its entirety. Now an appeal proceeds on the conventional basis of a party needing to demonstrate that the Judge was wrong, or based his or her decision on a wrong legal principle. On many occasions an appeal from the Family Court is heard by a Court of at least two Judges. This in itself is an important constitutional safeguard to those who feel aggrieved by the Family Court process or decision. It would be interesting to know how many of those so vociferously complaining exercised their right of appeal to the High Court - statistics would suggest there are few.

We are very concerned for those who may need to turn, to the Family Court for support and assistance. We are aware of some people who may have been seriously distressed by what we view as mischievous and misleading statements being published in the media. The facts are these. Last year the Court dealt with 11,300 cases involving the care of children after parents separated. Of that number only 1,150 remained unresolved after the Court had guided parties through a careful counselling and mediation process. Of the 1,150 remaining, a number would have settled before the Court was required to adjudicate.

The Court is criticized as being "secret", thereby by implication hiding some sinister truth from the public. The accusation is a useful obsession for some. The truth is that we are not practising in a criminal court. We practise in a Court which regards it as a priority to protect the vulnerable - and none of us feel we should have to defend that principle. The truth also is that a large number of practitioners and Family Court Judges support a liberalising of the rules relating to publication, and we are working towards that. The issue is complicated, however, by a number of factors and deserves careful, not knee-jerk, reaction. In particular the interests of children, whose welfare is the first and paramount consideration of the Court, must be taken into account.

Groups representing the views of some fathers loudly protest that their place in the family is not appropriately recognised by the Court. In the past it has been a commonly expressed concern that not enough fathers take an active role in their children's lives. We are therefore delighted that the very important role of fathers is being highlighted. We cannot, however, agree with many of the unmeasured and melodramatic statements which amount to misrepresentation and which serve no useful purpose. In every custody/access case which comes before the Family Court there is scope for consideration of a shared parenting regime. There is nothing particularly new about the concept. Many considerations, however, lead the Court to make an educated decision as to the best arrangement for the child - not the best arrangement for the adults. These considerations include the wishes of the child, the views of the child's own lawyer, the child psychologist, attachment and bonding issues, the availability of each parent at important times, the age and ability of the child to cope with moving from home to home, the child's current arrangements and so on. None of these are gender issues - they are issues involving consideration of expert opinion and fact which focus on the child's needs.

For some critics the easiest form of attack is personal, and so attention has been turned to individual Judges. Judges have a difficult and, at times, thankless task. They are men and women chosen for their expertise in what is now a very specialised field of work. Each of us would recall cases where we may have thought a Judge "got it wrong", but it would be difficult to point to a decision which we could conclude was founded on gender bias. As family court lawyers we would never tolerate that approach. The criticism is unfair and self-serving.

We remain positive about a unique court which we believe is attuned to the best interests of children. Perhaps therein lies the rub - in the business of the Family Court we are not dealing with commercial contracts, traffic offences, or business deals gone wrong - we are dealing with human dynamics and interpersonal relations at a time of high emotional intensity. To those people the Court freely offers counselling assistance - for some, pain is most easily relieved by criticizing the institution which happens to be at the end of the line.

Anita Chan (Family Law Section Chair) (Dunedin)
Simon Maude (Deputy Chair) (Wellington)
David Burns (Auckland)
Fiona Mackenzie (Tauranga)
Mary O'Dwyer (Christchurch)
Maureen Southwick (Auckland)
Gray Cameron (Auckland)
Pete O'Donnell (Christchurch)
Fenella Devlin (Wanganui)
Anna Skellern (Auckland)
Norman Elliott (Auckland)
Deborah Hollings (Auckland)
Stephen Coyle (Tauranga)
Stephen McCarthy (Auckland)
Simon Mitchell (Auckland)
Rosemary Riddell (Dunedin)
Adrienne Edwards (Christchurch)
James Wildling (Christchurch)
Dorothy Bodgers (Hamilton)
Penny Clothier (Palmerston North)
Kathryn Buchanan (Dunedin)

Chapter Three

CRITICAL VOICES

INTRODUCTION

This chapter considers the voices that politicians and lawyers appear to be ignoring. It does so by presenting, as appendices, a selection of five submissions to the Ministry of Justice's Review of Guardianship, Custody and Access[1], plus summary notes of a meeting between representatives of Auckland fathers' groups and the Principal Family Court Judge. Appendix 3.3 also includes the questions that the Ministry wanted submissions to address.

Submission 1

The first submission, in Appendix 3.1, is my own. It focuses on the poor quality of the information that the Ministry provided to people as background for their submissions. It highlights numerous problems and issues that require consideration in an analysis of the policy issues under consideration. Similar points have been made on several occasions, and it is hard to believe that they are still not included in the debate. It shows also that the review process, based on submissions, is unlikely to result in a useful analysis of the issues.

Further evidence of this can be found in the *Summary Analysis of Submissions in Response to the Discussion Paper "Responsibilities for Children: Especially when Parents Part"*, published by the Ministry of Justice in October 2001 and on the internet at:

http://www.justice.govt.nz/pubs/reports/2001/submissions_children/index.html

The methodology is described at:

http://www.justice.govt.nz/pubs/reports/2001/submissions_children/chapter_3.html

Submitters were divided into five groups: individuals; academics or researchers; professional individuals or groups; community groups; and government. Headings were selected "based on the discussion paper for capturing key points from each submission". Key points were then taken from submissions to compile a document for each of the five groups, assembled in such a way that "analysis focused on material addressing the questions raised in the discussion paper". In

[1] The Ministry's discussion paper, *Responsibilities for Children, Especially when Parents Part*, is available at http://www.justice.govt.nz/pubs/reports/2000/resp_for_children/index.html

other words, the questions had already been set, and submitters were unable to add to or alter the agenda. This information was used to create "a brief overview document summarising key themes emerging from the submissions". Further analysis, by an anonymous "independent researcher", was based on the selected key points.

Some immediately identifiable problems with this process are:

1. the summary merely lists points made with no attempts at further details, justification or context;
2. there is no systematic spelling out of alternative points of view;
3. there is no information to indicate which points are well reasoned and supported, or the credentials of the people making the points;
4. By grouping responses around the questions in the discussion paper, the agenda is already set and there is no consideration of major issues presented in submissions.

The significance of these weaknesses is illustrated by consideration of the submissions in this chapter, most of the reasoning in which would be lost in the analysis. Paragraphs 26-28 of submission 1 highlight the problem of analysis of submissions, but, as that does not fit under any of the discussion paper questions, the points would have been overlooked. Several submissions list relevant literature that should be included in a detailed analysis of the situation, but that information did not make it through to the first summary stage.

Submission 2

The second submission, in Appendix 3.2, is by Paul Callister. It also focuses on the poor information in the discussion paper and distortions in much of the available research. Many of these difficulties could be addressed through careful research and use of sources such as those indicated in the submission. Unfortunately, there is no stage in the Ministry's chosen process for this careful analysis, correction of distortions, and consideration of alternative questions to be undertaken.

Submission 3

The third submission, in Appendix 3.3, is by Karla Osmers. She presents a consistent theme through her submission that fathers matter and the current approach fails to support their parenting input. The consistency of theme is important for highlighting weaknesses in the review process. Before a researcher even started to analyse the content of her submission, at best it will have been whittled down to a few selected quotes, sorted according to the Ministry's chosen questions and scattered among extracts from other submissions. She would be entitled to feel short changed.

Submission 4

This submission, in Appendix 3.4, is by Angela Phillips. While not containing numerous references to the research literature, it is a detailed and thoughtful discussion of the nature and impact of the Family Court. As with Submission 3, she presents consistent themes, and it would be inappropriate to select aspects in a piecemeal fashion with the expectation that this would either reflect her position or give satisfactory results.

Submission 5

This submission, in Appendix 3.5, is by Don Rowlands of the Caring Fathers Group in Christchurch. This also is the result of much effort, and the information is more detailed and comes from a stronger research base than that in the Ministry's discussion document. One might almost think that the Ministry was providing rushed job in the hope that others in the community would do its work for it at no charge. As with the four submissions mentioned above, it is hard to see how the content of this submission can be considered in an analysis that merely reduces it to a small number of selected quotes.

Paper 6

Paper 6, in Appendix 3.6, is the "minutes of discussion held by Auckland fathers groups in the presence of Judge Mahony". Contrary to the description put forward by lawyers in Chapter 2, this document shows fathers seriously considering structural and process issues in relation to family law. At the very least, they present issues and options that could reasonably be included in an agenda for those concerned about the operation of family law. It is to Judge Mahony's credit that he attended this meeting and, apparently, is to attend a further meeting. It is not clear whether their concerns will be placed on the agendas of others involved in family law, however, especially given the apparent attitudes of many politicians and lawyers, and the review processes being applied.

APPENDIX 3.1

SUBMISSION

To the Ministry of Justice on the Review of the Laws About Guardianship, Custody and Access

Introduction

1. This submission is from Stuart Birks, Director, Centre for Public Policy Evaluation, Massey University, Private Bag 11222, Palmerston North

2. The objective of the Centre for Public Policy Evaluation is *"To facilitate the achievement of excellence in research in priority areas and to develop its domestic and international links. The focus will be on economic aspects of policies in a multidisciplinary context."* The work of the Centre has included, among other things, research and publications in the areas of family law and law and economics.

3. Given the nature of my Centre, this submission will focus more on the nature of the review process and the policy environment than on specific recommendations.

Misinformation

4. The discussion paper, *Responsibilities for Children, Especially when parents part*, raises some useful questions, but it also includes information which is likely to have an influence on submissions. This information is misleading. Here I discuss two statements in the paper's Appendix 1 about the situation in the United States, and omissions from Appendix 2 on international obligations.

Hardcastle on joint custody

5. Appendix 1 of the discussion paper is claimed to give overseas examples of laws "which may provide some good ideas and some warnings for New Zealand" (p.18). The information is patchy, to say the least. Rather than describe laws, it makes claims such as, "Research on the US's approach to joint custody shows that it can work, but only if both parents agree on it" (p.19). No source was given for this claim, but on request I was advised by the Ministry of Justice that it was based on one paper, Hardcastle G W (1998) "Joint Custody: A Family Court Judge's Perspective", *Family Law Quarterly*, 32(1), Spring, pp.201-219.

6. It is a concern not only that the Ministry of Justice paper relied on only one paper for its claim about US research, but also that the selected paper does not even claim to be a balanced assessment of the research. It presents a judge's perspective, and this may arise from narrow and unrepresentative exposure. Note that the Department for Courts was not so accepting of judges' opinions in its study to determine if they had an appropriate understanding of gender issues[2].

7. In his paper, Hardcastle expressed concern for what he perceived to be an overenthusiastic embracing of joint custody. The evidence he presented does not support the statement in the Ministry's discussion paper. Hardcastle reported from a 1993 source that dual physical custody was awarded in 20 per cent of **disputed** US cases. He also stated that, in a 1989 survey, "only" 35.3 percent of judges rated a joint legal and joint physical custody as their first preference.

8. Hardcastle's bias shows when he lists reasons given by judges for their concerns about joint custody, before claiming that, "No judge should accept joint custody without examination" (p.202). This illustrates problems that can be observed with legal reasoning[3]. By listing possible disadvantages, but not mentioning the advantages, Hardcastle presents only one side. It is not enough to identify problems with joint custody – any situation can have difficulties. There must be a point of comparison. What are the difficulties with sole custody, and which, in any particular case, is likely to be the least undesirable? For example, little thought is commonly given to the difficulties of re-establishing a severed relationship, although this can be a significant factor with sole custody decisions. Joint custody arrangements can always be changed to sole custody. It is much harder to have change in the other direction or to reverse custody.

9. When Hardcastle sets up the issue as one of whether to accept joint custody rather than whether to reject it, the burden of proof rests with those favouring joint custody. This is surprising given various international conventions relating to families which would suggest that family relationships should not be disrupted or severed without good reason and due process[4]. The alternative to Hardcastle's position would be to contend that, "no judge should **reject** joint custody without examination". **It is important to determine which question this review intends to ask.**

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2 Barwick H, Burns J and Gray A (1996) *Gender Equity in the New Zealand Judicial System: Judges' Perceptions of Gender Issues*, Judicial Working Group on Gender Equity, Department for Courts.

3 See Birks S (2000) "Legal Reasoning", chapter 5 in Birks S (ed) (2000) *Analytical Skills for Social Issues: Reason or Delusion?* Issues Paper No. 8, Centre for Public Policy Evaluation, Massey University.

4 See paragraphs 13-16 below.

10. Part IV of Hardcastle's paper discusses process. Without using the term, he describes the effect of "the shadow of the law" when stating that *"joint custody legislation places pressure on litigants to negotiate a joint custody arrangement"* (pp.217-8). This is important, but surprisingly the point is lost on many in government and law, as discussed further in paragraphs 17-25.

The primary caregiver/care-taker

11. The Ministry of Justice discussion paper also described another US method, the primary care-taker approach, where "the judge has to make decisions based on who they think was the parent who spent most time carrying out the day-to-day child care tasks before separation." (p.19)

12. We see similar reasoning presented as the sole option in a publication from the OCC[5], and in a recent speech by the Minister of Women's Affairs[6]. The view does not go unchallenged, however. Kelly (1997) states that: *"Child development research does not support the distinction between primary and secondary caretakers for children after age 4 or 5 if they have lived in the two-parent home."* [7]

International obligations

13. Appendix 2 of the discussion paper presents international obligations "relevant to custody of and access to children". It draws only from UNCROC, the United Nations Convention on the Rights of the Child. Article 9.1 is mentioned, but its significance may be missed. It states that, *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."* This could possibly be interpreted to mean that interim sole-custody arrangements are questionable, and that alternatives to shared custody should only be considered when they can be shown to be superior according to a "best interest of the child" criterion.

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5 See p. 32 of Julian R (1999) *Fathering in the New Millennium*, Wellington: Office of the Commissioner for Children.

6 *"At this point the [custody] decision is not made on the basis of gender. The reason custody is normally awarded to mothers is that they are usually the primary caregiver."* Hon. Laila Harre, Address to Social Policy 2000 - Children's Rights and Families, Wellington, 26 October 2000. http://www.executive.govt.nz/speech.cfm?speechralph=32804&SR=1

7 P.383 of Kelly J B (1997) "The best interests of the child: a concept in search of meaning", *Family and Conciliation Courts Review*, 35(4), October, pp.377-387. The primary caregiver concept is also discussed in Birks S (1999) "Parenting and the Family Court: An Economist's Perspective", chapter 8 in Birks S and Callister P (eds) (1999) *Perspectives on Fathering II*, Issues Paper No. 6, Centre for Public Policy Evaluation, Massey University.

14. There are other relevant articles in UNCROC:

- **Article 5** says that: *"States Parties shall respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance"*.

- In **Article 7** we see that: *"The child shall ... have ..., as far as possible, the right to know and be cared for by his or her parents"*.

- **Article 14.2** says: *"States parties shall respect the rights and duties of parents and, if applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."*

- **Article 18.2** requires the State to develop appropriate institutions, which would include the Family Court: *"For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of the child."*

- **Article 19.1**, referring to mental violence, could be considered to apply to emotional abuse in the form of parental alienation: *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."*

15. There are other internationally specified rights which merit consideration. From the submission of the Human Rights Commission to the Government Administration Services Select Committee on the Matrimonial Property Amendment Bill 1998 and the De Facto Relationships (Property) Bill 1998, July 1998:

- *"Article 16(1) of the Universal Declaration of Human Rights provides that men and women of full age have the right to marry and found a family; and relevantly they are entitled to equal rights as to marriage, during marriage and at its dissolution. Article 16(3) provides that the family is the natural and fundamental unit of society and is entitled to protection by society and the state."*

- *"International Covenant on Civil and Political Rights ... Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."*

- *"Convention on the Elimination of Discrimination Against Women [CEDAW] ... Article 16 provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: Article 16(f) ensures the same rights and responsibilities during marriage and at its dissolution."*

16. Article 5 of CEDAW is also relevant:

> *States Parties shall take all appropriate measures:*
>
> *(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*
>
> *(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

Relevance of laws and structures – the shadow of the law

17. The foreword to the Ministry of Justice discussion paper includes the following claim:

> *"If parents can agree on the important decisions about how children should be cared for, and if parents stay together, or can reach agreement about the care of children if they do separate, then the laws and structures discussed in this paper are irrelevant."* (p.3)

18. The foreword was signed by Hon Margaret Wilson, Associate Minister of Justice, and Hon Steve Maharey, Minister of Social Services and Employment. They are both Government Ministers involved in formulating and recommending policy and will have been advised by the Ministry of Justice.

19. The Ministers will be aware of laws on numerous diverse issues such as theft, speeding, drunk-driving, drugtaking, assault, and benefit fraud. These laws are intended to change behaviour. I doubt that they would dream of suggesting that these laws are irrelevant to all except those convicted of contravening those laws. New Zealand has seen changes to tax and benefit structures and major economic reforms on the basis that these changes will produce what is claimed to be more desirable behaviour. Actions will change to reflect the post-reform environment.

20. The concept of the Shadow of the Law refers to changed behaviour of people who, while not directly using the law, take account of the anticipated outcomes were the law to be applied. Legal outcomes affect the behaviour of many more people than those directly involved.

21. It stretches credibility to believe that the Ministers and the Ministry of Justice are unaware of such a fundamental aspect of policy. Yet they claim, in a document which is intended to inform the public, that such effects do not apply in the case of laws relating to guardianship, custody and access.

22. The same can be said of the New Zealand Law Society. On 26th April 2000 the Family Law Section of the New Zealand Law Society issued a press release opposing the Shared Parenting Bill. It included the following statement: *"...the Bill seems to ignore the fact that the vast majority of parents seem to be able to find sensible and pragmatic solutions to the problems posed by family separation without resort either to lawyers or the courts. The Section is concerned that substantive law changes are being promoted as a response to a relatively small number of difficult cases."* [8] It would be unfortunate if "difficult", and therefore unrepresentative, cases were to cast a shadow affecting the outcomes in numerous other cases where alternative, superior, solutions would otherwise have been possible.

23. John Priestley QC, the Chair of the Family Law Section of the New Zealand Law Society, in a news release of 6 October 2000, was also unable to see any connection between the Court and the actions of parents. In dismissing a claim that the behaviour of the Court might affect separating parents, he said, *"The large majority of separated New Zealanders put their own joint parenting arrangements into place without any need for intervention by lawyers or the Family Court"*. He has since been appointed a Judge in the High Court. In that role, will he use decisions as a signal to others?

[8] http://www.nz-lawsoc.org.nz/fls/news/sharedp.htm

24. The claim that those who reach agreement outside the court are satisfied with the outcome is even more surprising in the context of the statement by the Principal Family Court Judge that the Court is not effective at enforcing access orders.[9] If the Court is openly acknowledged to be ineffective in this area, wouldn't that serve as a disincentive for dissatisfied people to take the matter to the Court?

25. Institutions such as the Family Court do send signals and affect behaviour. It is regrettable, and not conducive to respect for society's institutions, that there is such denial of responsibility for the effects of the actions of these institutions.

Analysis of submissions

26. There is a call for submissions as part of the Government's review of the legislation on guardianship, custody and access. The discussion paper contains limited and misleading information which is likely to influence those making submissions. There is no guarantee that submissions will be from people who are any better informed. Nor is it apparent that the submissions will be representative of the opinions of the wider community. From an academic perspective, therefore, it is not clear how such submissions can be analysed.

