



Family Law Presentation
6PM – 8PM, Wednesday 2 May 2012
The Palace of Westminster

Panel

Professor Patrick Parkinson AM, University of Sydney

David Hodson, Partner at iFLG, Solicitor, Arbitrator, Mediator DDJ at PRFD (Chair)

Dr Samantha Callan, CSJ Chairman-in-Residence (Family, Early Years and Mental Health)

Also Speaking

Baroness Claire Tyler of Enfield, Chair of the CAFCASS Board

6pm	REGISTRATION
6.15pm	INTRODUCTION, 10 minutes <i>David Hodson (Chair)</i>
6.25pm	Professor Patrick Parkinson, 40 minutes <i>"Reforming the Children Act 1989: Learning from recent Australian experience"</i>
7.05pm	Q&A, 15 minutes <i>David Hodson (Chair)</i>
7.20/7:25pm	Baroness Claire Tyler of Enfield, 20 minutes <i>A perspective on lessons and relevance to family court practice in England</i>
7.35pm	CONCLUDING REMARKS, 5-10 minutes <i>Samantha Callan, CSJ Chairman-in-Residence</i>

Professor Patrick Parkinson AM

Patrick Parkinson is a specialist in family law, child protection and the law of equity and trusts. His books include *Family Law and the Indissolubility of Parenthood* (2011), *Tradition and Change in Australian Law* (4th ed, 2010), *Australian Family Law in Context* (4th ed, 2009), *The Voice of a Child in Family Law Disputes* (with Judy Cashmore, 2008), *Child Sexual Abuse and the Churches* (2nd ed, 2003) and *Principles of Equity* (editor, 2nd ed., 2003).

Prof. Parkinson served from 2004-2007 as Chairperson of the Family Law Council, an advisory body to the federal Attorney- General, and also chaired a review of the Child Support Scheme in 2004-05 which led to the enactment of major changes to the Child Support Scheme. He is President of the International Society of Family Law.

Prof. Parkinson is also well-known for his community work concerning child protection. He has been a member of the NSW Child Protection Council, and was Chairperson of a major review of the state law concerning child protection which led to the enactment of the Children and Young Persons (Care and Protection) Act 1998. He also works with churches on child protection issues.

MEANINGFUL REFORM TO THE CHILDREN ACT 1989:

LEARNING FROM THE AUSTRALIAN EXPERIENCE

Prof. Patrick Parkinson¹

Abstract

In the British debates concerning possible amendment to the Children Act, considerable prominence has been given to the experience in Australia, which reformed its laws in 2006. The Norgrove Report on the family justice system considered certain options for amending the law, but in the end recommended against this, relying very heavily on what it understood to be the problems in Australia. However, almost none of the arguments made by the Norgrove Committee can be supported by the available evidence.

The purpose of this article is fourfold: first, to review briefly the background to the Australian reforms and what the Australian government – with bipartisan political support – tried to achieve; second, to examine what the Norgrove Committee understood the Australian experience to be; thirdly, to correct the record in terms of what the research actually shows about post-separation parenting arrangements in Australia after 2006; and finally to consider what might be beneficial amendments to the Children Act 1989 in the light of the Australian experience.

It will be argued that the Norgrove Committee was right to avoid any legislative presumption that children should spend equal or near equal time with both parents. However, there is an advantage to the inclusion in legislation of principles that can help guide the settlement of cases. One of the main lessons from Australia is that there is benefit in moving away from a court-centric approach to family justice in favour of a community-centric approach to family relationships. Legislation needs to be drafted with that emphasis in mind.

1. Amending the Children Act: The controversy about change

After much discussion over many years, it appears that reform of the Children Act 1989 concerning parenting arrangements following family breakdown is on the political agenda again in Britain. Two reviews, the Family Law Review conducted under the auspices of the Centre for Social Justice,² and the Norgrove review of the family justice system,³ have both considered certain options for amending the law. The Coalition Government's response to the Norgrove review,⁴ rejecting one of its recommendations, indicates that the Government intends to include a legislative statement in the Children Act to the effect that it is important for children to have an ongoing relationship with both of their parents after family separation, as long as that is safe, and in the child's best interests.