27. One worrying indication of the possible misuse of submissions can be seen in a speech to the House by Hon Margaret Wilson on 13 November 2000.[10] To quote:

> *"I move that the House take note of the report of the Justice and Electoral Committee on the Matrimonial Property Amendment Bill incorporating Supplementary Order Paper No. 25.*
>
> *During 1998 the Government and Administration Select Committee heard submissions on both bills. Approximately 60% of submissions on the Matrimonial Property Amendment Bill expressed concern that it did not address the issue of economic disadvantage that can be suffered by the non-career partner on marriage breakdown."*

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[9] *Assignment*, TV1, 8.30pm, 16 November 2000

[10] 13/11/00, Hon Margaret Wilson, Property (Relationships) Bill, [Report-back speech], http://www.executive.govt.nz/speech.cfm?speechralph=33033&SR=1

28. Are submissions simply going to be counted as if they are votes? If so, is it appropriate to do this when, as with the bills referred to above, the matter in question was not even raised as a point for debate? Are all submissions to be given the same weight, irrespective of the bodies making the submission, whether they are groups or individuals? If submissions are to be used in this way, would it not be appropriate to have informed debate before the submissions are requested?

Policy and policy instruments

29. There are several aspects of policymaking which may have some bearing on the matters under consideration in this review. Stated generally, effective policies require suitable policy instruments, suitably trained people to apply those instruments, and monitoring of outcomes.

30. The Family Court recognizes that access orders are a poor policy instrument. They are crude and, in the present environment at least, hard to enforce. There is a simple explanation for this. The Court has taken an extreme position in creating a "favoured parent" status for the custodial parent. There is little that the Court has allowed itself to bargain with to persuade that parent to comply with the order, save the extreme threat of change of custody. The longer the period of non-compliance, the greater the disruption such a step would be for the children. The threat is scarcely credible in most cases.

31. Similarly it can be hard to enforce the guardianship rights of the parent who has far less contact with the children, if only because the children will usually be more influenced by the custodial parent.

32. We may be asking more from the Family Court than is possible given either available options or the Court's choice of options.

33. Parenting plans could offer greater scope as they permit acknowledgement of numerous minor events which, cumulatively, may be significant. Plans recognize the importance of factors besides contact time, thus also providing other options for change.

34. Policy instruments and their application depend in part on perspectives taken. The rights specified in paragraphs 13-16 above consider families in terms of the relationships between individuals, in particular the relationship between children and their parents. This is markedly different from the definition of family in the New Zealand census and the time-use survey, both of which are household-based. A parent is not recognized as such unless living in the same household as the children, and other adults who are live-in partners to a parent are considered as parents. This has numerous implications. It shapes views on

parenting and non-custodial parents, it affects tax payments, it is central to child support legislation and to benefit structures. It provides a distorted view of the issues. It may be that compliance with international obligations will only really be possible when domestic policy is based on a compatible view of families.

35. There are other issues to consider in relation to the training of those working in the areas of guardianship, custody and access. It is unlikely that they will have a realistic picture, given the information discussed in this submission. There are further problems in relation to supervision and accountability. The Law Society's complaints procedure was strongly criticized in the Cotter and Roper report.[11] Since its release, little has been done to improve matters. Adequate complaints procedures and professional standards are also necessary for others working in the Family Court.

36. It may be appropriate to consider how well coordinated the various Family Court interventions are. Are psychologists and counsellors informed of case histories and material in case files? How much detail should be passed on from counseling sessions?

37. It is unfortunate that there has been so little informed and open debate on policy issues surrounding family law and the Family Court. There is scope for far more than exists at present without threatening the secrecy of individual proceedings.

38. The following Issues Papers by the Centre for Public Policy Evaluation may be relevant to the review. They are available free of charge on the internet at:

http://econ.massey.ac.nz/cppe/papers/

- No.1 S. Birks and G. Buurman, *"Is the Legal System an Efficient Regulatory and Dispute Resolution Device"*, October 1997.
- No.2 S. Birks, *Gender Analysis and the Women's Access to Justice Project*, March 1998.
- No.3 S. Birks, *The Family Court: A View From The Outside*, October 1998.
- No.4 S. Birks and P. Callister (eds.), *Perspectives on Fathering*, April 1999.
- No.6 S. Birks and P. Callister (eds.), *Perspectives on Fathering II*, October 1999.

[11] W Brent Cotter QC and Christopher Roper, *Report on a project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society*, undated, but released in 1997.

- No.7 S. Birks and Gary Buurman, *Research for Policy: Informing or Misleading*, August 2000.
- No.8 S. Birks (ed.), *Analytical Skills for Social Issues: Reason for Delusion?* October 2000.
- No.9 S. Birks (ed.), *Inclusion or Exclusion: Family Strategy and Policy*, November 2000.

39. Issues Paper No.10, forthcoming, will contain papers presented at the Social Policy Forum, Children's Rights and Families, held in Wellington on 26 October 2000.

APPENDIX 3.2

SUBMISSION TO THE REVIEW OF THE LAWS ABOUT GUARDIANSHIP CUSTODY AND ACCESS

By Paul Callister

As background to this submission, I am an independent researcher. My research over the last decade has focussed on changes in work and family arrangements in New Zealand. In recent years I have particularly focussed on changing work and family patterns for men. My submission draws primarily on this experience. However, I am also on the national committee of the Father&Child Society, primarily in the role of research advisor. In this role I assisted in the preparation of their submission.

In this submission I do not propose to directly answer the questions raised in the discussion document. Instead, I focus on concerns I have about the information base on which decisions about social policy, including guardianship, access and custody issues, are being made.

Clearly, concepts and ideas about families and roles within them are highly contested. Having good quality research assists in sorting out what helps in creating optimal parenting, including laws that support such parenting. As an example, internationally there is a debate about biological versus social parenting (e.g. Dowd, 2000; Sarre, 1996). Yet groundbreaking New Zealand research indicates that biological links are extremely important and should still be of primary concern in policy making (Fleming and Atkinson, 1999). In a conclusion to a recent paper based on this research, Fleming (2000: 5) notes:

> *[W]hat this study revealed is that the parent-child relationship at the turn of the twentieth and twenty first centuries is not perceived as a social role but as a personal relationship with a biological base. A parent's new partner should not therefore be looked on as a substitute parent, and is unlikely to achieve a good relationship with the children if he or she tries to exert parental authority and discipline without first earning the child's liking and respect.*
>
> *Parents have an inbuilt tendency to favour their own children. Even when they strive to be fair, they are likely to be less tolerant of step-children than of their own.*
>
> *Whether parent's partners and their children get on well depends on personal compatibility and mutual goodwill. Liking cannot be forced even with the best of goodwill.*

> *Even when they get on well with the children and feel a genuine love towards them, parents' partners are unlikely to have the same deep inner commitment and sense of identification with the children as their natural parents.*

Such New Zealand research should be considered seriously when discussing issues of guardianship, custody and access.

Internationally, there is increasing focus on rights of child. This concept underlies many recent discussions of guardianship, custody and access. Yet, there remains little research on who actually determines the rights of children. In addition, while many people talk about giving a "voice" to children, both research and commonsense suggest that in a variety of situations this is unrealistic. For example, very young children simply do not and never will have a "voice".

In line with global trends, the Ministry of Justice/MOSP discussion paper also talks about rights and responsibilities (sometimes in other discussions referred to as duties) of parents. In recent years, a human rights framework has been increasingly drawn upon to address various social and economic inequities. In New Zealand, as well as internationally, in the 1960s and 1970s there was much focus on promoting the rights of women in all areas of public and private life. For example, during this period the United Nations established the Convention on the Elimination of Discrimination against Women. In the 1980s, debates on children's rights started to emerge both nationally and internationally leading to the adoption by the UN in 1989 of the Convention on the Rights of the Child. More recently, in the 1990s, there has been the emergence of a concern about men's rights and father's rights. In much social policy discourse women's rights and children's rights have been seen as mutually supportive. Reflecting this view of women's rights and children's rights being mutually supportive, the current government has the same person as Minister of Women's Affairs and Minister of Youth Affairs. Potentially, this dual role works against policy analysis of children's rights fully taking into account the views of fathers.

There is little research, both internationally and nationally, on shared parenting post separation.[12] In addition, apart from research that focuses on fathers in relation to child support payments, there is overall very little research on fathers who no longer live with their biological children. This includes a small, but important, group of fathers who are not only separated from their families but, due to major changes in work that have taken place over the last fifteen years, have also faced major barriers in the labour market. Research needs to undertaken in order to give these fathers a "voice". In undertaking such research, an inclusive approach needs to be taken so that fathers are not just the subjects of the research but can also help guide the research process (Callister 1999).

[12] In contrast, there is a growing body of research on shared parenting in intact couple families.

There is also little data and consequently little research on the workings of Family Court. For example, there are no firm figures on the proportion of separations that end up in the Family Court. In addition, unlike other areas of the law, the operation of the Family Court is not open to public scrutiny. In general, in all areas of life, public scrutiny assists in the process of delivering fair and equitable decisions.

In both the research world and policy making much of the language still falls back on increasingly outdated and inappropriate concepts. For example, the term "sole parent family" is a common expression, even if the children actually have two parents who are highly involved but happen to live apart. Such terms are reinforced by data collections such as the Census of Population and Dwellings that does not identify parents no longer living full-time with their children or even families where children spend equal time in two households.

Another concept that research suggests is now increasingly out of date is that of "primary caregiver" or "primary caretaker". Despite, on average, men spending more time in paid work and women more time looking after children at home, there is a growing body of international research that demonstrates that many fathers are playing a far more active part in looking after children in intact couples families (e.g. Gershuny, 2000; Sullivan, 2000). The idea that, post separation, one parent should become a sole caregiver does not reflect the division of labour in most couples prior to separation.

Finally, I am concerned that even when research is available in policy debates on parenting the participants nevertheless fall back on ideology, anecdotal evidence or research that is out of date. As a first example, in the parliamentary debate about Muriel Newman's proposed shared parenting bill, many speakers put forward views that were extreme and not at all based on good quality research. For example, the claims about the negative effects of "fatherlessness" greatly oversimplify the literature on the effects of family form on children's wellbeing. However, at the other end of the spectrum claims that family form are not important and it is solely poverty that affects child well-being are also not supported by a vast array of research literature (for an example of a balanced approach see Cherlin, 1999).

As a second example, much of the public discussion around changing property law to allow unequal splitting of property under Supplementary Order Paper No 25 was based on the concept of a male with a high-income career with a partner who spends perhaps 10 to 15 years at home looking after children full-time. This discussion was also often based on the concept that fathers still spend little time looking after children. In fact, there is much New Zealand research that shows that the high-income male (who is also remote from his children) with a partner who stays full-time at home for a couple of decades is an extremely small group (e.g. Podmore, 1994). This is for a variety of reasons including increasing employment rates of women in couples with young children and couples increasingly having similar educational and labour market characteristics (Callister, 1998).

SUMMARY

Policy making in the area of guardianship, access and custody needs to be based on good quality research rather than primarily based on ideology, personal experience or the anecdotes that are often seen to drive debate and decision making. While new research is needed in many areas of family change, current good quality research needs to be carefully considered when considering changes to social policy and the law.

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Appendix 3.3

Submission to the Ministry of Justice on the Discussion Paper: "Responsibilities for Children - Especially when parents part: The Laws about Guardianship, Custody and Access"

By Karla Osmers

4.1 How could the law better reflect a more consensual approach to custody and access?

The law should acknowledge, respect and encourage the reality that children have two parents. If parents start living apart the child should not lose access to either parent, as both are equally important in the child's life.

4.2 What sort of terms and key concepts would do this?

The terms "access", "visitation" and "custody" should be removed, and replaced with parenting time and parental responsibility.

4.3 Should guardianship, custody and access be replaced in the law by a broader range of options for the Courts to consider? What might these include? Children and young people's rights

The Act should focus on the rights of children to have equal access to both parents. That right should be protected and not open to abuse by either parent. Too often parents use parenting time as a means to achieve some other want - a child's right to be with either parent does not belong to the parent, but to the child, and it should not be able to be used to bargain/manipulate the other parent. Threats of non-visitation by either parent should be dealt with immediately to discourage what is really an abuse of children's rights to be with their parent.

4.4 Do the provisions of the Act ensure that the best interests of children and young people are the prime focus? If not, what changes need to be made to ensure this happens?

I believe that shared custody as a starting point is in both the children's and the parents' best interest. Both parents should mutually decide on any deviation from this, with the help of counselling or a third party if necessary. Parents must learn how to compromise to reach win-win solutions and this will eventually be in the children's best long-term interests.

4.5 Can we do more to comply with the UNCROC principles (see Appendix 2), which focus on ways the State can advance a child s welfare?

Can't comment

4.6 Is there a need to better ensure that children and young people are fully informed, that their views on custody and access are sought and taken into account and that they are participating to the fullest extent appropriate? If so, how could this be done?

Young children do not always know what is best for them, and asking them can put them in a position of having to take sides with parents. Older children are more able to be objective, but still reasonably self-centred. What a child thinks is appropriate may not take into account the financial, practical and logical realities of parenting. Children of two-parent homes are not expected to have to make decisions on these issues, so should not have to just because parents are unable to.

4.7 One possibility is that the law could include guidelines to help the Court determine which course of action would best promote a child or young person s welfare. These could include the child or young person s wishes and the need for real and ongoing parental contact (where appropriate) . What do you think of these? Any other suggestions?

Shared parenting promotes the child's welfare, and shares responsibility between parents. Too many women in this generation are faced with the difficult task of raising children alone. Too many men are alienated from their children, because of the difficulty of retaining a good relationship with their children when they only see them every second weekend. Studies show that the amount of time spent with children by non-custodial parents directly influences how much child support is paid.

Parental responsibility is not divisible from financial responsibility. Both parents should be equally responsible for time spent with and financial support of their children.

Children do not have to live with one parent most of the time. Living with both parents can work well and should be encouraged. Parents should be encouraged to explore shared parenting - for their own sake as well as the children's.

4.8 What are the key issues or concerns about the rights and responsibilities of parents? What ideas do you have for resolving these?

When women have too much responsibility in parenting, the result is that women and children are disadvantaged in many ways, including financial and social.

When men have too little involvement in parenting, the result can be that they do not feel needed, and thus some fathers are more likely to absolve responsibility.

Answer - share parenting - make both parents equally responsible.

4.9 Do you think there should be a greater emphasis in the law on the responsibilities of parents, instead of their rights regarding their children?

Yes.

4.10 Should the law encourage an emphasis on ongoing responsibilities of both parents? How could it do this?

Both parents should be encouraged to work out their problems, with counselling and/or extended family if required. This should be done in the open, rather than behind closed doors. Parents that are able to communicate with each other and show mutual respect are setting a better example to children than parents that will not co-operate. It is parents' responsibility to ensure that our children are taught how to work WITH others, rather than against them. Parenting courses that encourage involvement from both parents could be a start in the right direction.

If parenting plans or contracts are made up between parents, they should be able to be mutually re-negotiated to adjust to normal and reasonable changes in parents' lives.

4.11 How else can parents be encouraged to take greater responsibility for their children? For example, some have suggested the use of parenting plans which would be based on agreement between the parties and be sanctioned by the Court. Do you have any views on this idea?

Extended family are extremely important and rather than alienating them the law should encourage and facilitate their involvement with children after parents divorce. Extended family support parents when they most need it and this should be valued.

Step parents should not be recognised as having any greater rights or responsibilities than a child's parents, regardless of the time spent with children.

4.12 Should a wider group of adults be considered when thinking about the care of children or young people when parents part? If so, who?

Schools and day-care arrangements need to be taken into consideration. Both parents should be encouraged to share in the costs of this if they are both working, as is happening more and more in today's society. All information about children from schools etc should be given to both parents, regardless of it's perceived importance - and this should be enforced by law. Parents from two-parent families expect to be advised about all aspects of their children's lives, and this does not change just because parents are not living together.

4.13 How could the values and aspirations of Maori be incorporated in the Act?

It does not make any difference whether parents are Maori or European, male or female, handicapped or able. We are all human, and all parents. This is divisive rather than inclusive.

4.14 Should the law especially recognise the role which is played by the wider family/ whanau in the raising of Maori and Pacific children? Would including this matter in guidelines to the Family Court be helpful? Have you suggestions for other ways to make sure our law supports the family structures of all New Zealand's people?

See above

4.15 Should members of the wider family/whanau, such as grandparents, have the right to apply to the Court for the ability to have ongoing contact?

Yes, but they should not be given more importance than parents. Grandparents should be encouraged to work together with parents, rather than against parents.

4.16 Should others, such as step-parents, who have had a role in the upbringing of the child or young person, have the ability to apply to the Court for ongoing contact?

Can't comment

4.17 What would be the best way to obtain the input of wider family/whanau members in relation to custody and access matters.

Can't comment

5.1 Are the Courts the best agencies, or the only agencies appropriate to offer dispute resolution services for custody and access matters?

No - counselling agencies would encourage parents to reach compromises - the courts should only be involved if communication has broken down irretrievably.

5.2 Should the Court proceedings be more in the form of an inquiry rather than a contest between parties?

Can't comment

5.3 Should the Judge and the lawyers who appear before the Family Court always have a duty to promote reconciliation?

No. They should promote communication, compromise and that parents work to find win-win solutions. Parents that can't do this won't stay reconciled until they learn, so promoting reconciliation without these skills would be putting effort into a black hole.

5.4 Is counselling the best way to try and resolve custody and access disputes?

It is "a" way - the best way is the way that works. People are all different, so one way will not necessarily suit all.

5.5 Should children and young people be entitled to counselling services and to attend mediation conferences as of right?

Parents should make this decision.

5.6 Should provision be made for the participation of wider family/whanau in counselling or mediation conferences? How could this be achieved?

Can't really comment, but veer towards yes if both parents are agreeable.

5.7 Is mediation which is led by the Judge the best way of working for agreements in disputes over custody and access?

Only as a final plunge at fairness. Parents generally will be able to work together as long as they start from a 50/50 position where neither have any extra leverage on their side. When the playing field is level, the game is played more fairly by all participants.

5.8 Are there other forms of alternative dispute resolution not involving the Court which should be available? What might some options be?

When third parties are involved, there is more scope for biases towards one or the other parent. Unless there is some danger to the child, parents are the best people to decide what is best for their child. One parent should not be allowed to do this. If NZ society does not start to head towards shared parenting as a norm, how long will it be before fathers start taking custody of children and making mothers fight for access rights?

5.9 Is there a need for more information to be given to parents about the purpose of the social worker or psychological reports?

Yes, both parents should have access to this information.

5.10 How can the views of children and young people best be represented in the Family Court? Are lawyers the most appropriate people to do this? Who else should be involved?

Parents should be made responsible for presenting the child's views, to encourage them to see issues from the children's point of view rather than their own. A third party could then confirm or deny opposing viewpoints of parents.

5.11 What sort of information on custody and access should be provided to children and young people? Who should provide this information?

Parents should provide this information **together** to the children. Information should be given on which home the child will spend most of the time in and why the parents have reached this agreement. The child should also have it explained to him/her that this is what the parents are going to try, and that if it is not working well for the family that they will try other ways until they find a solution that works for everyone.

5.12 Do parents need more information about the role of counsel for the child?

Can't comment

5.13 Are there other services that should be provided by the Family Court (for example, social work services, mediation services provided by trained mediators)

Other services can be done by other agencies that specialise in the areas of mediation etc. However, any work done outside of the family court should be accountable - feedback from both parties involved should be recorded and open to public inspection.

5.14 What else could be done to address issues in this area?

All court cases should be open to the public unless specifically requested by both parties. Mediation should be done in private between the two parties involved.

5.15 Should the proceedings be more open?

Yes

5.16 How do we balance the need for openness with the essentially private nature of these proceedings and the need to protect the interests of the children and young people involved?

Bringing these issues back into the open will create a balance eventually itself. Having openness encourages self-moderation.

5.17 Does the Family Court have a role in promoting a better understanding of its services and the way it operates? How can this be achieved?

The family court has a role and responsibility to promote equality in parenting responsibility.

5.18 Should the Family Court provide information sessions to potential participants? Who should facilitate such sessions? What information should be provided to participants?

Parental responsibility should immediately go to a 50/50 split, and this will eliminate any disputes over delays. Repeat applications happen because parents have not understood the message that they do not own the children, but rather that they must share their parenting role. Parents that must work together because neither of them has total power or control over the children, will work together.

5.19 Do you have any ideas that might help to make sure that disputes are handled more quickly and cheaply? For example, should the Family Court provide do-it-yourself kits to potential parties to proceedings? ? How should these kits be publicised?

If fathers started taking children and women had to fight to get access to the children, I believe (although I may be being a bit cynical) that disputes would be handled more quickly.

5.20 Should the Court have greater powers to stop people from making repeat applications for custody and access?

Yes. People that do not comply with court orders are setting bad role models to their children, and are working for only themselves, not for the good of the child. Non-co-operation should result in immediate action and strong deterrents should be put in place so this does not happen.

5.21 How could the enforcement mechanisms be strengthened in a way that promotes the welfare of the child or young person?

The child's welfare is not being put first by parents that reach agreement and then continually break that agreement. Children need a sense of stability and order in their lives. If one party is discouraging this from happening, the party that gives the greater indication of stability should take the greater share of responsibility until the other party can work together towards a common goal for the child's best welfare.

5.22 How can families or communities be helped to support Court Orders? How can we ensure children and young persons views over time are acknowledged and influence enforcement, or changes, to Court orders?

Children's views should be recorded and be open to public scrutiny. Family court outcomes should also be open to public scrutiny.

5.23 Are there any problems with the way these provisions are working?

Violence is not just physical, it can also be verbal and psychological, and children suffer also from the witnessing the latter. It is important that people know that violence is not acceptable and that children will be removed so they are safe from harm.

5.24 Is supervised access, where the access parent has been violent, the best way to ensure the child s safety? Are there other ways that the child can have safe access to a parent who has been violent?

It does not follow that a parent who has been violent to another person or the other parent will be violent to his/her child. Unless there is evidence of prior violence to the child, supervised access is unnecessary and may do more harm than good to the relationship between the child and the parent. If there are concerns, get extended family - grandparents etc - involved, rather than strangers.

There are raising incidents of parents being falsely accused of violence and abuse to claim sole custody by one parent. This should be punishable with the loss of the custody they desire.

5.25 Should the violent parent be required to pay for the cost of supervision when they seek to exercise access rights?

No, parents should be encouraged to be with their children. They should not have to pay to do this.

5.26 Is the purpose of the supervised access position generally understood?

Supervised access is unnatural and demeaning, and discourages active participation by parents with their children. I understand that it is necessary in some cases, but those cases should be the exception.

APPENDIX 3.4

Submission by Angela Phillips

Authors Note.

Prior to coming to university I had been involved with the Family Court (FC) for three years as a custodial parent (CP) and then as a non-custodial parent (NCP) seeking access. Unfortunately four years later I am still involved, this time as a stepmother and the partner of a NCP.

I went to university partially to improve my chances in the FC but also to try and understand what the FC was trying to achieve and why it was the way it is. Rather than gaining any understanding I have learnt of how the FC works in contradiction to all other social policies regarding families and in contradiction to all other legal processes.

Throughout my academic career I have applied what I have learnt to what I have experienced within the FC and this paper is the result. Whilst it is an academic paper I have not relied on the thoughts of others in what I present. This paper will be used as a submission document and therefore contains my own thoughts, beliefs and ideas about what is essential in any new the Guardianship Act.

The FC is the institution that implements the GA and it is in the implementation that the weaknesses and the contradictions of the GA are exposed. I aim in this paper to identify the worst aspects of the current structure and provide solutions to the problems.

I hope that I have presented my thoughts neutrally and rationally and that the negativity that I feel about the FC does not taint what I write. Personally I believe that what is occurring within the FC is socially destructive and socially expensive. And I hope that the solutions I have provided assist in creating a more positive outcome for the children of separated parents.

1. SUBMISSION DOCUMENT

Key Recommendations:

- That the language of the FC is simplified to better reflect the true relationships and purpose of the contact
- That children are provided with an opportunity to have their voices heard in a neutral and supportive way
- Joint custody becomes a normal outcome for children
- Minimal levels of access are enforced from the onset of proceedings.
- Parents be treated equally and co-operation becomes the focus rather than ownership
- Family members and other involved individuals are able to participate in proceedings
- That a structure for dealing with 'specific issues' is created in order to simplify the court process
- A separate category of protection orders is created for those orders that are applied for as part of FC proceedings.
- Increased use of sanctions to enable orders to be enforced
- Increased openness of proceedings to increase accountability and consistency

My Submission

In this section I will address the specific issues raised in the discussion paper following the format of the discussion paper. This begins in Section 2, page 7.

2. WHAT DO WE WANT FROM THE LAW?

This section addresses the issue of what is needed from laws that seek to address issues of guardianship, custody and access. Three objectives are suggested, the first of which needs further expansion. The first objective involves the statement *'to ensure that children and young people receive adequate and proper parenting…'* This should be expanded to include 'from both parents'.

Any laws need to equalise mothers and fathers and the objectives of these laws should emphasise this. We need to place both parents in a position whereby they have equal opportunity to fulfil their responsibilities to the children. In keeping with current New Zealand social polices and philosophies any new laws must not have a gender bias in it's implementation, should be non-discriminatory, should recognise all relationships affected by the legislation and should be able to be delivered a cost effective, equitable and accountable way.

We live in a society that disallows discrimination. Many users of the family court (FC), especially non-custodial parents (NCP), feel that the FC discriminates against them and I therefore feel that it is essential that the objectives of any new law respects both parents equally (for examples see Gilmour, 1998, Julian, 1999, Rankin, 1997). The children are the clients of the FC and consequently the FC implementation of legislation should be focussed on the best possible outcome for the children. Children should not have to experience the discrimination that is alleged by NCP. In it's simplest form the GA is legislation that decides and protects the amount of time a child gets to spend with either parent.

2.1

- To ensure that the law equally supports both parents in fulfilling their responsibilities to their children through providing equal opportunity to do so.

- To ensure that both parents recognise the responsibility they have in supporting the parenting role of the other parent. Advocate co-operation and stigmatise the use of the FC so it becomes an institution of last resort rather than normal course.

- To ensure that any process for solving family conflict does not serve to increase the conflict by focussing on current issues as they arise and being aware of possible future impediments to implementation of court orders.

- To ensure that parents are able to maintain a meaningful relationship with their children whilst the court process runs it's course.

- To ensure that any orders made by the court are enforceable without any further damage to the parent/child relationship and that the expense of enforcement is shared.

- To ensure that the children's voices are heard and they are supported throughout the court process.

The power of possession is an inherent aspect within the current structure for resolving family conflict. By creating a minimum starting point, which occurs as soon as any action is filed in the FC, the relationship that the child has with both parents is maintained. Access to a parent is a right for all children and they should not have to wait for the court process to protect the relationship they have with their parent. The long-term consequences for society of maternal and paternal deprivation are well known and under the current system where access has to be won, the legislation is contributing to the prevalence of such deprivation.

Our laws need to focus on both parents and the joint responsibilities they have. Under the current structure too much emphasis is placed on one parent. The laws should also seek to include children in the decision making process especially in light of the findings in Gollop et al (2000) which found that in circumstances where the children had had an input into the decision making process the arrangements were usually successfully implemented.

3. WHAT IS THE CURRENT LAW?

Section three (p.8) contains a contradiction. In its first point, under the heading 'What is Guardianship', the discussion paper defines guardianship as both the custody of the child and right of control over their upbringing. The second point raised in this section explains that guardianship does apply to NCP as well. This error illustrates the complexity of the GA and highlights the difficulties in defining guardianship.

This section fails to make any acknowledgement of the growth in the number of children who do not have fathers named on their birth certificates. Whilst the decision not to name a father can be made for a number of reasons the complexity and ramifications of the GA may contribute to this. The most probable reason for not naming the father is economic and related to the Child Support Act,_____ but if the relationship has ended prior to the birth of the child the naming of the father gives him legal rights to the child and brings the GA into the equation.

Section three presents an idealised explanation of what occurs under the GA. For example it is noted that if the guardians disagree about a guardianship issue at any stage they can apply to the court for an order to resolve a dispute. However by the time a court date is obtained an interim decision has had to have been made at the time of dispute in order for the child's life to proceed. As the CP is the one with the majority of time and consequently the majority of control in all likelihood the CP has made any interim decision. This leaves the NCP to apply to the court to get what becomes a status quo situation changed. When the best interests of the child are paramount it becomes difficult for the interim decision to be overturned without adversely affecting the child. Whilst the wording of the current GA may state that the NCP has equal right of control in guardianship issues in reality the most a NCP can hope for is consultation and input into the decision making process.

This aspect is illustrated by comments such as this:

> *"...the reality is that [G] has the appellant as a father who is very much part of his life. It is only in the day-to-day choices and events of living that - as with every separated parent - one parent alone is of necessity involved."*
>
> [Haslett v Thorndon, NZFLR, 2000, 200, p.207]

Under the headings 'What is Custody' and 'Access' an idealised picture is again presented. When relationships break up children normally go into the initial sole care of the mother. There is a societal expectation that this will occur despite the feminist movement and despite the move away from the concept of the 'breadwinner'. Providing the financial support for the family is not considered as important as being the parent at home when it comes to identifying who should have custody. Men are still relegated to the role of financial provider for their families and the fulfilment of this responsibility reduces their chances of gaining custody.

A mother without her children is perceived to be deviant. Possession is 9/10ths of the law and in practice the status quo is perceived to be the best outcome for the children unless the other parent can prove it is not. It is not enough, under the current system, to provide evidence of being able to provide an equal or even a better home for the children. Rather it must be proven that there is something fundamentally wrong with the current situation before custody will be altered.

In the second point under the 'Access' heading it is explained that the NCP *'may apply to the court for an access order so that the arrangements have legal weight'* (pg. 9). This statement implies that access is easy to negotiate. In reality access can be extremely difficult to negotiate and many NCP are finding it necessary to apply to the court to gain access in the first place. Whilst the court process is being completed access may not be occurring and the relationship between the child and NCP is subsequently being degraded. Due to the court's presumption that the status quo is often the best outcome for the child the NCP often find themselves having to argue for access to be reinstated rather than simply having the boundaries of access defined as implied by this statement.

The heading 'No Presumption in Favour of One Parent Over Another' presents yet another idealised belief from the discussion paper's authors. Whilst the GA may state that there will be no presumption about the gender of the CP society does have such a presumption. Unfortunately it is believed that mothers should be primary caregivers despite the efforts of feminists over the last 40 years. The Judges who sit in the FC are also part of society and often are elder members of society. Their personal experiences and beliefs surrounding parenthood do impact on their decision making process. I know of no judge who was able to achieve a position on the bench whilst he was a fulltime father. There will always be a presumption in favour of the mother until society accepts that fathers can be primary care givers also and acknowledgement is made of the

role that financial support plays in primary caregiving. Fathers sacrifice time with their children in order to support them, as do many mothers in the dual income families prevalent within current society. Parents should not be punished by the court for being the financial provider as is currently the case. This change in attitude is beginning to occur but it will take at least one more generation of judges, if not two, before it is the prevalent view amongst the judiciary. In the meantime it is simply an ideal.

Under the heading of 'Medical Treatment' there is no acknowledgement made of the Privacy Act, _____. Any new laws about guardianship must allow guardians to access information about their children. Currently doctors are able to hide behind the Privacy Act and not make medical information available to the NCP without specific court orders instructing them to. It is absurd that guardians need to go to court in order to find out about their child's health. Guardianship rights of the NCP should supersede the right of the CP to keep medical notes about their children private. This issue of the Privacy Act also affects educational institutions and the ability of NCP to access school records. It is essential that any new legislation in regard to guardianship addresses the conflicts and anomalies created by the Privacy Act.

4. ISSUES ABOUT THE CURRENT LAW

Modernising Language and Key Concepts

There is little doubt that the language used within the GA has negative connotations and needs to be altered. Whilst this may be line with what other countries are doing the language used overseas also have weaknesses. Regardless of this, the change of language and procedure internationally has provided New Zealand with options that have already been tested

The United Kingdom (UK) has replaced 'custody' with the term 'residential'. Whilst this is a more accurate description of the overall situation than custody it does stress one home before the other. Many children of separated parents learn to have two of everything – two beds, two sets of clothes, and two residences. 'Access' has been replaced by 'contact', which increases the types of arrangements possible. There is a big difference between an accessible child and a contactable child. Access implies the presence of the child whilst contact can be maintained on a mobile phone. This may appear to be splitting hairs but the splitting of hairs occurs quite regularly within the FC and the language we use must restrict the opportunity for conflicts to develop as a result of differing definitions.

The UK has also introduce the concept of 'specific issue' orders which, if introduced in New Zealand, may reduce the amount of time conflicting parents spend it court. The ability of the court to restrict evidence to specific issues means that there is less potential for proceedings to escalate. The length of time involved in finding resolution under the current FC structure means

that there is a risk that the parties may attempt to use the court time to resolve other petty or minor issues, consequently drawing out the process, increasing the conflict and uncertainty surrounding the children's lives. As both parties live under the stress of not knowing what is happening in the lives of their children long-term bitterness and resentment towards the other party builds up and conflict potentially increases – often to the detriment of the children and the parenting relationship. From the description of this arrangement presented in the discussion document (pg. 18) there appears to be a cool down period where both parties have to comply with the order before any attempt can be made to alter it. This increases the chance for it to become a status quo situation – which may be a double-edged sword. However the potential for reducing repetitive and vexatious court applications is huge and therefore should at least be investigated. One of my objectives for any new legislation was that the process didn't serve to increase conflict and this option provides an example of how this objective could be possibly met.

Australia has also gone with the concepts of residence and contact but under the umbrella of 'parental responsibility' and specifically encourages parents to come to their own arrangements with parenting plans. This concept seems to miss the point that if parents could agree about their arrangements for the children then they wouldn't have turned to the FC.

America has a quite different approach. 'Joint Custody' has become the standard arrangement with the back up of parenting plans. However should custody be awarded to only one parent then the other parent loses their rights entirely. Due to the subjective nature of the decision making process within a family courtroom this is a horrendous prospect. What custody arrangements are made should never impinge on the child's right to know two parents.

4.1, 4.2, 4.3

The GA is not failing due to parents not being responsible. If parents were irresponsible then they wouldn't bother with the expense and the stress that is inherent in family court proceedings. Rather lack of co-operation between the parents is the main problem. The court and any legislation needs to stress the need for co-operation and a phrase such as 'co-operative parenting' illustrates the intent and purpose of court proceedings as facilitation rather than confrontation. The court facilitating such co-operation allows the parents to learn how to co-operate and may again lead to a reduction of further court applications.

When we look at this issue from the child's perspective it seems logical to keep it simple. 'Mum time' and 'dad time' as opposed to 'custody' and 'access' keeps the language simple whilst reinforcing the true relationships and true purposes of the time spent together. It reinforces the roles of the adult to both the children involved and the other parent. There are no implications of ownership and the issue is kept very simple and focussed. When expressed simply custody and access conflicts are conflicts over the division of time. By concentrating on how much time a

mum gets and how much time a dad gets the issue is simple. Custody as it stands is only a legal situation that will never override the genetic and biological relationship. Legal ownership of a child should only be specified when there are serious and proven care and protection issues. Children are not chattels, they cannot be owned – to have legislation that confers ownership is barbaric and in complete contrast to all other laws we have in regard to human rights.

Children and young people's rights

This sections aims to refocus the purpose of the act in order to ensure that the rights of the children are paramount.

4.4, 4.5, 4.6, 4.7

Currently the GA does not ensure that the best interests of the child paramount. Rather it appears to focus on finding the easiest solution for the CP. This is demonstrated by the need for NCP to have to ask for access and prove why it is needed and the consistency with which the FC opts to simply go with the status quo.

In order for the court and the state to be able to focus on the children's rights there needs to be identification of what their rights are. This has partially been done through the ratification of UNCROC but without the convention being law these rights are not protected by law.

Children have the right to participate in proceedings and have their voices heard. However, I don't think it is appropriate for children to actually be involved in either mediation or the actual court room proceedings. Currently children may be able to speak to a counsel for child (CC). This only occurs in some cases and CC for child may present to the court the child's wishes or make recommendations as to what is in the child's best interests. If the child is to speak to the CC then often this is done in the presence of the CP. This can impact on the responses given to the CC as the child is influenced by the presence of their parent.

A better method of gaining information about what the child thinks would be to utilise the Social Workers in Schools initiative and school counsellors. The school is a neutral environment for the child and they will often have some sort of relationship with the social worker or counsellor prior to this type of assistance being needed. This allows the child to speak freely and allows an ongoing relationship to develop which will also help the child through the process. Another benefit is that the professional is also in a position to be able to comment on how the arrangements are working as they can informally touch base with the child after access and assess the child's temperament and demeanour. Teachers get to know the children in their care a lot better than a CC ever will and any altering in behaviour can be bought to the attention of the social worker or counsellor. This means that the child will get help with issues surrounding the breakdown of their family unit in the early stages rather than waiting until crisis point.

The only way to protect the rights of the child is to ensure that the system functions quickly and consistently. The current system potentially allows the relationship between the children and their NCP to deteriorate whilst counselling, mediation and other court processes evolve. The process of the court can easily be delayed through lawyer unavailability, late reports and limited court availability. One method of protecting the child-parent relationship is for the court to provide both a structure for and the enforcement of a minimum level of structured access to be implemented the moment an application is filed. If custody is disputed then, providing there are suitable accommodation arrangements in place then joint custody should occur This allows the relationships with both parents to continue whilst the process of resolving disputes occurs. There needs to be sufficient flexibility in such a structure as to allow for different life circumstances and differing age groups. Whilst there will still be criticisms of any model developed the fairest to the child must involve protection of a minimum level of contact with the NCP and equality in the courts perception of parenting roles from the onset of court proceedings.

Personally, ensuring that access to both parents is maintained and stabilised from the start is the most essential element of any new guardianship legislation. Children often feel abandoned, confused and end up blaming themselves for the breakdown of their parent's relationship. Without being able to see the other parent there is a risk that these feelings will intensify, compounding the consequences of the parental break up for the child. The child will not necessarily know that the other parent is desperate to see them, they will simply believe what the CP is telling them. By the time the court's representative gets to speak to them this sense of abandonment can lead to resentment and anger. These negative emotions may prevent the court from finding out how the child really feels.

A minimum level of access and joint custody may also serve to reduce the number of cases before the court. If individuals know what is going to happen, regardless of personal feelings, then some may choose to simply go with the structures set out by the court. This also provides some 'cool down' time in which the parents can sort out aspects of their individual lives without the stress of fighting over their children further destroying the parenting relationship.