It is likely, on the basis of the debates generated by the Norgrove review, that any such amendment will be hotly contested. There is strong opposition to such a change, and the Norgrove Committee committee was persuaded by certain arguments against modest proposals for legislative reform that it had made.

In the British debates, considerable prominence has been given to the lessons from Australia, which reformed its laws in 2006. In making the case against legislative amendment in its final report, the Norgrove Committee relied very heavily on what it understood to be the Australian experience. However, analysis of the evidence that the Norgrove Committee used in support of its arguments reveals a very surprising conclusion. Almost none of the claims made by the Norgrove Committee, or which were made to it and relied upon by the Committee, can be sustained. Yet these claims were central to its arguments against the kind of legislative amendment it had earlier proposed.

The purpose of this article is fourfold: first, to review briefly the background to the Australian reforms and

¹ Professor of Law, University of Sydney; President, International Society of Family Law; Counsel, International Family Law Group LLP, London.

² Centre for Social Justice (David Hedden, Chair), *Family Matters: An in-depth review of family law in Britain* (2009).

what the Australian government – with bipartisan political support – tried to achieve; second, to examine what the Norgrove Committee understood (or rather misunderstood) the Australian experience to be; thirdly, to correct the record in terms of what the research actually shows about post-separation parenting arrangements in Australia after 2006; and finally to consider what might be beneficial amendments to the Children Act 1989 in the light of the Australian experience.

It will be argued that the Norgrove Committee was right to avoid any legislative presumption that children should spend equal or near equal time with both parents. However, there is a benefit to the inclusion in legislation of principles that can help guide the settlement of cases. It is time to move on from the idea that family law legislation can be drafted for judges, in the hope and expectation that the vast majority of parents who resolve their disputes without judicial determination will gain guidance from reading the judicial tealeaves.

2. The background to the 2006 amendments in Australia

The Australian Parliament amended the *Family Law Act 1975* by means of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The legislation was to a large extent the consequence of recommendations made by a Parliamentary Committee, consisting of both government and opposition members, in a unanimous report.⁵ The Family and Community Affairs Committee of the House of Representatives had been asked by the then Prime Minister, John Howard, to examine, inter alia, whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted.

Committee members favoured significant reform of the law in order to get away from what they saw as the standard pattern of contact for non-resident parents of every other weekend and half the school holidays. This, they dubbed the 80-20 rule, on the basis that it gave non-resident parents approximately 20% of the time with their children. In the end, the Committee concluded against a presumption of equal time.⁶ However, it considered that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time”.⁷

In the period between the time that the Committee reported at the end of 2003, and the enactment of the legislation in 2006, the Government’s position evolved as it sought to satisfy the different interest groups. Nonetheless, in broad terms, the legislation as enacted in 2006 reflects the intentions and recommendations of the Parliamentary Committee. The legislation passed through Parliament with the support of the opposition Labor Party, which, within 18 months, was to form government.

3. The changes made by the 2006 amendments

One of the objectives of the 2006 amendments is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child”.⁸ This is importantly balanced by the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent.⁹

The way that the legislation is structured, there is certainly a strong emphasis on maintaining the involvement of both parents where it is safe to do so, reflecting these objectives. This does not translate at all into a presumption of shared parenting, and still less, equal time. The most that the legislation imposes by way of presumed outcome is a rebuttable presumption in favour of “equal shared parental responsibility” (a linguistic formulation in the legislation to emphasise the equality of the parents). This can be rebutted in cases where there is reason to believe there is a history of violence or abuse, or there is a risk thereof.

⁵ The Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003) (hereafter, *Every Picture*).

⁶ *Ibid.*, at 35.

⁷ *Ibid.* at 30.

⁸ The objects of the Part of the Act concerning children are contained in s.60B of the Family Law Act 1975.

⁹ Best interests of the child: s.60CC(2).