A minimum level of access or joint custody from the start also allows the parents to experience what life would be like. This way they go into future proceedings with more knowledge about the day to day practicalities and aspects of the arrangements than they currently do. This allows for problems associated with the arrangements to be identified and resolved as part of the process. This would aid in eliminating repeat applications coming before the court and reduce the number of cases where parents are fighting for an ideal or a principal.

Parental rights and responsibilities

This segment discusses the rights of the parents

4.8, 4.9, 4.10, 4.11

The issue of 'responsibility' and the way it is used throughout this paper causes me some concern. There seems to be little doubt that CP are fulfilling their responsibility to their children and the stereotypical 'deadbeat dad' appears to be an underlying perception of the papers writers. Whilst I acknowledge that there are some fathers who do not fulfil their responsibility to their children I personally believe that these fathers are a minority. If they were the majority then there would be little demand for the services of the family court.

Whilst parents have a responsibility to their children they also have a responsibility to the other parent. This responsibility includes supporting and acknowledging the role the other parent has in the lives of the children. The adversarial approach inherent in the current family court structure does not assist the parents in fulfilling this responsibility. Rather than working together in the child's best interests the parents compete, which leads to each parent undermining the role of the other. This may not consciously be done. But if the parents are competing with each other the attitude towards the other parent is tainted.

The language of the used in the court should be altered to focus on what is important. The use of 'mum time' and 'dad time' reinforces what the issue actually is. There is probably a big difference in how a parent perceives denying access as opposed to denying 'mum time' or 'dad time'. By using the language of 'co-operative parenting' the focus is again directed onto what is the most essential part of ensuring that any arrangements decided by the court actually work in reality. Parents need to co-operate with each other to ensure children maintain a relationship with both parents.

The key issue is the rights of the child and without doubt one of the most fundamental rights that a child has is to know, love and spend time with both parents.

Recognition of wider family/whanau and cultural diversity

This section discusses the ability of extended family members and other individuals that the child has a relationship with to use the FC to ensure ongoing contact with the child. It also raises the issue of whether or not the FC is a culturally appropriate institution within New Zealand society.

4.12, 4.13, 4.14, 4.15, 4.16, 4.17

Anyone who has formed a bond with any child involved in FC proceedings should be able to maintain that bond. People close to a child during the time of parental separation can help the child deal with any problems associated with the break-up. These support structures are especially vital when there is conflict about future care arrangements. If the whole family situation has broken down then individuals who are involved in the child's life should be able to seek assistance form the court. This includes grandparents and other family members' as well as future stepparents. The importance of stepparents becomes more apparent when there are relationships with other siblings to maintain.

Involved individuals should be able to speak to the court on what is occurring in the child's life as they often have enough emotional distance to be able to see what the effect of the events has been on the children. Parents are often so emotionally involved that they don't see some of the more subtle behavioural changes. There is also a possibility that children speak about what is happening to adults other than their parents so allowing other adults to comment may assist in the child's voice being heard.

There is already an emphasis on whanau involvement with families at risk within New Zealand policies for family. Children who's parents seek the assistance of the FC should be treated with the same urgency as any other child considered to be at risk. Being raised in a one-parent family is a well known risk factor The exclusion of extended family members by the FC is in conflict with all other social policies. Recognition by the FC of the role that extended family members can play within families in conflict would bring the FC into line with all other state agencies involved with families. This consistency in approach will benefit all.

It is necessary for any new legislation to be flexible enough for all cultures to be taken into account. There are no statistics available on the ethnicity of the users of the FC and these are needed. However, due to cost, the time involved in resolving custody and access conflicts and the different approach to family that is an inherent part of Maori culture I suspect that the FC could be one court in which Maori are under represented. Maori has a strong whanau culture and would not accept outsiders making decisions about children. This would mean that disputes are settled within the family and decisions are easier to implement as conflict is reduced. Many cultures have their own methods for deciding what should happen in regard to the day to day care of children in the case of parental separation and where possible these cultural expectations should be respected.

The best way of gaining input from other involved individuals would be to utilise the current Family Group Conference (FGC) structures and having a type of mediation hearing. I don't think it would be appropriate for the children to be present at such a meeting. Children have often been exposed to a lot of parental conflict prior to the relationship ending and it would be detrimental

for children to be present whilst the adults 'thrashed out' the arrangements for their future. It would be necessary for the child to be represented by someone in these proceedings, which is where the previously mentioned counsellors or social workers come in.

5. PROCEDURES IN THE FAMILY COURT

This section overviews the institution entrusted with the implementation of the GA. Questions are raised about the appropriateness of using the FC for this purpose, level of children's participation in proceedings and the ability of the child to access the support structures provided by the FC to the adults.

5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8

Whilst I don't agree with a lot of what is occurring within the FC I can't identify what other institution could facilitate custody and access agreements. The current system is complex and there is no guarantee that families will cease contact with the FC before their children reach the age of 16. Appendix two illustrates the complexity of the process and demonstrates how it is possible for families to never actually end their involvement. The court supposedly provides weight to the agreements in order to ensure that they are complied with and it is necessary to have this backup. Proceedings should be more of an inquiry and the focus should be on future arrangements rather than what has occurred in the past. Focussing on the future would help reduce the risk of the parenting relationship further deteriorating due to the continual rehashing of past wrongdoings and hurts. The FC needs to recognise that both parents are acting in what they perceive to be the child's best interests – rightly or wrongly. The stakes are very high in the FC and the judgements delivered are 'life sentences' for the child – especially if the outcome is wrong. Emotions run high and it is an extremely distressing, stressful and painful experience. Focussing on the future would eliminate opportunities for either party to lay blame and act out of resentment or revenge.

Once the parents have reached the stage of applying to the FC to resolve custody and access disputes the opportunity for reconciliation has passed. I believe that rather than promoting reconciliation the FC would be more successful if it promoted co-operation. By ensuring that access or joint custody has been occurring from the beginning of proceedings the court can focus on what adjustments need to be made to assist the parents in co-operating in order to ensure future success in the parenting relationship.

Counselling and mediation should be a part of any new legislation but it needs to recognised that these options are an aspect of current proceedings. There is no reason to believe that they will be any more successful under new legislation than they currently are. Whilst resolution via this methodology is desirable the needs to be an option for Judges to be able to refer the case directly

to a hearing if the parties are so entrenched that it is considered necessary. Continually referring parents to counselling and mediation when no outcome is probable is not only a waste of resources but also a very good stalling tactic for the parent who is happy with what ever is occurring whilst the issues are being disputed. Potentially this emphasis on counselling and mediation can serve to further destroy relationships between children and their parents.

Children should be entitled to counselling and again this should be implemented through the current support structures in schools. Extended family members and other involved adults should be able to attend mediation but again I don't think it is appropriate for children to be directly involved in these proceedings without the child specifically requesting to be involved.

Court appointed specialists and counsel for the child

This section queries the roles of external professionals and their involvement in FC proceedings.

5.9, 5.10, 5.11, 5.12, 5.13, 5.14

Parents are currently in the situation where they are ordered to co-operate with professionals appointed by the court to write reports. These include psychologists, social workers and council for the child (CC). As already discussed I believe the best way for the child's view to be obtained is through school counsellors or social workers. This role should extend to providing information to the child about the FC process.

Parents need more information about the report writing process, including procedure, purpose and the use of the report. Report writers should only be able to provide an opinion and not decide what is the best outcome as that is the role of the judge. Parents should also be able to respond to any written report in writing by way of a letter to the court or an affidavit. To only learn of a reports contents on the day of the hearing and only be able to respond in evidence places the parent in a position of disadvantage as they are unable to actually consider the contents of the report.

Report writers need to be provided with strict terms of reference for writing the report and the time spent with each parent should be similar. If one parent gets to meet with the report writer in the presence of the child so to should the other parent.

The risk of removing mediation conferences from the realm of judges is that there is a potential that any consented agreements will have less weight and thus be harder to enforce. Whilst trained mediators may be able to facilitate an agreement more efficiently than a judge the orders still need to be enforceable in order to ensure that they are complied with.

Private proceedings

The issue discussed in this segment is the question of whether or not the FC needs to be more open and whether the FC provide information to inform users of the service about how it operates.

5.15, 5.16, 5.17, 5.18

There is a need for more openness within the FC. Currently there is no publicity about the judgements made and therefore no public accountability. This is enabling decisions to be made in some courts and areas that are inconsistent with other courts. As individuals who use the FC are unaware of what occurs in the FC there is a possibility that parents apply to the court with unreal expectations. Opening the court to public scrutiny may help reduce the number of cases before the court as the public will become aware of the type of arrangements that are being ordered and may opt to implement a decision by themselves rather than seek a judgement.

Increased openness should also include more attention paid to the statistics of the FC. Currently no statistics are available as to what the FC is being used for. In the neo-liberal economic environment this is unacceptable for most other institutions. Analysis of statistics would allow resources to be directed at the problem areas and would assist the FC in developing a structure that provides an efficient, effect and accountable service.

However, I don't think it appropriate that the general public be allowed into the courtroom. Rather I think family members and other involved individuals should be able to hear proceedings as this will allow them to develop a full picture of what is occurring rather than just being aware of one side of the story. In order to inform the public reporters should be allowed in to court but with restrictions similar to what is currently used in rape and sexual abuse cases. Participants should never be identified and the judge should be able to suppress details when appropriate. Reporters who work in the FC should have to receive specific permission and strict guidelines for reporting would need to be developed. This type of reporting will assist the FC in educating the public about the FC.

Information sessions would be useful and should be facilitated by the Counselling Co-ordinator. However I also feel that the lawyers who practice within family law have an ethical obligation to inform their clients of this same information. It should be made clear to potential users that turning to the FC is a stressful, emotional and expensive process and that the process can be extremely destructive to the parenting relationship.

There needs to be a publicity campaign that not only advises the public about the FC but also stigmatises the use of the FC. Using the FC to resolve custody and access disputes is a sad outcome for both the parents and the children and it should be targeted at only extreme cases. We, as a society, should be trying to encourage both parent's participation in the lives of their children. By setting minimum levels of access and promoting joint custody as a normal outcome for children when their parents separate the societal expectation will change and children will experience a more positive life outcome.

Delays, costs and repeat applications

This section deals with issues about the length of time involved in gaining resolution in the FC, the expense and repetitive applications.

5.19, 5.20

The concept of do it yourself kits is a good one but I have doubts about the ability of such an idea being able to achieve anything. Those who are able to achieve resolution on their own don't get to FC. Whilst it may be cheaper for individuals to be able to write their own affidavits there will be a lot of unnecessary information detailed in them which will serve to increase the amount of time a judge must spend on preparing for a case.

Repeat applications could be prevented by two means. Firstly, the needs to be a set period of time for orders to be complied with prior to any further application being made. However, this should not remove the right of the parties to appeal any decision. Minor difficulties that may arise should be dealt with through specific issue hearings. This will allow both parties to actually live with the arrangements that the court have put in place rather than returning to court to defend an ideal or a principal.

The second means is to increase the prevalence of costs being awarded. Where court action is being pursued for the wrong reasons than the respondent should be able to have costs awarded. This will lessen the number of vexatious applications and make individuals think twice about going back to court about petty matters.

Enforcement of court orders

This segment overviews the enforcement of court orders and the problems associated with having orders applied with.

5.21, 5.22, 5.23

Currently the only way a court order can be enforced is through the rather barbaric use of 'warrants to uplift'. This involves the police or a social worker uplifting a child from any location in order to ensure changes in custody or access occurs. Personally I can think of nothing more distressing for a child than to be subjected to this. Not only is it frightening but also will taint the relationship between the child and the parent having to enforce such a warrant. If a child hasn't seen a parent for a period of time, due to access being denied, then being taken there in a police car will not help the child bond with that parent.

Enforcement of court orders has to take place away from the child. The refusal to comply with court orders should be perceived as a criminal offence and punitive measures such as those available in the criminal court should be considered. The need for orders to be enforced really only applies to access orders and other orders such as protection orders already have the back up of criminal charges. Financial means, similar to fines, such as reducing levels of child support is one way. If a parent refuses to hand a child over for access they should receive less child support. This will also offset the cost, for the non-custodial parent, of having to enforce the order that they have already paid a lot of money to gain. Whilst this may create financial hardship for the custodial parent it is a financial hardship that can be avoided. Where the parent is receiving a benefit and doesn't directly receive child support then a deduction in benefit payments should apply, similar to what occurs when fathers are unnamed.

Judges should also be able to mark a file as 'no longer able to be pursued on Legal Aid'. Removal of the financial ability to pursue applications may restrict repeat applications and the Legal Aid board should be able to decline funding if the applications are repetitive.

If school counsellors and social workers were used to gain the children's views about the arrangements from the beginning this established relationship will allow children to speak to them if they feel that access is not working for them. There is little other family members or involved individuals can do to ensure court orders are complied with if a parent is entrenched with opinion that they are not going to comply.

To eliminate the risk of children being taken overseas it should become necessary for passport applications to be co-signed and witnessed by both parents. If a child's passport exists at the time of the application passports should have to be surrendered to the court similar to what occurs in the criminal courts in regard to obtaining bail.

Supervised access

This final section raises questions about the use of supervised access.

Supervised access is one way of maintaining the relationship when there are concerns about the safety of the child. However it can also be extremely detrimental to the relationship as it undermines the role of the parent. Care needs to be taken to ensure that abuse has occurred. If it is simply alleged in an application for a protection order (PO) then the hearing concerning the PO needs to occur quickly. There is a risk that PO are used simply to undermine custody and access applications and PO that are applied for as part of or during the course of such applications should be fast-tracked through the court process to test their veracity and necessity. The use of PO to gain supervised access should not be able to be used as a tactic in FC proceedings.

5.24, 5.25, 5.26

Supervised access should not be at the expense of the parent. FC is an expensive process and coupled with child support requirements there is a risk that this further expense will be unsustainable for the parent. The state needs to support parents in maintaining relationships with their children in order to ensure that society does not end up paying a much heavier price further down the track.

Supervised access is a self-explanatory term and I doubt there is little confusion about what supervised access actually is. However I believe that it can be extremely difficult to facilitate and there needs to be an agency identified and contracted to provide for such need.

APPENDIX 3.5

Christchurch Caring Fathers Support and Education Group

Submission to the Review of the Laws about Guardianship Custody and Access

SECTIONS OF THE SUBMISSION:

1. The Caring Fathers Support and Education Group defined

2. The Need for Changes to Current Law and Practice

3. Proposed Changes

4. Supporting Research and Argument in Favour of Change

5. The Nature and Fairness of the Review Process

6. References, Bibliography

7. Appendix **[NOT INCLUDED IN THIS ISSUES PAPER – ed.]**
   (a) Mark Henaghan: Paper to the Fathering the Future Forum 1998
   (b) Australian Law change relating to enforcement and parenting plans
   (c) Examples of Parenting Plans and Australian Family Court
   (d) lain Johnson, NZ Law Journal "Shared Custody after Parental Separation"

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1. THE CARING FATHERS SUPPORT GROUP

The Christchurch-based support and education group, Caring Fathers, works in conjunction with the social work and counselling agency Home and Family Society. The group evolved from parent education courses called Fathers Alone in 1994. The support group structure began by one participant, Jim Murphy, proved to be more user friendly for fathers and the founder's occupation as a plumber enabled him to recruit tradesmen into the group. Courses run by several agencies were not found to be user friendly and often left the men feeling "pathologised" by the implication that they may have been violent, controlling, abusive or neglectful to need to attend a

course. Other fathers seemed to be reluctant to join parenting courses that may expose their inadequacies. Men are often competitive, unwilling to be vulnerable, and poor at networking. Recently separated men are the most frequent course attendees, but their participation is likely to fall away once they form new relationships.

The support group began to grow in numbers and the group invited the author to assist with facilitation. Media focus in the last year on fathers' issues brought increased numbers of fathers with immediate problems, including Family Court issues and parenting needs, to the centre. Many are referred to individual counselling, parenting courses and other agencies such as the Child and Father Trust's drop-in centre or Stopping Violence services.

The monthly meeting has become a contact point for individuals seeking help, and an opportunity to hear from speakers and for information to be distributed. The most important focus of the group is the safety and welfare of children. Respectful relationships, non-violence and gender equity for men in relationships are principal goals. Other goals are:

- to offer ongoing support to fathers who take a responsible parenting role;
- to provide education and information about parenting, children's needs, and coping with separation;
- to advocate for fathers as individuals or as a group with agencies, the Courts, and the political system;
- to support men who are genuine in their desire to become caring and positive parents;
- to encourage group responsibility for networking, friendship and support.

Caring Fathers seeks changes in both legislation and social attitudes. In 2000, the group has a membership of 120 and contact from 500 fathers per year at meetings or by telephone. To meet the individual needs of that number of fathers, the group has needed to adopt more "service provider" structures. It was important not to lose the benefits of the support group culture in doing this. The Fathers Helping Network provides a way in which fathers who have resolved the crisis issues immediately following separation and stabilised their parenting pattern, can become involved as helpers or mentors to newly separated fathers. They receive monthly supervision and training in helping skills, grief and separation issues, the care and protection of children, stopping violence and anger management, the operation of the Family Court and the referral agencies available. In formalising the structure, the group is able to provide effective and safe assistance to men and to have a structure that is sustainable and ongoing. As individuals move on from the Helping Network Group, they will take their skills into the workplace and wider community to encourage positive fathering.

2. THE NEED FOR CHANGES TO CURRENT LAW AND PRACTICE

A 1992 study by Janne Gibson for the Australian Family Court[4] found that only 48 per cent of fathers' have overnight contact with their children after separation. She found that only one-third of fathers were still involved in the major issues of their children's lives (discipline, health, holidays and the like). Only half were still involved in events that were significant in their lives (Christmas, birthdays, school sports, etc) post separation. These statistics are likely to be similar in New Zealand and the trend has probably led to further deterioration. Lauri O'Reilly reported a trend that would mean by the year 2010, 50 per cent of European and 85 per cent of Maori infants would be in families without a biological father[5]. In 1996, two of every five families with a child between birth and 4 years were sole parent families. Over the last decade the number of single-parent families has doubled to the second highest percentages in the industrial world. Janne Gibson's study found that 73 per cent of separated fathers wanted more access to their children.

The UNO Convention states that *"Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child's best interests."* New Zealand legal practice and social policy is frequently applied in a way that deprives the child of their right of contact to fathers.

While the Family Court may rule on less than 10 per cent of custody and access cases, most separated parents consult professionals who advise on the application of the Guardianship Laws. Lawyers and counsellors have a widespread impact on the decisions of separating parents and they apply the precedents of the Courts in advising or influencing their clients.

While a number of fathers choose to neglect their responsibilities to their children, most want ongoing contact and many have to overcome obstacles, low expectations and negative attitudes in maintaining the relationships. Currently our wider Family Court system is failing children and fathers. This submission does <u>not</u> argue that unsafe or ineffective parents should as of right be given access to their children. Studies of "quality" parenting[6] have measured what makes a difference. The more caring adults in the life of a child the better the outcomes. The removal of obstacles to fathers obtaining worthwhile overnight access and the parallel resourcing of parent education programmes (similar to those in Australia) would produce improved outcomes for children.

It is not the presence of fathers that is critical for children's wellbeing, it is the extent to which fathers engage in quality parenting. In the past, researchers have focused too much on the wrong dimension of father contact time. The results have been used to devalue the importance of fathers and the potential benefits of quality father-child relationships. The findings of Paul Amato, Gray and Steinberg in *Unpacking Authoritative Parenting*[7] support the need for shared residential

custody after separation. Real and empowered parenting arrangements are needed for fathers to develop strong attachments and to set effective limits with their children. Many "visiting" contact or non-residential parents find it extremely difficult to maintain an effective long-term relationship without a shared parenting arrangement.

The New Zealand Family Court system is theoretically gender neutral and currently endorses the underlying principles of the "primary caregiver" and the "best interest of the child" when awarding custody and access. In practice, where working fathers with young children separate, many are disadvantaged in the long term by the provider role they had in their past parenting relationship. Contact often becomes severely circumscribed and the potential for increasing the role over time is lost when access is rigidly prescribed. It is financial necessity that results in forty per cent of fathers with preschoolers working more than 50 hours per week, plus travel *(Census 1996)*.

The services of the Family Court were not perceived by men and women to be neutral. A recent survey by the Office of the Commissioner for Children found that 41 per cent believe that the Courts discriminate against fathers, 34 per cent were unsure, and 25 per cent disagreed.[1]

The English researcher and feminist author, Adrienne Burgess[17], reflects the stance of the Caring Fathers Group in her book. *Fatherhood Reclaimed* (p31). Her comments are valid in the New Zealand context:

> *"The old style feminist argument seems to be that 'we've invited men in' and they 'haven't been interested', with no recognition given to the fact that there are enormous cultural and structural barriers to men's participation in family life. For men to become close to their children, these will have to be taken as seriously and tackled as consciously as the dismantling of barriers to women's participation in the wider world."*

In another chapter, Burgess quotes research that indicates: *"Mothers are gatekeepers capable of enhancing or dampening father-infant attachment. Attitude surveys in the US have revealed that 60-80 per cent of mothers did not want fathers to take a greater role in child-rearing"* (Burgess, p.135).

While mothers may welcome fathers as babysitters, they reject them as equal partners in parenthood, resenting the intrusion of males on their mother role (Burgess, p.135).

Professionals often actively avoid engaging with fathers or simply target services at mothers. A term has been developed to describe researchers' discounting of fathers. Family research is said to be gynocentric (Burgess, p.136).

Fathers are exalted as breadwinners and scorned as intimate parents by a system which relentlessly promotes in family care by mothers, not because it is the best option but because it is thought to be the cheapest option.

> *"Legal pundits declare that there is no obvious mother bias in the Courts because fathers win in custody disputes quite regularly. This may be so, but it entirely missed the point. The fathers who get as far as contesting custody usually have strong cases. The rest will have backed off earlier"* (Burgess, p.197).
>
> *"Those fathers who do not back off voluntarily will usually do so after taking legal advice"* (Burgess, p.197).

The disengagement of noncustodial fathers from the lives of their children after divorce, particularly those most involved with and attached to their children during the marriage, can be the result of a custodial arrangement which they perceive as "disqualifying" them as parents. Many caring fathers find that meaningful, regular and frequent parenting is not possible within the bounds of sole maternal custody and limited paternal access; the very concept of "access" connotes for many fathers a de facto cessation of their parenting role. These fathers want at least partial physical custody of their children. Many fathers consider shared parenting with their former spouses as the only custodial arrangement that would allow them to maintain a meaningful relationship with their children.

Although in theory there is a presumption of shared custody after separation, the practice and assumptions regarding the mother's role as primary caretaker seems to operate. Expectations on the fathering role are low and proactive support systems are rare. Guardianship provides little influence and protection for the father-child relationship even though it legally defines rights to information and decision making in the areas of education, health and religion. In practice, schools defer to the custodial parent and exclude the access parent, especially if they detect any conflict or opposition from the custodial parent. This extract from a letter of a primary school principal reflects the dominant policy and practice of schools to relate directly and often exclusively to the custodial parent, *"...you have unrestricted access to me or the teachers of... However this needs to be out of class time as is the case for all our noncustodial parents where specific access is outlined by the Court."* (Principal withdraws request by classroom teacher for this access father to be parent help at a camp after the custodial parent objects.)

Legislation to protect against domestic violence has strengthened protection for women and many of the changes are supported. However, the philosophical premise underlying the regulation and practice within the Family Court system is not supported by research[9]. The belief that domestic violence and child abuse is exclusively a male problem has served to pathologise fathers and impact directly and indirectly on decision making within CYFS and the Family Court. Numerous

international studies have found that women engage in violent acts towards their partners at least as often as men. Violence found in lesbian relationships is at least as frequent as in heterosexual relationships.

Mark Henaghan, in his paper "Above and beyond the best interest of the child"[11], has cautioned judges against damaging restrictions on access in situations when domestic violence is alleged. Karen Zelas[12] has warned against professional complicity in the break up of biological families after abuse allegations or convictions. She suggests that many children face worse scenarios from stepfathers than from the biological family. Too often in attempting the impossible goal to eliminate all risk, judges have denied or severely restricted access to fathers who have strong psychological relationships with their children and the potential for positive parenting. The impact of ex parte domestic violence orders have been acknowledged in the order requiring the allocation of time for interim access hearings each week in Family Courts around the country[10]. DVO orders and allegations of abuse are being used routinely by some lawyers and counsellors to influence custody and access issues. Research in the USA[14] indicates that over half the allegations of sexual abuse made in the context where there are Family Court proceedings filed, are not upheld.

Supervised access at authorised centres are seen as safe and easy options in many cases. The restrictions that this form of access (often unjustified) places on many children and fathers has the effect of damaging or destroying the relationship. Too often other safe and suitable alternatives are rejected by the applicant who has the ultimate control over these arrangements under Section 16b of the Guardianship Act.

There is a lack of resourcing and provision for alternative supervised access providers that are both safe and father-friendly. Bamados is the only access centre approved officially by the Family Court. The Courts are unable to refer to alternative marae-based programmes such as Rehua (Christchurch) or the Father and Child Trust supervised access (Christchurch). Despite the majority of users being fathers, only one of nine supervisors of Bamados Access Service, Christchurch, is male.

Alternative programme providers are rejected by panels that administer the respondent and applicant programmes if they do not comply in all sessions to the Duluth model. This model is appropriate for only a minority of applicants.

The New Zealand Family Court is still adversarial and damaging to good family outcomes. The practice of writing affidavits as an initial approach to the Family Court often reduces the possibility of a mediated settlement.

Joan Kelly has argued that delays in hearing custody and access cases have severely damaged the relationships between parents and children. For example, the threshold of psychological damage for a one year old child removed from an attached caregiver is seven days. Ex parte protection orders have been made against custodial fathers severing access for months[16].

Research in the USA found that child custody policies have a significant influence on divorce rates. States that have higher levels of joint physical custody have, on average, lower divorce rates. Kuhn and Guidubaldi (1997) showed a significant correlation between joint physical custody awards and reduced divorce. They conjectured that a parent who expects to receive sole custody is more likely to file for divorce than one who may be awarded shared custody. Sole custody allows one parent to hurt the other by taking away the children, and usually involves higher child support transfers than shared physical custody. Sanford Braver discusses the implications of their findings in his new book *Divorced Dads*.

Brinig and Buckley (1998) independently found the same correlation between joint physical custody awards and reduced divorce. They conjectured that fathers are more likely to form strong bonds with children if they know that their relationship would be protected through joint physical custody in the event of a divorce. This would reduce the likelihood that fathers would initiate divorce.

Brinig and Allen (1998) showed that the parent who receives custody is more likely to be the one who files for divorce. That is, among cases where the mother received custody, the mother usually filed for divorce, and where the father received custody, the father was more likely to be the one who filed. They concluded that filing behaviour is largely driven by attempts to "exploit the other partner through divorce". Significantly, they found that custody had a stronger relationship with filing than financial factors, although these factors are of course co-mingled through child support.[18]

3. PROPOSED CHANGES

3.1 Parenting Orders based on the bests interests of the child and the rebuttable presumption of <u>shared</u> parenting.

New Zealand should adopt the Australian law change Section 60B(2) - Children have the "right to know" and be cared for by both their parents "and a right to contact" with both parents. Those principles are expressed to apply "except when it would be contrary to the child's best interests" and a separate section (65e) provides that a court must regard the bests interests of the child as the paramount consideration in deciding whether to make a particular parenting order.

3.2 Effective measures to ensure that parenting orders are enforced. The Family Law Act of Australia is attached (Part XIIIA). The amendments adopted in 2000 will restore credibility to their courts and ensure that children's rights are protected.

The credibility and fairness of the Family Court will be upheld. Speedy, inexpensive and effective systems will be implemented to enforce access orders when the Court has ruled that these are safe and in the best interests of the child.

(a) A specially selected, qualified and trained team will be established in each region to enforce warrants. These teams would operate in a manner similar to the sexual abuse teams and comprise representatives of the Police, CYPFS, childcare workers and Court staff.

(b) Group and individual programmes will be established for parents who are in breach of orders for access. Family Court counsellors, specially trained in parental alienation issues and therapy, could operate these programmes. Diversion to these programmes would be a constructive alternative to fines. The funding and operation would be similar to DVA programmes.

(c) Reviews will be automatically undertaken after a period of six months to one year to examine the viability and application of the Court order. When access orders and parenting plans have not been undertaken to a reasonable level given the circumstances of the parent, the Courts may:

(i) continue access (Residential Orders) at the same level providing the parent completes a parenting programme and/or counselling authorised by the Family Court;
(ii) remove or reduce access (Residential care) if the non-compliance to orders has been detrimental to the welfare of the child and the parent has not undertaken (i) above;
(iii) order either parent to undertake a programme as outlined in Ib.

3.3 School Policy on Communicating with Parents and Guardians The Government should adopt the protocol used in South Australia.

Proposal:
That the school adopt the following draft policy on *Communicating with Parents/Guardians.*

"Our school will use its best endeavours to communicate with parents/legal guardians on matters relating to the child's activities and progress while in the school's care. Where the child's parents/legal guardians are not living together, the school's communication will be with each independently. Notices, invitations, and so on will be sent out in sufficient time for both parents to respond, should they so wish." *(See notes and commentary below.)*

Notes/commentary

1. *"Best endeavours"* means that the school should make special arrangements where it is aware that sending a notice or other written communication home with the child may not be effective in reaching BOTH parents/legal guardians. Both the school office and the classroom teacher may need to keep records to assist with these arrangements.

2. *"Matters relating to the child's activities and progress"* mean all those things that a school would normally communicate with parents/guardians about, including general notices and newsletters, invitations to participate in school activities, arrangements for parent/teacher interviews, illness while at school, progress reports, assignment to different classes, newsletters, and so on.

3. *"Each independently"* means that the school will provide two copies of notices, invitations, reports, and other written communications, one for each parent. If the school is aware that sending communications home with the child may mean that one parent (eg. the noncustodial parent) may not receive them, or may not receive them in adequate time to respond appropriately, then the school will arrange for that copy to be delivered independently.

Of course, there may be unusual circumstances (such as when a Court Order banning contact between child and parent is in effect, or where a parent/legal guardian and the child are otherwise estranged) where it would be improper for communications about the child to be passed to one of the parents. Both the school office and classroom teacher may need to keep records of such circumstances, once they have become aware of them. However, the school should ensure that one parent (eg. the noncustodial one) is not disenfranchised simply on the say-so of the other parent.

3.4 Parenting Plans

Separated, divorced and unmarried parents living apart should be required to develop a parenting plan.

These need to be designed to have legally enforceable status, by warrant. The Court should be able to approve mediators, counsellors in addition to lawyers who can prepare and file these documents.

The Australian Parenting Plan booklet is attached. This could be modified for New Zealand conditions and made more user friendly. An example developed in Christchurch by Ann Caseley is attached. The Australian innovation was not accompanied by a user-friendly parenting plan booklet. The introduction of a legally enforceable parenting plan option needs to be accompanied by extensive education among Family Court professionals.

3.5 Mediation

New Zealand should follow Australia and require a mandatory mediation session prior to the granting of legal aid. The appropriateness of legal support can be assessed at this time. The Family Court should approve and train mediators to resolve parenting disputes prior to the dispute entering the Court system. The development of a range of primary dispute resolution services should be the focus of the procedural reforms.

Where parents cannot reach agreement on a parenting plan, they should be required to resolve their differences through mediation by trained neutral mediators.

The use of a process similar to a Family Group Conference would be appropriate for many Pacific Island and Maori families.

3.6 Terminology

The terms of custody and access should be replaced by a range of *"parenting orders"* that state when the child is *"in the care of"* each parent.

Unlike custody orders, a residence order or care order does not vest a parent with sole decision-making power nor does it take away any aspect of the non-resident parent's responsibility for the child.

Parental Responsibility: All the duties, powers, responsibilities and authority which by law parents have in relation to their children. Each parent has parental responsibility for each of their children who is under 18 unless they have agreed otherwise or the court has made an order which changes this responsibility in some way. Parental responsibility is not affected by any changes in the parents' relationship, such as separation, divorce or remarriage.

3.7 Access determination for protection orders

(a) Delete 16b clause 4, Guardianship Act.

(b) Guardianship Act Clause 4a and 4b to be replaced with the clause: The Court should have discretion in the allocation of custody or access arrangements to respondents of the DVA.

The Courts need to have the option to allow for other than the rigid requirement of supervised access. Rigid and limited access to respondents in some cases can be more emotionally damaging to children. The provisions could be used in prior custody/access disputes to undermine natural justice and the best interests of the child.

(c) Delete 5f clause 16b Guardianship Act, p 629 "Whether the other party to the proceedings (i) considers that the child will be safe while the violent party has custody of or access to the child; and (ii) consents to the violent party having custody of or access (other than supervised) to the child."

(d) Replace with
"The other party shall be consulted on what they consider to be the safe and appropriate parenting plan for the child."

3.8 Biological fathers will be granted guardianship as of right unless there is evidence of danger to the child. Refer Mark Henaghan - Paper to the Fathering the Future Forum, "Fatherhood and Family Law" (attached).

3.9 The Government should fund programmes for couples in communication skills and conflict resolution.

3.10 Provision will be made for the use of Counselling Orders to establish an arbitration process for minor disputes (not involving domestic violence). This could reduce delays, stress and expense. The availability of an arbitration process could be especially helpful in property matters.

3.11 The Guardianship Act should be amended to allow for the Courts to order counselling for children. The Act should be amended to establish an appropriate and safe way to consult with children about decisions affecting their future.

3.12 The Government should promote and resource community education programmes that help reduce domestic violence and the use of corporal punishment. That the commissioning of programmes reflect the research findings that domestic violence is a family problem, not a problem perpetrated by males only.

3.13 The Government should promote programmes to educate parents and the Family Court counsellors, lawyers and officers in the merits of shared parenting and developing comprehensive parenting plans for meeting the needs of children.

3.14 The Government should promote measures to improve the ability of parents to resolve issues outside the formal court system and will review the legal aid provision to ensure that it is fair to both parties involved. That the Australian policy of requiring a session of mediation prior to granting of legal aid be adopted.

3.15 The Government will adequately fund supervised access centres and expand the number and quality of service offered, including a range of alternatives. (Refer to comments in section 2.)

3.16 Family Court lawyers should be accredited and required to undertake specialised training in interpersonal skills, child development, parenting plans, conflict resolution, and family law. A specific criterion will be developed in the selection of Counsel for the Child and 29A report writers.

3.17 Delays in Court hearings should be reduced by the adequate provision of time for short course hearings for Interim Orders.

3.18 Parents making applications to the Family Court should be required to attend education programmes to help them understand the Court processes and the effect that their decisions will have on their children.

4. SUPPORTING RESEARCH AND ARGUMENT

Change 1

Shared parenting may involve a range of residential and care arrangements that can be negotiated through the provisions of mutually agreed variation. Irving and Benjamin undertook a comparative analysis of shared and sole custody (*Parents in Joint Custody and Shared Parenting*, ed. Jay Folberg, 1991, Guilford). These were the recommendations (p.l26):

> *"Logic argues against any custody arrangement which disrupts the relationship between children and both the parents… by comparison with sole custody, shared parenting seems to benefit the majority of child participants while promoting joint co-parental involvement, decision making and fiscal responsibility as well as encouraging maximum contact between the children and both parents. On these grounds we contend that child custody statues should rest on a rebuttable presumption of shared parenting... children's rights to maintain their relationship with both parents should not be lost in divorce and then "won back" through the courts. Joan Kelly in the same volume has challenged the negative views toward shared parenting. She argues that stability is more about stable care and routine and consistent caretakers than about geographic locations. Regular stays at dad's house could be much easier than visiting the child care centre. Separation for long periods from attached fathers can create anxiety and unhappiness. The threshold of damage for a one year old child is seven days. Joan Kelly found that child rearing issues are not a common cause of adult separation and that anger between parents diminishes in the first year. Adult conflict around the time of separation is not a valid reason to prevent shared parenting. With better mediation and counselling services, most parents can maintain a cooperative parenting relationship."*

Michael Green in his recent New Zealand address[13] found that the Australian reforms had benefited consumers. More liberal "contact" orders had been sought and more shared parenting orders had been asked for in the Courts. He saw the move toward primary and alternative resolution procedures as especially positive. He was concerned that the recent paper[24] reviewing the reforms was unbalanced and biased. The paper had made no attempt to consult the consumers of the Family Court.

A paper prepared by Ian Johnson for the New Zealand Law Journal refutes most of the common arguments against shared parenting (attached).

Judge Inglis QC and Judge Von Dadelszen have already taken the view that because guardianship is the overriding legal concept, when there is a dispute over custody (day to day care) such a dispute is really about when each parent will exercise their guardianship responsibilities. Court orders have been made as directions under section 13 to when the child will live with each parent, rather than the normal custody to one parent and access to the other (Henaghan). This approach would appear to reflect more closely the Australian reforms and would be a positive direction for New Zealand. For the law references, refer to the paper by Mark Henaghan in the Appendix.

Although shared parenting is possible within the current law, the legislation needs to signal the Court's preference for this arrangement as the initial rebuttable presumption when responsibilities for parenting after separation is decided.

Change 2

ENFORCEMENT

Men are being denied access to their children by former partners in a legal system that fails to protect the right of the child to have access to both parents. Some men in the Caring Fathers Group have been forced to give up seeing their children because their former partners have repeatedly disobeyed Family Court Orders on contact arrangements. Our legal system is unable to respond quickly to breaches. The Warrant system is rarely used for enforcement and frequently issues end up back in the Courts for more expensive and time-consuming delays. The message to custodial parents is that they can flout the law with impunity. Contact parents because of the cost factor or simply to avoid the conflict involved are either rarely seeing their children or are losing contact with them altogether. Safe and caring separated parents who are paying child support but are unable to see their children feel that the system has let them down.

There needs to be a simpler and immediate way of dealing with alleged breaches when they happen. Costly, time-consuming and delays in Court hearings are not the best way to deal with disputes that involve alienation, coaxing and poor cooperation by one parent. These situations are further exacerbated by the powerful assumptions of 'ownership' and 'gatekeeping' that are attributed to the custodial parent.

The failure of our legal system in this regard may be a major cause of suicide by separated parents who feel distraught about the injustice and their powerlessness in the situation.

Change 3

GUARDIANSHIP 'RIGHTS'

New Zealand's guardianship rights to separating parents are often regarded as effectively the same as the American term 'legal custody'. The existence of these rights in law, it is argued, allows for protection to be given to the non-residential parent and facilitates the on-going relationship between child and parent.

In reality, access parents experience little support of acknowledgment from schools or health professionals. The stated and informal policy of schools in Christchurch has been that they will be guided by the wishes of the custodial parent. Many schools fail to even see the contact information about both the guardians and most fail to provide newsletters or reports to the non-custodial parent.