Under the Family Law Act 1975, the best interests of the child is of course the paramount consideration in determining parenting arrangements for children when the parents live apart. However, in making that determination about what is best for the child, the 2006 amendments introduced two primary considerations. The first is the "benefit to the child of having a meaningful relationship with both of the child's parents." The second is "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence." There are then a large number of other factors that are described as "additional" considerations.

One practical expression of the requirement to consider the benefit to the child of a meaningful relationship with both parents is that when deciding cases in which it is appropriate to make an order for equal shared parental responsibility, judges must consider making an order for equal time or "substantial and significant" time if this is in the best interests of the child and reasonably practicable.¹⁰ "Substantial and significant" time means periods not only at weekends and school holidays but also during the school week, giving the parent an opportunity to be involved in the child's daily routine and occasions and events that are of particular significance to the child or the parent.

Thus while an order for equal shared parental responsibility says nothing, *per se*, about how time is allocated between parents, what follows from it is a duty imposed on judges to consider whether some kind of shared care arrangement might be appropriate in the circumstances of the case. This, together with misunderstandings of the new law in the media, may well have contributed to an impression among some members of the Australian public that because judges must consider equal time, there is accordingly a default presumption of equal time, or at least that fathers have a very high prospect of success in the courts if that is what they seek. That is not an impression which is justified by the legislation, but it has undoubtedly led to some shared care arrangements that are less than satisfactory for children. The Norgrove Committee was right to want to avoid either creating a presumption of equal time or giving the public the impression that this is the law.

Although the Family Law Amendment (Shared Parental Responsibility) Act 2006 was not a triumph of legislative drafting, its general intent was clear enough. It was summarised by the Full Court of the Family Court of Australia as follows:

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.¹¹

There was another aspect of the 2006 legislation that deserves mention, for it was a unique element of those amendments. Lawyers, mediators and counsellors were required to advise their clients that they should consider the options of equal time, and substantial and significant time.¹² This was a means of reaching the population that uses lawyers and mediators to help resolve disputes and to this extent "bargains in the shadow of the law".¹³ Former family Court judge, Richard Chisholm has posited that the population of parents who separate can be divided into three groups when it comes to thinking about how legislation concerning post-separation parenting should be written.¹⁴ There are those who litigate, those who sort out their parenting issues without reference to the law at all, and a group in the middle, who at some level or another, engage with the family law system in resolving their disputes, at least through lawyers and mediators.

The typical way in which legislation is drafted in common law countries is that the legislature instructs judges on how they should determine the issues for that very small group of parents who are unable to settle their disputes by agreement or compromise. These cases are utterly atypical. In Australia, only about 6% of all

¹⁰ Section 65DAA(5).

¹¹ Goode & Goode (2006) FLC 93-296 at [17].

¹² Family Law Act 1975 (Cth) s 65DA.

¹³ Robert Mnookin and Lewis Kornhauser, "Bargaining in the shadow of the law: the case of divorce", (1979) 88 Yale Law Journal 950.

parenting cases that are commenced in the courts end up in a judgment following a trial.¹⁵

The Parliamentary Committee in 2003 saw legislation as a means of reaching the third group – those who at some level may be influenced by the law in resolving their disputes. It sought to do so in a more direct way than simply relying on normative messages to flow down from the judges in those cases that go to trial. The Committee wrote:¹⁶

Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it.

Its recommendation¹⁷ was translated into the legislative requirement that professionals working in the area of family law should discuss the option of substantially shared parenting time with clients. Parliament thus sought to reach the majority of families through their professional advisers and through mediators with the intention that the content of discussions in mediation would be informed by the types of parenting arrangement being promoted in the statute.