Change 4

Separating, divorced and unmarried parents living apart should be required to develop a parenting plan which sets out parental responsibilities for decision-making, parenting time and residential arrangements for the children.

It is clear from the research in other jurisdictions that mandatory mediation for disputed custody and access cases should be implemented. There are a number of benefits. Firstly, from a social policy standpoint, the research shows good settlement rates of between 50% and 75%, usually following one to two hours (Kelly, 1994)[19], and 79% reaching agreement on at least one substantive issue (Bordow and Gibson, 1994)[20], reported in Australia. In addition, it is more cost effective than adversarial proceedings, produces more compliance, results in more positive interaction between parents, and may reduce acrimony and relitigation (Brown, 1997, US Commission on Child and Family Welfare, 1996)[21].

It is important to note that mediation means a facilitative process empowering people to make their own decisions and reach a consensual settlement. This process is distinct from conciliation which is more directive and counselling which is more therapeutic. It is essential that this is carried out by mediators with specialised training in divorce and custody matters, domestic violence assessment and divorce mediation. Kelly (1994) asserts that training and experience as a therapist, evaluator, lawyer, probation officer or judge is not adequate preparation.

Change 5

Where parents are unable to reach agreement on a parenting plan they should be required to resolve their differences through mediation by trained neutral mediators, except where domestic abuse, substance abuse, mental disability or other factors would preclude a fair process.

A recent submission by the Family Court of Australia (2000)[22] finds that 'relationship and reconciliation counselling are normally of benefit to adult clients before separation'. By the time they reach the Family court the marriage has broken down and although one party may want to discuss reconciliation the other in almost all cases does not. Hence the focus of the Family Court has been on Dispute Resolution and clients seeking relationship and reconciliation counselling are referred to community agencies. It seems that at this point a requirement to focus on reconciliation is both pointless and disrespectful of the clients' wishes.

There should be no requirement for judges, lawyers, or counsellors to promote reconciliation when parents have decided to separate. The emphasis should be on helping them meet their parenting responsibilities to their children.

Change 11

The research undertaken by the Centre for Research on Family, Kinship and Childhood at the University of Leeds has important findings on the value of consultation with children on residence, custody and access, supports the provision of trained professionals who can advocate for and counsel children[23].

They condemn current practices in the UK:

> *"One of the ironies of the exclusion of children from open discussions about divorce and changes in family life is that they are a font of knowledge and information themselves on what it is like, on how to cope, on how to intervene and what it feels like. They may have a different perspective on the process when compared with parents, and they may even have solutions to some of the typical problems thrown up by parenting across the households. We may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection."*

Change 12

Recent Canadian court decisions have ordered changes to programme providers in the area of domestic violence. Many programmes sanctioned by the New Zealand panels would not comply with Canadian practice.

Change 13

The Australian reforms (1995) in the area of shared parental responsibility and parenting plans were excellent initiatives, but they could have been more successful if the Courts had educated the professionals and consumers by programmes and information packages. Michael Green QC believes that the legal profession was slow to embrace these changes in Australia because it would reduce their income from the adversarial process that they were used to. Mediation and parenting plan processes could occur without engaging a lawyer, even at the registration stage.

Change 17

Delays in hearing ex parte Protection Orders and Interim Access Orders have caused separation anxiety to children, damaged the relationship between fathers and their children, and breached natural justice. Resolutions of the Principal Family Court Judge for short course hearings have not been consistently adopted throughout New Zealand. Delays and Protection Orders are routinely used to disadvantage fathers and their relationship with children. The Court professionals are finding it difficult to accept when the violence alleged is not physical that this is a reason to avoid mediation and counselling processes needed to resolve disputes.

5. THE NATURE AND FAIRNESS OF THE REVIEW PROCESS

Although the Government has established a "level playing field" in the area of Industrial Law, the access and resourcing of groups and individuals supporting and advocating for fathers and children has been severely limited and closed.

The Fathers Who Care project began by Laurie O'Reilly and the Office of the Commissioner for Children has ceased and the earlier findings have been largely ignored in Government social policy changes'. In contrast to this, the Australian Federal Government in 1999 funded $100,000 to the Lone Fathers Association of Australia to ensure that advocacy in family policy was balanced. The Government has not funded the New Zealand Father and Child Soviety or the regional organisations.

The Ministry of Women's Affairs has $3.7 million to advocate for women and children. Representatives are flown to select committees all over the country. In addition, numerous other women's groups such as the Refuges receive Government funding. They do valuable work and the inequalities of the past fully justified their role. In the year 2000 we are experiencing issues involving the loss of contact by children with their fathers, health statistics that indicate men are worse off and boys are falling behind in education.

In social policy research about family, no attempt is made to achieve gender balance in staffing. A review of Australasian recent research literature found that in studies of the effect of parents on the mental health of their children: 51 per cent examined the effect of both parents, 48 per cent examined the effects of only the mother, and only 1 per cent the father[2]. One has to question the validity of one review at this time when the research base is so biased and limited in relation to fathers and children.

The number and quality of submissions re this review are likely to reflect the limited resourcing personnel and resources available to fathers in the area of family policy. The exercise is neither balanced nor democratic.

The subsequent political process will also be undemocratic and unbalanced. The examination of the review submission and proposals will be critiqued by the Ministry of Women's Affairs and referred to the Labour Women's Caucus and the Combined Women's Caucus of Governing Parties. A paper will be presented to the Labour Party Caucus by a women's advocate. It is unlikely that the "father's view" will be represented at this critical stage and balanced debate if any is unlikely. This process occurred with the negative response for the Shared Parenting Bill 2000. The Select Committee process will be too late to introduce or modify the proposed legislation.

The Review Document itself is a slanted document that fails to mention the issue that over 50 per cent of fathers lose overnight access to their children after separation. The analysis of shared parenting changes in Australia uses a minority and limited study to denigrate the changes. The women authors have implied that the Government is considering only cosmetic changes in terminology rather than the innovative changes to social policy required to create a framework to facilitate the right of the child to have contact with both parents.

Requests to resource and balance the process of the Review and the introduction of legislation have been largely ignored by the Associate Minister of Justice[3].

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APPENDIX 3.6

MEETING WITH JUDGE MAHONY

21ST AUGUST 2001 at the Man Alive rooms

Minutes of discussion held by Auckland fathers groups in the presence of Judge Mahony

The following was advanced as key issues for those present.

EX-PARTE ORDERS

Principle:
Protect the father/child relationship

Problem:
- Orders are taken out on insufficient evidence, with the consequence that fathers are isolated from their children for insufficient reason.

Solution:
- Testable evidence required for ex-parte orders.
- Ex-parte only if enough evidence for arrest, access to continue through the time of the order.
- The Temporary Protection Order to be in effect for 1 week – 10 days only.

Problem:
- Counsel-for-the-child reports which are written after orders are issued often suffer from the child having been traumatised by the split, suffering from loyalty issues, and one parent having induced alienation during the time of non-contact.

Solution:
- Counsel-for-child reports to be replaced by, or influenced by, home video or evidence from the past. This may include previous history as a parent.

Problem:
- Consistency of judgement by judges.

Solution:
- Training judges in attitudes and interpretation.
- The establishment of clear principles for judges to work from

PERMANENT ORDERS

Principle:
Ongoing safety vs change and improved applicant/respondent/child relationships.

Problem:
- The grounds for some orders are questionable but their consequences on the child-father relationship can be far reaching
- Many orders are in effect long after they need to be.

Solution:
- A Permanent Protection Order to be obtained only with good evidence.
- Permanent Protection Orders will need to be renewed after three years or a period in excess of that, specified by a judge, if the order has been broken.

FALSE ALLEGATIONS

Principle:
Safety vs unaccountable abuse of safety precautions for power/control reasons

Problem:
- Applicants are making false allegations to obtain orders and there is no disincentive to cause them to cease doing so.

Solution:
- That there be a penalty for a false report, or allegation, or for perjury.
- A higher standard of evidence be required for allegation of abuse.
- Acknowledge envy or revenge by the custodial parent, which may lead to a punishment motivation in interactions with the access parent and affect children's welfare.

MANDATORY PARENTING COURSES

Principle:
Our children are too valuable to be hurt in parental disputes and through the expression of parental emotional hurt

Problem:
- Children and adolescents are being hurt in ongoing fighting, disrespect and incivility between separated parents.

Solution:

- Mandatory Parenting Courses (teaching how to be separated parents).
- Include content on effects of separation and conflict, and on the need for two parent responsibility and participation

PROTECTION ORDER

Principle:

Balancing safety with ongoing relationship

Problem:

- Fathers who have abused spouses are being prevented from free contact with children after separation due to a policy of assuming that they are also being violent to the child.

Solution:

- Not assume that the Father have been violent to the child if he has been violent to the partner.
- Children will not automatically go on the Protection Order
- Protection for child only if respondent is violent to the child (not just applicant)

Problem:

- Respondent is often left for weeks without contact with the child due to allegations of non-safety.

Solution:

- Faster processing of hearing (i.e. reports)
- Compulsory mediation quickly with penalty for non-attendance.

CUSTODIAL /PRIMARY CAREGIVER

Principle:

Equal rights and value to both parents

Problem:

- There is a conscious and unconscious practice preferring the mother as the major caregiver and giving that person control over the child's welfare that is unequal to the father.

Solution:

- The Principle needs to be Equal Shared Parenting as a starting place. There would be no primary caregiver or custodial parent unless it is clearly damaging for the child to be with one of the parents.
- Assume that 2 homes are a possible option for children (Research this)

GENDER BIAS IN BELIEVING TESMONY AND ALLEGATIONS

Principle:

Equal value to both genders despite social stereotypes

Problem:

- Men, apart from being reluctant to lay complaints, are not so easily believed by the police and the courts.

Solution:

- Reduce the historical and sexist inclination to rescue women.
- The police, lawyers, court staff and the judges need to believe men who apply with allegations of abuse. The principle of equal believability of either gender needs to apply.
- Pay attention to women's violence to both men and children.
- Acknowledge that men can be hurt physically, emotionally, relationally, and psychologically.

A "PRO–FAMILY" COURT

Principle:

That the court serves the whole family unit which includes the child and siblings, the genetic parents, the caregivers, both sets of grandparents and the wider whanau.

Problem:

- The court has been predisposed to deal more sympathetically with women than men. This has been evidenced by:
  - Few or no men as counselling co-ordinators.
  - No process for dealing with the specific trauma that men go through.
  - High male suicide rates of men waiting in the Family Court.
  - Few male or all female members of regional D.V. panels.
  - Male respondent programmes that have a tone of punishment rather than stopping abuse.
  - Female respondent programmes that still blame men for women's abuse of men, women and children.
  - No structured rights for grandparents to have time with children.

Solution:

- Staffing at F.C.
  - At least 50% male staff.
  - Train staff to be more male empathic, knowledgeable and helpful.
  - Prepare male friendly material, posters pamphlets, videos.
  - **Set up a committee of father-wise persons to advise on court friendly measures for men.**
  - Have appropriate referral lists for male support.
  - Have a father's representative on policy and procedures committees.
  - Have an hour paid session available from the Family Court for respondents with trained male personnel that assists with court procedures and personal situations to ensure safety, rights and wellbeing.
  - Understand that written data and procedures do not work well with men.
- Appoint male-positive men to D.V panels.
- Have pro-family respondent programmes that seek to hold the individual responsible while at the same time trying to understand them and help them build relationship skills.
- Where at least one parent is supportive of contact, the grandparents should have some rights of access to the grandchildren.
- Have free mediation available.
- Acknowledge male PTSD and supply trauma support.

OPEN FAMILY COURT

Principle:

Transparency and accountability plus respect for individual personal privacy.

Problem:

- The workings of the court are unseen and the outcomes appear inconsistent.
- There are no statistics available.
- Men feel disadvantaged by the proceedings.

Solution:

- That the Family Court proceedings be open or that the reasons for fear of unfairness and inconsistency be removed.
- That the opening of the Court allow for protecting clients privacy
- That there be no media in the courts
- That reports be open and accountable.

CUSTODIAL RESIDENCE

Principle:

The power of the custodial parent not be used to damage the relationship with the access parent vs the right for an individual to live where they want.

Problem:

- Currently the custodial parent can move away from the vicinity of the access parent's residence.
- The custodial parent can move frequently, which presents an additional problem if the father chooses to move also.

Solution:

- Movement away by the custodial parent be prevented on the basis that the child's needs are paramount.
- The custodial pays all costs of the access parent's access if that parent chooses to move away.
- All conditions of access to be honoured by both parties, or they face penalties. The court needs teeth.
- Fathers who fail to take up the responsibility of access be penalised due to both the short-term and long-term disadvantage to the child.
- Fathering courses for all fathers who go through the Family Court.
- Custody-access disagreements have mediation available quickly.

TRAINING

Principle:

Education creates changes, towards equality of gender, better than regulation.

Problem:

- The last 40 years of eloquent feminism has left a system highly educated as to women's perspectives and needs. There is a lack of awareness, articulation and advocacy of men's experience, needs and perspective. Courts are then unwittingly delivering a one-sided service.

Solution:

- Training for Family Court staff, social workers, police, lawyers, counsellors, psychologists, and judges.
- Create a father-friendly Family Court engagement procedure. (1 hour talk and briefing of respondent by court or external contracted workers.)
- Family Court take notice of fathering research (especially the male positive research which has been largely ignored).

CUSTODY/ACCESS RESEARCH

Principle:
Equality of gender in research. Reducing bias in research

Problem:
- The ratio of research projects generally on social issues from female and male perspectives runs at 20 to 1.
- Research largely sets out to prove what it wants to believe.
- Much research on men [including fathers] is done by women.
- The positive or negative attitude of the researcher is often reflected in the research and the topics chosen.all ok

Solution:
- Research on men and fathers to be done by male-positive men.
- Social fora be established to mature the debate and issues.
- Statistics on the Family Court and its judgements and outcomes be made available to the public.
- There be research on the following topics quickly:
  - Effect on children of having 2 homes.
  - Length of wait by fathers in the Family Court.
  - Attitudinal alienation pressure by either separated parent. (Parent alienation)
  - What really is in the best interest of child. What do children want?
  - The cost to fathers who are alienated from their children.
  - The costs to children of separation and alienation from their fathers.
  - Spousal violence by women on men.
  - Abuse of children not living with their father.

The meeting was between Auckland fathering pressure groups, service providers to fathers and the Principle Family Court Judge.

Not all of the notes and points made were agreed totally by all but a general consensus prevailed.

Judge Mahony agreed to meet again in 6 months time and consider the material. He indicated that there was already a number of changes taking place and that social norms and values around fathering had changed since the court's establishment.

The meeting was facilitated and notes compiled by Warwick Pudney

Chapter Four

FAMILY LAW – WHAT IT TEACHES OUR CHILDREN

Paper for the Fourth Child and Family Policy Conference, Children and Young People: Their Environments, Dunedin, 28-30 June 2001

By Stuart Birks

Abstract

Family law directly or indirectly affects virtually all children in New Zealand. It shapes their views and experiences of family, and their understanding of their rights and obligations. There are significant messages being given about fathers and mothers, and their respective roles and obligations. While the signals are important with respect to both parents, the negative images and widespread lack of support for ongoing parent-child relationships between fathers and children are of particular concern.

This paper explores the signals being given and considers their possible long-term impact. It arises from an ongoing programme of research in the law and economics and related areas. The Centre's approach involves both academic research and collaboration with service providers, thus providing insights into practical problems and details of individual cases.

The focus of the paper will be on wider trends and broader social implications, pulling together information from a variety of sources. The central theme is that family interventions are "micro" in nature, considering the individual cases, and there has been insufficient consideration of broader social and long-term "macro" implications. The paper is intended to generate debate on these macro factors.

1. SOCIAL CONTEXT

People's behaviour can be greatly influenced by their social environment. The social context in which people operate is therefore important, although not always recognised. One interesting illustration is the case of the "Order of the White Feather" in First World War Britain. This involved women pressuring boys and men to enlist by giving white feathers, symbolizing cowardice.

To quote[1]:

> *"One young woman remembers her father, Robert Smith, being given a feather on his way home from work: "That night he came home and cried his heart out. My father was no coward, but had been reluctant to leave his family. He was thirty-four and my mother, who had two young children, had been suffering from a serious illness. Soon after this incident my father joined the army.""*

or:

> *"(4) James Lovegrove was only sixteen when he joined the army on the outbreak of the First World War.*
>
> *On my way to work one morning a group of women surrounded me. They started shouting and yelling at me, calling me all sorts of names for not being a soldier! Do you know what they did? They struck a white feather in my coat, meaning I was a coward. Oh, I did feel dreadful, so ashamed.*
>
> *I went to the recruiting office. The sergeant there couldn't stop laughing at me, saying things like "Looking for your father, sonny?", and "Come back next year when the war's over!" Well, I must have looked so crestfallen that he said "Let's check your measurements again". You see, I was five foot six inches and only about eight and a half stone. This time he made me out to be about six feet tall and twelve stone, at least, that is what he wrote down. All lies of course - but I was in!""*

and:

> *"Although he was a serving soldier, the writer, Compton Mackenzie, complained about the activities of the Order of the White Feather. He argued that these "idiotic young women were using white feathers to get rid of boyfriends of whom they were tired". The pacifist, Fenner Brockway, claimed that he received so many white feathers he had enough to make a fan."*

It should not be assumed that all women agreed with this approach, but it did have some noteworthy supporters. Christabel Pankhurst wrote of her suffragette mother, Emily: "She called for wartime military conscription for men, believing that this was democratic and equitable".[2] The term “equity” is often loosely applied.

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1 Taken from a web site on the subject at: http://www.spartacus.schoolnet.co.uk/FWWfeather.htm

2 http://www.spartacus.schoolnet.co.uk/Wfirst.htm

This example is of interest because it says something about male and female roles, the influence that women can exert on men, and even women's caring for others and attitudes to violence. It is relevant because, rather than taking a short-term case-by-case perspective, I want to consider the impact of the Family Court in a wider context.

The phenomenon of engineered gender roles can be observed also with maternal "gatekeeping".

2. GATEKEEPING

It appears that this may not be a new phenomenon, as Hardyment (1995, p.122) observes. She refers to the author of *Child Training*, published in 1914:

> *Mrs Arthur Acland felt she had to plead against 'a tendency towards putting the father outside the life of the child, a more or less clumsy interloper whose opinion and advice is to be taken critically, and with more or less conscious derision'.*

Doherty et al. (1997) acknowledge that "substantial barriers stand in the way of active, involved fathering" (p.286). Among these barriers, they include gatekeeping. They suggest that this may be linked to the relationship between the parents, especially if they are separated, but "even within satisfactory marital relationships, a father's involvement with his children, especially young children, is often contingent on the mother's attitudes toward, expectations of, and support for the father" (pp.286-7). The authors cite studies indicating that, "many mothers are ambivalent about the fathers' active involvement with their children" (p.287). By way of explanation, they say that, "active paternal involvement would threaten some women's identity and sense of control over this central domain of their lives" (p.287).

Not surprisingly perhaps, conflict or stress between parents can therefore be a major inhibitor of effective father involvement. As Doherty et al. state, "Research demonstrates the particular vulnerability of fathering to contextual and institutional practices" (p.287). The Family Court can be a major factor in this for many fathers, and the resulting signals can impact far more widely. Attitudes can be both inappropriate and significant, so it is important that people are well informed.

A strong, current message that, if anything, pushes gatekeeping to extremes is that conveyed by the "primary caregiver" concept. This is used to support the present situation where sole custody is commonly awarded to the mother when the parents live apart. In other words, primary caregiving leads to sole-caregiving:

Laila Harre said in her speech at the first reading of the Shared Parenting Bill[3]:

> *"I have to say that if there is a desire to have the primary care-giving tasks, which is what this bill is about, equally distributed after a separation, then the work to share parenting must begin a long time before a separation...*
>
> *As I have said earlier, if we want to share parenting when it all busts up, we have to make a lot more effort to share parenting much earlier in the relationship. Then, in fact, the courts are far more likely to see a shared parenting role as being in the best interests of our children."*

Julian made the point in an even more extreme way, requiring fathers to have provided not only "primary care", but "fulltime care":

> *"...there are good reasons why custody cases at present are more likely to favour the women. The best interests of the child are the paramount consideration. Most of the women awarded custody will have been the primary caregivers and they will, therefore, be seen by the court as best able to care for the children, especially when they are very young. It is possible that many current fathers would be able to provide the same standards of care as the mothers of their children. However, since few of them have practically demonstrated their nurturing skills through providing fulltime care for their children, the judge will be bound to make a decision based on evidence rather than speculation."* (Julian, 1999, p.32)

Nash pushes this even further, suggesting that it is acceptable for fathers to perform "mundane" tasks, but suggesting that pressure for more than that is a sinister attempt to achieve patriarchal power and control.[4]

Tapp and Taylor (2001, p.11) assert that, as mothers do more of the day-to-day care during marriage, "decreeing that the ending of the marriage should not affect the responsibility of parents who should continue as before, then the decree would not be for full shared care but in the main for primary care by the mother". Given that "primary care" is commonly interpreted as "sole care", this could be further removed than shared parenting from the in marriage division of care.

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[3] 10 May 2000, http://rangi.knowledge-basket.co.nz/hansard/han/text/2000/05/10_054.html

[4] Page 213 of Nash (1992)

As we see, it is argued that the "primary caregiver" in a relationship should be the sole caregiver at the end of the relationship. There are weaknesses in this argument:

(a) Why should sole custody be the only option considered?

(b) There are difficulties in determining who a "primary caregiver" is. What units of measurement are used? Is it time? If so, what of simultaneous activities? If it is tasks, what tasks should be considered?

(c) Is parenting synonymous with caregiving? What about such things as interaction with older children, role modeling, play, boundary-setting, or providing a family environment?

(d) If there are stages of parenting, then it should not be assumed that skills displayed at one stage demonstrate suitable skills for another.

(e) The chosen pattern of specialization in an intact family may not reflect the best pattern for after separation. In an intact family many tasks are shared, even if unequally, so the specialization is only partial. Sole custody suggests far less sharing post-separation. Also, circumstances are different, and this may affect both motivations and abilities. In economic terms, specialization when together may reflect comparative advantage, but the post-separation best interest of the child requires consideration of absolute advantage.

(f) Parents may not be perfect substitutes for each other, so exclusion of one parent may result in loss of specific contributions that the other parent cannot make.

(g) Two parents may be able to provide more time than one alone.

Additional concerns about the measurement of inputs by mothers and fathers are raised by Lareau (2000). Hence she asserts that, "fathers are important members of their families, but their importance centers on their *presence* and on the meaning that they have for their children (and wives)" (p.431). She refers to both methodological and conceptual concerns giving imbalance in the study of fathers. "We find the study of family life to be disproportionately skewed to selected, usually easily quantifiable, topics and to privilege the views of mothers" (p.431).

A further problem arising from use of the primary caregiver criterion relates to Family Court processes. As the Hastings Family Court co-ordinator explained at a public meeting in Napier on 22nd March 2000, the first priority when a couple separate is to create stability for the children. This was described in terms of deciding which parent the children would live with as an interim

measure until all the information could be considered. In other words, "stability" is defined in physical rather than emotional terms, where the latter would stress maintenance of close relationships with both parents. Pryor and Seymour (1998, p.22) suggest that research evidence favours the emotional stability approach:

> *"In studies in which they have been consulted, children have been found to endorse joint custody arrangements (Benjamin and Irving, 1989; Rothberg, 1983; Steinman, 1981). In particular, these studies show that joint physical living arrangements did not cause confusion over the arrangements, and avoided the sense of loss experienced by children who enter sole custody when parents separate."*

The court's approach to interim arrangements appears to be contrary to Article 9.1 of the United Nations Convention on the Rights of the Child, which permits States Parties to take such a step only if determined by competent authorities to be in the best interests of the child. It also means that the interim decision is based not on consideration of the circumstances of the specific case, but on presumptions, such as the mother being the best person to have interim custody. By this approach, the final decision is pre-empted as any pre-separation role will be of secondary importance compared to the status quo at the time of a hearing, if matters progress that far.

Moreover, the primary caregiver concept itself has been questioned. Kelly (1997, p.383) says, "Child development research does not support the distinction between primary and secondary caretakers for children after age 4 or 5 if they have lived in the two-parent home." Discussion of debate on the concept in New Zealand, including consideration of definitions used, can be found in Birks (1999), section 2.

3. RESULTING DISTORTIONS

The attitudes described above influence the operation of family law and the views of those working in that area. It is notable that those with a legal training are not required to have a wider understanding of the issues and it is doubtful that their legal education adequately equips them for their responsibilities. If we were to draw a comparison with health care workers, it is unlikely that we would feel comfortable if their training included no coverage of the workings of the human body, but merely involved a knowledge of certain loosely defined rules, with much scope for individual interpretation.

There is little critical debate in New Zealand either on the options available or on the effects of current interventions. The published criticism and associated analysis appear to be largely ignored by those responsible for the implementation of family law. Some have suggested that those involved in policy are biased. For example, Fleming and Atkinson write:

> *"It would help if the application of the child support formula could take better account of the remarriage family situation, including the costs of access visits of non-custodial children, which can be considerable. Talking to some policy analysts about this, I have detected an implicitly punitive attitude towards non-custodial fathers, which is expressed in remarks such as "if a man leaves his wife he deserves what he gets" or "that man's problem is that he has too many wives".* (Fleming and Atkinson, 1999, p.159)

Similarly, shared custody is ruled out as an option if there is conflict between parents. The reasoning behind this is questionable, as discussed in detail in Birks (2001). It is worth noting also that, in Britain, a Lord Chancellor's Department (LCD) publication mentions the option of "parallel parenting", whereby both parents continue to be involved, but they do this independently (Children's Act Sub-Committee, 2001, para.1.14). This is also mentioned in Pryor and Seymour (1998, p.22):

> *"Hetherington has suggested that 'independent, non-interfering parental relations' are necessary and adequate for joint custodial arrangements to work, and notes that children are readily able to adjust to differing sets of rules and organization between households (Hetherington, 1993, p.214)."*

The above paragraph of the LCD publication also identifies gatekeeping as a problem. Clearly it could be a cause of conflict, in which case we could question the desirability of institutional support for such behaviour.

4. WHAT CHILDREN SEE

Children are unlikely to see or understand the situations that parents are placed in. They will learn from their experiences as they see them. These lessons may be in terms of judging what is right or wrong, or what is socially acceptable, or whose explanation to believe. They will form opinions of their parents and of society's institutions, and will be influenced in their view of what society has to offer them. They will also observe how people react to issues and problems. They may respond to these lessons by copying them, or by reacting against them. They are unlikely to ignore them.

Some possible lessons are listed in Birks (2001, p.64):

1. From the view that ongoing contact in general and shared custody in particular are unsuitable if there is conflict between the parents: If you have a problem, you should cut off contact (so a small matter may be inflated and never resolved).

2. From the failure to support the guardianship rights of non-custodial parents: One parent has all the say.[5]

3. From the separation of child support and access issues, and the lack of accountability for the use of child support payments: A parent can be made to pay child support in a one-sided arrangement with no rights in return, nor any obligations on the receiving party.[6]

4. From failure to enforce court access orders or penalise custodial parents for disregarding those orders: Court orders (such as for access) can be disregarded without penalty.

5. From the sort of evidence the court accepts and acts upon: Smears, and false and unsupported accusations can be made and heeded by the Court without investigation (Guardianship Act 1968, section 28).

6. From the terms the court imposes on non-custodial parents: A parent can be faced with whatever restrictions the Court chooses to impose (Guardianship Act 1968 sections 11.2 and 15.2.a). The Court need give no justification. Non-custodial parents in particular may be left with no parental authority and would therefore be unable to fulfil their parental responsibilities.

The factors giving these lessons can have other flow-on effects. Hence actions of others can reinforce parental alienation:

> *"A failure to appropriately identify and intervene in the early stages of these cases may result in the alienating parent being given professional support for his/her position, reinforcing the child's need to maintain or expand complaints about the alienated parent. This has the capacity to more firmly entrench the syndrome and to enhance the severity of the dynamics."* (Dunne and Hendrick, 1994, discussion)

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[5] Judge Inglis has said that "…a parent who is deprived of the right of custody is in reality left with only the shell of guardianship". P.264 of Dadelszen (1995).

[6] Note that this would be considered abusive in an intact relationship according to the Duluth model.

"... the influential role of other people in the child's life, such as relatives and professionals aligned with the alienating parent, whose endorsement of the program advances the brainwashing process." (Rand, 1997a, p.35)

A child's involvement in the alienation process can have other harmful effects also. Hence Rand (1997b, p.47) suggests that, "children may learn to get their needs met by fabrication and manipulation" (Rand, 1997b, p.47). Other effects of alienation can include: an extreme lack of concern for the alienated parent's feelings; polarised views, with the alienated parent seen as all bad; and an identification with the alienating parent which can lead to problems in what Daly describes as the separation stage of parenting as the children move into adulthood as separate people[7]. Rand describes the effects of parental alienation in more detail:

"Depending on the severity of the PAS, a child may exhibit all or only some of the following behaviors. It is the cluster of these symptoms which prompted Gardner to consider them as a syndrome.

(a) The child is aligned with the alienating parent in a campaign of denigration against the target parent, with the child making active contributions;

(b) Rationalizations for deprecating the target parent are often weak, frivolous or absurd;

(c) Animosity toward the rejected parent lacks the ambivalence normal to human relationships;

(d) The child asserts that the decision to reject the target parent is his or her own, what Gardner calls the "independent thinker" phenomenon; 5) The child reflexively supports the parent with whom he or she is aligned;

(e) The child expresses guiltless disregard for the feelings of the target or hated parent;

(f) Borrowed scenarios are present, i.e., the child's statements reflect themes and terminology of the alienating parent;

(g) Animosity is spread to the extended family and others associated with the hated parent." (Rand, 1997a, pp.27-28)

[7] See Birks, 1999, section 2.5

Although alienating behaviours have been described in a paper by a Family Court judge as emotional abuse of children (Blaikie, 1994), the point does not appear to have been acknowledged.

It is surprising that Battered Women's Syndrome gets much attention, but there is far less acknowledgement of PAS, although both refer to people being affected by their environment. Calls for greater attention to children's wishes in custody and access issues should be considered in relation to the environments shaping those wishes and the options presented to the children.

Children may also be unaware of the nature and effects of constraints on non-custodial parents. They then judge those parents according to their actions, rather than their desired actions. Children may choose to see less and less of those parents because they find contact to be unsatisfactory. This may be because the conditions of contact prevent the non-custodial parent from being part of the child's routine and fulfilling an effective parenting role.

> *"Again and again, the story is the same: distance makes the heart grow colder. In many instances, visitations started on the grand scale and then trickled to nothing. In part, the visitation trickled to nothing because of the child's preference. They grew older and less interested in the non-custodial parent. Perhaps sensing that he could do nothing about the growing chasm, the non-custodial parent did little to stem the loss of interest."* (Berner, 1992, pp.63-64)

> *"Wallerstein and Kelly say that when the non-custodial parent lacks legal rights to share in major decisions, many withdraw. Children see that as rejection. Adult children of divorce bitterly report the diminished contact they experienced as children."* (Berner, 1992, p.64)

> *"Although the amount of visitation with the noncustodian did* not *statistically predict poor adjustment, most single-custody children were dissatisfied with the amount of visitation they had. This was not the case with joint-custody children, however, most of whom were content with their arrangement.*
>
> *More important than the quantity of time spent with each parent was the quality of time. It was clear that the children in joint custody had retained a filial relationship with both parents. The single-custody children, in contrast, seemed to have an avuncular relationship with their noncustodian."* (Luepnitz, 1982, p.150)

A loss of interest in contact is unlikely to reflect absence of need so much as an inability to meet that need through available contact arrangements. This initial need has been described by several writers. Henaghan et al (1998, p.284):

> *"The relationship with the non-custodial parent (usually the father) was clearly an important part of the children's lives…Even in two families where there was high parental conflict, children were devoted to their father (the non-custodial parent) and looked forward to their contacts with him…Continuing relationships with both parents seemed to be an important aspect of helping children to adjust to parental separation."*

And Pryor and Seymour (1998, p.18):

> *"When asked, most children indicate very clearly that whatever custody arrangement is made, they want continuing contact with both parents. As noted earlier, decisions about custody arrangements are made at a time of high emotional arousal. A decision which limits access to a non-custodial parent at that time may be detrimental to the longer term well-being of the child. Involvement with both parents in the presence of high levels of conflict is a complex issue. Disputes over property, anger about the reasons for the separation, and other contentious issues are likely to dissipate with time, however, leaving room for the development of independent, non-conflicted parental relationships which facilitate joint parental involvement."*

On a personal level, society's reluctance to recognize the costs of a lost or disrupted relationship to both parent and child was made evident to me in relation to a burglary. My home was broken into and some appliances taken. Within an hour of phoning the insurance company, a glazier arrived to repair the broken window. The police also arrived, filed out a report, checked the scene and arranged for a fingerprint team to come. They also notified Victim Support, although I had said that it was not necessary. Shortly afterwards Victim Support phoned me and later sent a follow-up letter. Mentioning the burglary to friends and colleagues, I received lots of sympathy for the intrusion into my home, the lost goods, and the feelings of "violation" that I must be experiencing. The goods were replaced with new items within weeks.

I see no comparison between the intrusion of a burglary and the intrusion for a non-custodial parent of denied contact, denied involvement in guardianship decisions, denied participation in a child's routine, and enforced child support payments for up to 19 years with no accountability or guarantee that the money is spent on the child or even that the child realizes that the money comes from the parent. I see no comparison between the intrusion of a burglary and with the denial for a child of his/her right to know and be cared for by a parent, or to have the direction and guidance of that parent. Society similarly seems to see no comparison either, but in the opposite direction, with the latter viewed as far less worthy of concern.

5. IMPLICATIONS FOR THE FUTURE

These lessons are not learned by isolated individuals. They are signals given to large numbers of people. According to the Inland Revenue Department there are about 200,000 liable parents and 300,000 children in the child support system.[8] In other words, about one child in four is recorded as having a parent living in another household. Events in these people's lives send signals to intact families also. There are immediate signals to children as outlined above, but there are longer-term implications also.

For example, our children grow up with ideas about themselves, acceptable behaviour, how to deal with conflict, what their parents are like, whether they are cared for, and how society views them. The discussion above already indicates what some of these lessons may be. Many of the lessons are unhelpful.

They also develop expectations about their position in society as adults. Consider the position of a boy growing up with the Property Relationships Act, student loans, and proposed increases in child support. He could look ahead and, if he is able and studies hard, let us imagine that he could see himself as a family man earning an income approaching $85,000. He would risk losing home and family at the whim of his partner. Under the Property Relationships Act he would then get far less than half the matrimonial property due to his earning capacity.

What would he have to look forward to? Of his take-home pay, if he had a student loan, he could be paying 45% in child support. Out of an extra dollar earned he might see less than 15 cents following deductions. Child support payments could continue for 19 years. He would have no say in how the money is used, but would be expected to believe that it is for his children. For one child, he could be paying $1100 per month from his after tax income. This is not affected by the mother's income, or by his time with the child, even up to 145 nights a year. Not only would his remaining income be the equivalent of someone earning half his pay, but he would have the emotional burden of being denied a close relationship with his children.

How might this environment affect his willingness to study and build a career, and to make long-term plans? What will the collective effect of these signals be on a whole generation? How will that affect family structures, the cohesion of society, and caring across generations? How will it affect people's attitudes to their own children if they grow up viewing fathers as people to be sidelined and disparaged? Will they know what fathers have to offer, and will they be willing to take the emotional risks of offering that to their children?

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[8] Inland Revenue figures for 31 August 1999 indicate 200,738 persons paying child support, in relation to about 300,000 children.

The implications go further than the boundaries of families. Eggebeen and Knoester (2001) consider the effects of fatherhood and men's social connections. They suggest that loss of a regular parenting role also prevents men from being active in many family-based organisations. If so, then not only are many men being excluded from families, but they are being excluded from mentoring and other valuable community roles. It is not clear what they would do with their time and energy if denied these constructive outlets.

People may copy, or react against, the lessons they learn. In either event, the nature of the lessons and their impact will be significant in shaping our futures. We should be concerned that so little thought has been given to these matters.

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Chapter Five

PUBLIC OPINION OR PUBLIC SENTIMENT: FAMILY LAW POLICYMAKING IN NEW ZEALAND

Paper for the New Zealand Political Studies Association Conference, Massey University, 7-9 December 2001

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Abstract

Major policy changes in family law have recently occurred, and others are currently being considered. This paper looks at the debate surrounding those changes, considering the information presented and the issues considered. Consultation processes may be used to shape attitudes rather than promote informed debate. The paper asks in particular whether policies are being formed on the basis of an understanding of the current situation and the social implications of the planned changes.

"What we call public opinion is generally public sentiment."
Benjamin Disraeli, Speech in House of Commons, 3 August 1880[1]

1. INTRODUCTION

What underpins policy, opinion or sentiment? Are we guided by emotions or reasoned assessments? How well informed are we? This paper will briefly summarise some relevant information relating to family law policymaking in New Zealand. In an appendix, there is discussion of three areas where perspectives are distorted or inconsistent. They relate to views of the family, unpaid work, and family violence.

[1] Sherrin N (1996) *Oxford Dictionary of Humorous Quotations*, Oxford: OUP, p.251

Debate on recent developments in family law has been limited or fragmented. These developments include, in order:

(a) The Shared Parenting Bill (defeated on its first reading)
(b) The Child Support Amendment Act 2001 (passed)
(c) Property Relationships legislation (passed)
(d) The Guardianship, Custody and Access review (in progress)

The Shared Parenting Bill was defeated on the grounds that it was partial, and a comprehensive reassessment was needed, hence the review of guardianship, custody and access.

The property relationships legislation was initially going to be passed into law without calling for submissions, on the grounds that its terms had been considered in submissions on the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill. Consideration of post-separation earning capacity was not included in these earlier bills. The legislation was passed after a short delay, during which submissions were heard. The Child Support Amendment Bill was also introduced with little sign of prior planning and analysis.

Meanwhile the government is talking about an inclusive society (e.g. Helen Clark, 12 July 2001, Palmerston North), catching the knowledge wave (conference, Auckland, July 2001), and planning long-term for retirement (Steve Maharey, 13 July 2001, Wellington). In March 2001 Statistics New Zealand published a report, *Framework for the Measurement of Social Capital in New Zealand*, stressing the importance of relationships among people. In June 2001 the then Ministry of Social Policy published a report, *The Social Development Approach*, aiming, among other things, to reduce social exclusion. A case could be made that the property and child support changes have implications, probably negative, for these objectives. They are also likely to be interrelated with issues of guardianship, custody and access. It is not clear why the government considers it appropriate to make these changes as two stand-alone pieces of legislation, having argued against piecemeal changes in relation to shared parenting.