4. Norgrove and the Australian experience of 'shared parenting'

The Norgrove Committee was not really established for the purpose of considering the substantive law on parenting after separation. Rather, its demanding brief was to consider how to reform the family justice system in England and Wales against a background both of heavy demand for court intervention and fiscal stringency. It was asked to make recommendations in two core areas: the promotion of informed settlement and agreement; and management of the family justice system. Nonetheless, one of the matters it was asked to consider was how to promote further contact rights for non-resident parents and grandparents.¹⁸ In that context it paid significant attention to the Australian developments. Members of the Norgrove Committee made a visit to parts of Australia in the course of their inquiries.¹⁹

In its Interim Report, the Norgrove Committee included just over two pages on the law of parenting after separation.²⁰ Drawing upon their visits to Sweden and Australia, but without referring to any specific problems or research evidence, the Committee warned against the dangers of legislation being introduced that "creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents".²¹ However, the Committee put forward a proposal that "a statement should be inserted into legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm."²²

Even this very modest proposal was withdrawn in its final report.²³ The treatment of this issue in the final report was relatively brief.²⁴ One of the main concerns was that the reference to the child having a meaningful relationship with both parents might be misinterpreted as a presumption of shared time.

What evidence then, did the Committee adduce to support its concern that the law would be understood to mean something very different from what it would say? The Committee indicated that "often" people writing in support of the proposal "conflated our more limited proposal with a move toward a presumption of shared parenting".²⁵ However, this is something rather different from saying it amounted to a presumption of shared parenting. Respondents may have simply meant it was a step in the right direction – a 'move toward' what they saw as a desirable outcome. No examples were given of submissions in which the respondents actually

¹⁵ Data provided by the Family Court, *Every Picture*, at p.7.

¹⁶ *Every Picture*, at 2.26.

¹⁷ *Every Picture*, Recommendation 5.

¹⁸ Norgrove Report, *Terms of Reference*, at 182.

¹⁹ *Interim Report* p. 155-160.

²⁰ *Interim Report* from the bottom of p.157 to the top of p.160.

²¹ *Interim Report*, pp.155-160.

²² *Ibid.*

²³ Norgrove Report at 141.

thought that a 'meaningful relationship' provision would amount to a de facto presumption of shared time.

The Committee also reported that:²⁶

Many respondents felt that the insertion of a 'meaningful relationship' statement would potentially allow for the creation of a de facto shared time presumption and rejected the proposal as a result.

However, the two quotes that the Committee used to illustrate these concerns did not actually express this point of view. A Circuit Judge was quoted in support of this contention, but he or she said nothing of the sort.²⁷ The other quotation used to support this assertion was from the advocacy group, Gingerbread, which argued only that a reference to a meaningful relationship in the legislation might be the 'thin end of the wedge' towards a legal presumption of shared care or the expectation of shared care as an expression of parental rights.²⁸ No other examples were given of submissions that reflected the views that were said to be represented.

It may well be that the Gingerbread view is similar to the views of those who supported the proposal. That is, some respondents thought a reference to a meaningful relationship would be a 'step in the right direction' towards further legislative reform or judicial interpretation to establish a presumption of shared care, while Gingerbread feared that this might be so. Thin end of the wedge arguments need to be evaluated on their merits. If that is a concern, then it could be dealt with by inserting a sentence in the legislation to the effect that the law provides no presumption either in favour of or against a shared parenting arrangement, as is done in other jurisdictions,²⁹ or making this clear in the Minister's Second Reading Speech and briefings to the media. No doubt the appellate courts in Britain can also be trusted to interpret the legislation correctly. Indeed, the Circuit Judge who was quoted actually thought that the Interim Report proposal would merely put into statutory form the approach already taken by the court. Recent dicta in a decision of the Court of Appeal is to this effect.³⁰

The other evidence that the Norgrove Committee used in its report to justify backtracking from its earlier proposal, was "further evidence" from Australia. The Committee wrote:³¹

We have also been particularly struck by further evidence, received from Australia, where a similar provision for a 'meaningful relationship' was made in their 2006 family law reforms. Evidence has shown increased litigation and that the change has contributed to damage to children because the term 'meaningful' has come to be measured in terms of the quantity of time spent with each parent, rather than the quality of the relationship for the child.

The problem with this statement is that it simply cannot be supported by any available evidence. Indeed, as far as litigation rates are concerned, the evidence is completely to the contrary. There has actually been a sharp fall in litigation over children since 2006, after a long period in which the number of applications had been rising,³² as have contact orders in Britain.³³ A comprehensive evaluation of the 2006 reforms by the Australian Institute of Family Studies ('the AIFS evaluation') found that the overall number of applications for final orders in children's matters (including cases where there were also property issues being litigated) declined by 22%

²⁶ Norgrove Report at 142, para 4.34.