2. POLICIES

2.1 The Shared Parenting Bill

The Shared Parenting Bill was a private member's bill by Muriel Newman, ACT MP. It is a good example to study because it is relatively self-contained, being first presented on 17th February 2000 and defeated at its first reading on 10th May. It addressed the issue of care for children when parents are living apart from each other. The bill aimed to introduce a rebuttable presumption of 50-50 shared custody, in place of the prevailing approach, which emphasizes sole custody.

The Parliamentary debate on the bill, being the first reading, was less a debate on the content of the bill than a debate on whether to even consider the content of the bill by allowing it to progress to the select committee stage. It might be thought appropriate that reasons not to proceed should therefore be well-founded. In this instance the reasons presented were dubious.[2]

The text of the bill and more detailed discussion of the debate can be found in Birks (2000). There was one ministerial briefing paper, from the Ministry of Women's Affairs, that received any publicity. Papers were also prepared by the then Ministry of Social Policy and the Labour Research Office, but they offered little extra of substance. The Ministry of Women's Affairs paper was presented as a memorandum, but was referred to as a briefing paper in a government press release by Laila Harré, Minister of Women's Affairs, dated March 21. It is notable that the briefing paper was produced by the Ministry of Women's Affairs (MWA), although Laila Harré is also Minister of Youth Affairs. There has been no mention of papers from the Ministries of Youth Affairs, Justice or Courts, or the Human Rights Commission, or the Law Commission, or the Office of the Commissioner for Children. The Ministry of Youth Affairs youth policy consultation, reported in the *Briefing to the Incoming Minister*, identified the impact of parental separation as one of the key issues for youth.[3]

The MWA paper was open about its purpose, namely to "provide advice on the implications of the Shared Parenting Bill for outcomes for women". The footer on each page of the paper is, *"Making a Difference for Women in Aeotearoa New Zealand"*. The Ministry describes its role on its web page: *"The Ministry provides gender-specific policy advice to the Government to improve women's lives and achieve recognition of women's contribution in society"*.[4] The briefing paper claims to "scope other policy approaches", but there is little sign of this.

There are omissions in the consideration of implications. For the memorandum to give a balanced assessment it would have to include:

(a) Consideration of the scale of the problem in terms of the number of families affected and the implications for the structure of society and associated social problems;
(b) A broader view of rights than just article 3 of UNCROC;
(c) Mention of "the shadow of the law" and more of the various published criticisms of the current operation of the Family Court;
(d) Broader and more searching coverage of the literature.

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2 In this paper, my concern is more for the quality of reasoning than the merits of the legislation itself. The factual content of the government speeches in the debate on the Shared Parenting Bill reflected the advice given to government and discussed here. Those speeches are therefore not included. They are available at: http://rangi.knowledge-basket.co.nz/hansard/han/text/2000/05/10_chron.html

3 Ministry of Youth Affairs, *Briefing to the Incoming Minister, November 1999*, appendix B, at: http://www.youthaffairs.govt.nz/pdf/BIM2000.pdf

4 http://www.mwa.govt.nz/new.html

To elaborate on (iii), the shadow of the law refers to the way litigated decisions send a signal to others, thereby affecting non-litigated outcomes. It was ignored by those opposed to the bill, as demonstrated in a news release of 26 April 2000 on the Shared Parenting Bill by the Family Law Section of the New Zealand Law Society:

> *"...the Bill seems to ignore the fact that the vast majority of parents seem to be able to find sensible and pragmatic solutions to the problems posed by family separation without resort either to lawyers or the courts. The Section is concerned that substantive law changes are being promoted as a response to a relatively small number of difficult cases."* [5]

2.2 The Child Support Amendment Act 2001[6]

The recently passed Child Support Amendment Act (2001) raised the minimum weekly child support payment from $10 to $12.75. It also raised the ceiling level of income on which child support is assessed by 25 percent.

In the Bill, the increase in the ceiling for child support income is explained on the basis that, "The increase will require those liable parents with higher incomes to make a more appropriate contribution towards the costs of raising their children". No further explanation is given, and it is therefore difficult to know what is intended by the term "more appropriate". Letters sent to liable parents in November describe the increase as to "ensure that paying parents with higher incomes make a fairer contribution towards the financial support of their children". Confusion on the same matter has been evident for some time, suggesting a lack of supporting logic or analysis. I discuss this in some detail to illustrate the problem of the starting point for policy debate, with many prior issues being ignored.

On p.11 of Child Support Review 1994: Consultative Document, it states that:

> *"The maximum liable income amount is twice the average ordinary time weekly wage. It reflects the maximum cost of keeping a child."*

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[5] http://www.nz-lawsoc.org.nz/fls/news/sharedp.htm

[6] More detailed discussion can be found in the following papers:
http://econ.massey.ac.nz/cppe/issues/csasub.htm
http://www.massey.ac.nz/~kbirks/gender/econ/CSAA.htm
http://www.massey.ac.nz/~kbirks/gender/econ/durie.htm

This quote is puzzling because child support is assessed on income less living allowance. Two liable parents, both on the maximum income level, could be paying different amounts of child support because one has dependants and the other does not. In other words, it suggests that the maximum cost to the recipient parent of keeping a child varies according to the liable parent's living circumstances.

The quote is also very worrying. It suggests that a person paying the maximum is paying the whole cost of the child(ren), rather than the cost being shared by both parents. There is also no consideration of the financial burden to the liable parent and savings to the recipient parent associated with the time that the child(ren) may be living with the liable parent. If the maximum liable income amount does represent the maximum cost of keeping a child, then the Act is clearly in breach of several of its objects. Moreover, the proposed increase in maximum liable income would have to be taken to mean that the liable parent in the extended income range would be paying more than the maximum cost of the child(ren). How can it then be claimed that the increased liability is “fairer” or “more appropriate”?

A contradictory description of the relationship between child support liabilities and costs of children is given on p.29 of the same consultative document:

> *"It is not intended that expenditure be reflected in child support liabilities. Nevertheless, international research shows that expenditure on children remains roughly proportional up to a very high income."* (p.29)

If expenditure is proportional to income in a household, it indicates that any increase in the recipient household’s income through higher child support received will be split in a fairly constant proportion between all the children and the adults. One could ask why a liable parent should be subsidising a whole household when only one member of that household might be related. This is particularly relevant in relation to object (c) of the Act - "financial support in respect of these children".

The consultative document’s unsupported claim of roughly proportional expenditure may be incorrect. Expenditure on children as a share of gross family income appears to decline as income rises according to figures 1 and 2 of Harding and Percival (1999).

A recent study in Australia attempted to assess the costs of access for liable parents (Henman and Mitchell, 2001). Quoting from the abstract:

> *"Costs of contact are found to be high. For contact with one child for 20 per cent of the year, costs of contact represent about 40 per cent of the costs of that same child in an intact couple household with a medium income, and more than half of the total yearly costs of that child in a household with a low income."*

The Child Support formula does not take these costs into account. While there is some discretion to review an assessment due to high costs of "enabling" access, there is no scope to allow for costs of "enjoyment of" access. This can affect the provision and "enjoyment" of access. In a media statement of 21 June 2001 on this child support legislation, a cross-household emotional connection between biological parents and their children was acknowledged: *"Mr Maharey said the Bill reinforced the Government's firm view that all parents had a responsibility to contribute to the financial and emotional support of their children."* The Act runs counter to the second of Mr Maharey's aims of the liable parent providing financial *and emotional* support. The legislation had nothing to do with emotional support, except perhaps to inhibit it, and there was no mention of emotional connection in an announcement, in *Maharey Notes* of 5 November, when the Bill had been passed.[7]

Considering the stated objectives of the Child Support Act, there are many flaws with the existing child support formula. This is clearly apparent in relation to "equity". In a non-custodial parent situation, the formula: 1) takes no account of the income of the custodial parent; 2) places no requirements on the use of money transferred as "child support"; and 3) ignores the liable parent's direct costs of caring for the child. A liable parent could be caring for a child for nearly 40 percent of nights with no adjustment of child support liability in recognition of direct costs, or costs of "enjoyment of access", as they are called. The new changes do nothing to address these flaws.

Others have suggested that there may be a bias against fathers in relation to child support policy:

> *"It would help if the application of the child support formula could take better account of the remarriage family situation, including the costs of access visits of non-custodial children, which can be considerable. Talking to some policy analysts about this, I have detected an implicitly punitive attitude towards non-custodial fathers, which is expressed in remarks such as "if a man leaves his wife he deserves what he gets" or "that man's problem is that he has too many wives".* Fleming and Atkinson (1999), p.159

[7] http://www.executive.govt.nz/minister/maharey/notes/nov01/051101.htm#2

2.3 Property Relationships Legislation[8]

A significant aspect of this legislation was the change to provisions for unequal splitting of relationship property. The initial intent was to use SOP 25 to supersede the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill Property (Relationships) Amendment Bill without the opportunity for further submissions. To quote from a speech to the House by Hon Margaret Wilson on 13 November 2000:

> *"I move that the House take note of the report of the Justice and Electoral Committee on the Matrimonial Property Amendment Bill incorporating Supplementary Order Paper No. 25.*
>
> *During 1998 the Government and Administration Select Committee heard submissions on both bills. Approximately 60% of submissions on the Matrimonial Property Amendment Bill expressed concern that it did not address the issue of economic disadvantage that can be suffered by the non-career partner on marriage breakdown."* [9]

This statement and approach gives numerous grounds for concern. Are submissions simply to be counted as if they are votes? If so, is it appropriate to do this when, as with the above, the matter in question was not even raised as a point for debate? Are all submissions to be given the same weight, irrespective of the bodies making the submission, whether they are groups or individuals? If submissions are to be used in this way, would it not be appropriate to have informed debate before the submissions are requested?

In this context, a comment by Tapp, Geddes and Taylor suggests a longstanding problem:

> *The present policies in this area in New Zealand are not the end result of logical, coherent evolution, but rather reflect an ad hoc compromise in the face of pressures applied from vested interests.* Tapp, et al (1992), p.197.

After numerous objections, submissions were allowed, although the general direction of the legislation was not changed.

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[8] My written submission to the select committee can be found at: http://econ.massey.ac.nz/cppe/issues/sop25sub.htm

[9] http://www.executive.govt.nz/speech.cfm?speechralph=33033&SR=1, 13/11/00, Hon Margaret Wilson, Property (Relationships) Bill, [Report-back speech]

Implicit in the case presented for extension of legislation to, de facto couples was the assumption that the Matrimonial Property Act was essentially fair, and the additional changes made it more so.

The piecemeal approach to policymaking is apparent when this legislation is set next to the legislation on child support. Under certain circumstances, the Property Relationships Act now allows for unequal splitting of relationship property in recognition of one partner's higher potential future income. In other words, a lump sum payment can be required on settlement, reflecting a person's future income. The payer will recoup this money through future earnings. The child support formula does not make any allowance for such forced settlements, but treats all future income in the same way. The result is "double dipping", with the same income being levied first for a lump sum payment, and second for child support. The problem is clear if you consider the effect of replacing the lump sum payment with annual payments based on income. Out of that income, deductions would be made for both property settlement and child support purposes.

2.4 Review of Guardianship, Custody and Access[10]

A discussion paper entitled *Responsibilities for Children, Especially when parents part* was issued as a basis for submission. It raised some useful questions, but it also included incorrect information which is likely to have had an influence on submissions.

Appendix 1 of the discussion paper is claimed to give overseas examples of laws "which may provide some good ideas and some warnings for New Zealand" (p.18). The information is patchy, to say the least. Rather than describe laws, it makes claims such as, "Research on the US's approach to joint custody shows that it can work, but only if both parents agree on it" (p.19). No source was given for this claim, but on request I was advised by the Ministry of Justice that it was based on one paper, Hardcastle (1998).

It is a concern not only that the Ministry of Justice paper relied on only one paper for its claim about US research, but also that the selected paper does not even claim to be a balanced assessment of the research. It presents a judge's perspective, and this may arise from narrow and unrepresentative exposure.

[10] My written submission can be found at: http://econ.massey.ac.nz/cppe/issues/guardsub.htm

As with the debate on the Shared Parenting Bill, there is a denial of the shadow of the law. The foreword to the Ministry of Justice discussion paper includes the following claim:

> *"If parents can agree on the important decisions about how children should be cared for, and if parents stay together, or can reach agreement about the care of children if they do separate, then the laws and structures discussed in this paper are irrelevant."* (p.3)

The foreword was signed by Hon Margaret Wilson, Associate Minister of Justice, and Hon Steve Maharey, Minister of Social Services and Employment. They are both Government Ministers involved in formulating and recommending policy and will have been advised by the Ministry of Justice. They will be aware of laws on numerous diverse issues such as theft, speeding, drunk-driving, drugtaking, assault, and benefit fraud. These laws are intended to change behaviour. I doubt that they would suggest that these laws are irrelevant to all except those convicted of contravening those laws. New Zealand has seen changes to tax and benefit structures and major economic reforms on the basis that these changes will produce what is claimed to be more desirable behaviour. Actions will change to reflect a changed environment.

We have yet to see the results of the Review, but a summary of submissions was released in October 2001. The summary was described in a letter Hon Margaret Wilson dated 30 October 2001 to Dr Muriel Newman MP, "I consider that these documents constitute an accurate excerpt or summary of the information contained in all the submissions". Also, in a letter dated 6 November to those making submissions, it states, "…an analysis of all the submissions received has been completed and a summary report has been compiled".

As with submissions on the property relationships legislation, there are grounds for concern about the processing of these submissions. There are clear weaknesses in the approach taken in the summary publication:

- it merely lists points made with no attempts at further details, justification or context;
- there is no systematic spelling out of alternative points of view;
- there is no information to indicate which points are well reasoned and supported, or the credentials of the people making the points.

The summary simply takes selected points from what might have been well reasoned, coherent submissions. What of the context? What of the supporting information? What of wider discussion of issues?

3. IMPLICATIONS

We see changes being considered in isolation, and wider implications downplayed. In many cases this involves consideration of a marginal change using partial analysis and without reassessment of the underlying foundation.

The issues being presented for public consideration and the supporting information can have a significant impact on the resulting feedback. The nature of the analysis is also likely to colour the results.

There are grounds for questioning the function of a consultation process. Should there be an attempt to inform people, public debate and exchange of ideas, and then an analysis of submissions, or should submissions be gathered "from cold"?

There is a narrow focus of discussion and analysis, even in the case of the guardianship review where a broad approach was considered necessary. Understanding of the current situation and associated social implications are likely to be limited.[11]

[11] This issue is considered in some detail in relation to the definition of "family" in Birks (2001).

APPENDIX 5.1

DISTORTED AND INCONSISTENT PERSPECTIVES

This appendix outlines three areas, family, unpaid work, and family violence, where distorted or inconsistent perspectives are widely accepted.

1. THE DEFINITION OF "FAMILY"[12]

The term "family" has many meanings. These can depend on social, cultural and economic context, and they vary over time as societies change. Policies are determined and implemented based on an understanding derived also from the available information. Definitions of "family" for the purposes of data gathering and analysis can therefore be very important in shaping our understanding of the issues and the effectiveness of policies. The definition of family found in Statistics New Zealand (1995), (NZSCHF), is based on households and relationships between household members. It is the classification used in the census and elsewhere. This perspective has implications where relationships are not recognized, such as for same sex couples in the past, where families are not confined to one household, such as with Maori and other extended families, and where parents of dependent children live apart. To add to the confusion, terms are used in the classification that have very different meanings in common usage. The commonly understood meaning of extended family incorporates members of several households, but not so in the NZSCHF. A household focus results in terms such as "two parent family" and "one parent family", with only household members being considered to be family members. Children whose parents live apart and who spend time with both parents would be more accurately termed "two home children". Such an option is explicitly excluded from the NZSCHF. Even when the children spend equal amounts of time at each residence, they are assumed to live in one, and the other parent is not recognized as a parent. If a "sole parent" repartners, the new partner can also be recorded as a parent, and the children recorded as being in a "two parent family". This is the so-called "social" definition of family, where biological ties are disregarded, and the search is for a "person in a parenting role" who lives in the same (single) household as a child. It can be quite misleading to use households as the basic unit for analysis. People can be active members of more than one household, and there can be sharing of resources and income between households.

[12] For more details, see chapters 4, 5 and 7 of Birks (2001).

2. UNPAID WORK

Consider also the varying approaches that we observe on paid and unpaid work, an area central to relationship property issues. Costs and benefits of both should be considered. However we see:

(a) *costs of one, benefits of the other*

It is common, and evidenced in Hyman (1994), to refer to paid work in terms of its benefits (income earned), and unpaid work as a cost (time/effort incurred). Effort and sacrifices required to obtain consistent and high incomes get relatively little attention, so the background information that shapes our understanding of the issues is unbalanced.

(b) *benefits of both, then benefits of one only*

In the Matrimonial Property Act 1976, now Property Relationships Act 1976, there is a general assumption of equal contributions of partners, considering both paid and unpaid work, during the time they are together. Debate on post-separation circumstances focuses on income alone, without mention of unpaid work or the effort and costs of earning income. The criteria applied in relation to pre- and post-separation circumstances are inconsistent.

3. FAMILY VIOLENCE AND RELATIONSHIPS

There, I believe we can observe three distinct approaches which are simultaneously accepted:

One approach could be called “endogenous macro”. Behaviour is therefore not exogenous, but prescribed by wider social factors. The approach is based on the Duluth Wheel, a gender specific model taking a “patriarchal power and control” view of relationships. It underpins family violence legislation and policy in New Zealand, although subsequent gender-neutral versions suggest that the original is an oversimplification. Family violence is considered to involve an “abuser” or “batterer” and a “victim”. The former is responsible for “his” actions (for example, in her still quoted study, Snively (1994) assumed that all family violence is perpetrated by men). The violence is considered to occur because of male socialization and traditional beliefs of male power over women, hence the “macro” dimension. It is said to be inappropriate to assign any responsibility to the woman, as that would involve “blaming the victim”, and “there is no excuse” for the violence. Attempted solutions are in the form of removal of the abuser from the family, and re-education. Attempts by an abuser to explain the behaviour in terms of relationship dynamics are taken as denial of responsibility.

A second approach could be called “endogenous micro” - behaviour is shaped by past and current interactions between family members. An example is “battered women's syndrome”, whereby a woman's experiences affect her perceptions to the point where she may feel compelled to behave violently when such behaviour would normally be considered unacceptable. Perceptions and behaviour are said to be shaped by a person's immediate environment. The sufferer, although being violent, is herself a victim, and the resulting violence is therefore largely excusable - the violent person should not be considered responsible as it is really caused by the apparent victim of her violence.

A third approach is evident in the attention given to “parental alienation”. This more closely resembles the economist's “exogenous preferences” in that the phenomenon is largely ignored. According to the parental alienation literature, a child's opinion of and attitude towards a parent can be negatively influenced by others, generally by the other parent. It is suggested that, in extreme cases, a child could be unable to see any positive qualities in, and refuse to see, the alienated parent. Some analysts talk of parental alienation syndrome, but it was not included in the Law Commission's investigation of psychological syndrome evidence (although battered women's syndrome was considered). On the contrary, we see people advocating greater attention being given to children's stated opinions, as if those opinions or perceptions would not influenced by those around them. Paradoxically, it is simultaneously suggested that children are adversely affected by observing violence between their parents. In other words, in relation to alienation, children are not affected by their immediate environment, and in relation to violence, women and children are influenced, but men are not.

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