²⁷ The judge was simply concerned about an increased level of litigation resulting from over-claiming that the mother was denying them a meaningful relationship with their child. The quotation was: "Although it could be said that such a provision would do no harm and would merely put into statutory form the approach already taken by the court, there is a real risk that such a statutory provision could give rise to an increase in litigation and in particular an increase in the number of high-conflict cases where one parent (more often likely to be the father) stoutly asserts that the other parent is not permitting him to enjoy a meaningful relationship with his child. In short, the motive for such a change is laudable but the consequences may not be." Ibid at 140.

²⁸ Ibid at 140, para 4.34.

²⁹ In Florida, for example, the law provides that: "There is no presumption for or against ... any specific time-sharing schedule when creating or modifying the parenting plan of the child." Fla. Stat. Title VI, § 61.18(2)(b)(3). See also California Family Code § 3042(b).

³⁰ *McFarlane LJ*, who was a member of the Norgrove Committee, said in *Re H (A Child)* [2012] 1 WLR 1811 (CA) at para 18: "It is of course a given, and a starting point for these courts, that children will normally benefit from having a full and meaningful relationship with both of their parents as they grow up."

³¹ Norgrove Report at 140.

³² In 1994-95, there were 14,144 applications for access orders in the Family Court of Australia. In 1999-2000, there were 27,207 applications for contact. Family Court of Australia *Statistics 1999/2000* Table 4.1E.

³³ In Britain, contact orders increased more than fourfold between 1992 and 2008. In 1992, there were 17,439 contact orders. In 2008, there were 76,759. See Ministry of Justice, *Judicial and Court Statistics 2008*, ch 5; Lord Chancellor's Department, *Judicial Statistics 1988-2000*. For discussion of the explanations for this rise in litigation, see Gaym Devin, 'Save in a Cold Climate - Disputes About Children in the Aftermath of Parental Separation', in Stephen Cretney, (ed.), *Family Law: Essays for the New Millennium* 127, 128-29 (2000).

from 18,752 in 2005–06 to 14,549 in 2008–09.³⁴ Rates of litigation have fallen further since that time. In 2010–2011, the total number of applications for final orders in children's matters (including cases where there were also property issues), was 12,815.³⁵ There has therefore been a reduction of nearly a third in court workload in terms of filings in children's cases in the last five years.³⁶

It is possible that when the Norgrove Committee referred to 'increased litigation' as a consequence of the 2006 reforms, it meant only that there had been an increase in litigation that would otherwise not have taken place had the law been different. However, there is absolutely no evidence to support that contention either.

There is also, with respect, no reasonable basis for the Committee's assertion that in Australia "the change has contributed to damage to children because the term 'meaningful' has come to be measured in terms of the quantity of time".³⁷ In support of this proposition, the Committee relied on a quotation from an Australian respondent who wrote:³⁸

In practice, Australian trial judges have tended to measure the notion of a meaningful relationship in temporal terms, creating a *de facto* assumption or at least a yardstick of shared care.

There are two difficulties with this proposition. The first is that the evidence does not demonstrate that there is either a *de facto* assumption or a yardstick of shared care among trial judges. The statistics from the AIFS evaluation on judicially determined cases after 2006 show that 12.6% of all orders in children's cases gave each parent at least 35% of nights per year,³⁹ which is the definition of shared care used in Australia.⁴⁰ In the majority of these cases, so the researchers reported,⁴¹ the level of contact was not defined. It was either specified to be as agreed between the parents or not dealt with at all (no doubt because the case involved other issues). In the minority of cases where the contact hours were specified, just over a third (33.9%) of all judicially determined cases involved shared care (within the 35%+ nights definition).⁴² Many of these are likely to have been orders that the children spend every other weekend, half the school holidays and one mid-week night with the non-resident parent, since this is becoming an increasingly common pattern.

Even taking the one-third figure, which may represent cases where both parents were seeking residence orders in their favour, or one parent was seeking equal time, there does not seem to be a *de facto* assumption or yardstick of shared care used by trial judges, since two-thirds of these contested cases did not result in shared care. Certainly, the one-third figure for some kind of shared care appears to be a high one in contested cases, but, keeping these statistics in perspective, these shared care decisions represented only 32 cases out of a total of 253.⁴³ Nearly 90% of children's cases analysed did not result in an award of shared care.

The second difficulty is in ascribing the current level of shared care arrangements resulting from judicially determined cases to the requirement that judges must consider the benefit to the child of having a meaningful relationship with both parents. It is reasonable to suppose that the current level of shared care arrangements arising from judicially determined cases is because of the requirement to consider equal time or "substantial and significant time" (both involving temporal measures) rather than because the court has to consider the benefit to the child of a "meaningful" relationship with both parents. Whatever trends may be discerned as a consequence of changes to the law would have to be the consequence of changes to this part of the legislation as a whole, not the introduction of an isolated provision.

Furthermore, to assert, as the Norgrove Committee did, that the provision in the Family Law Act 1975 that refers to "the benefit to the child of a meaningful relationship with both parents" has "contributed to damage

³⁴ See Kasprow, Matthew Gray, Ruth Weston, Laurie Moloney, Kelly Ward, Lili Qi et al, *Evaluation of the 2006 Family Law Reforms 2004-05 (2009)* (hereafter, Kasprow et al).

³⁵ Figures calculated from Federal Magistrates Court of Australia Annual Report 2010–2011, pp.28–29; Family Court of Australia, *Annual Report 2010–2011* p.48.

³⁶ There is no evidence that this is due to changes in the legislation of course. The main explanation is the introduction of mandatory mediation before filing unless a ground for exemption exists (Family Law Act 1975, s.80), and free mediation in the Family Relationship Centres, which opened in stages between 2006 and 2008.

³⁷ Norgrove report at 583.

³⁸ *Ibid.* The quotation is attributed to Assoc. Prof. Helen Rhodes, of the University of Melbourne, however, the submission is published in full in an annexure to the Report, and this quotation appears nowhere in that submission.

³⁹ Kasprow et al, at 275, 133.

⁴⁰ This is the definition used in the child support legislation: *Child Support (Assessment) Act 1989* (Cth).

⁴¹ Kasprow et al, p.125.

to children", is with great respect, wholly unsupported by any cogent evidence. The Committee supported this assertion by stating that the Australian legislation.⁴⁶

has also led the courts to weigh up the balance between a meaningful relationship and harm to the child, with protection from harm compromised in some cases.

It is not clear what evidence the Committee had to support this statement, as no citation to evidence or quotation from any submission was given.⁴⁷ The Committee might have had in mind one case example given in a submission that was published in full as an annexure to its report.⁴⁸ This submission referred to the trial judge's decision in *Partington and Code*⁴⁹ as an illustration of a case in which involvement with children was emphasised at the expense of protection for family members. However, this case does not support the assertion at all that protection from harm was compromised by a focus on a meaningful relationship with the father. There was clear evidence in this case that led the judge to conclude there was an unacceptable risk of sexual abuse by the father, although he was unable to make an affirmative finding that sexual abuse had occurred. He made orders only for supervised contact (at a contact centre) and gave sole parental responsibility to the mother. The protection of the children was the paramount concern. Nonetheless, he required the mother to live in Tasmania nearby the father, in order to promote the children's relationship with the father, when her case was to live in New South Wales.

It was argued in the submission that the meaningful relationship factor played a 'pivotal role' in the decision.⁵⁰ However, examination of the judgment indicates that it was the evidence that played the pivotal role, not the law. The evidence from the expert witnesses was that the children's relationships with their father were "highly significant to them and to their proper development" and that they needed their father in their lives.⁵¹ The trial judge said that "despite lengthy separations from their father the children are emphatically of the view that they want to see him, want to spend time with him and want to do so regularly."⁵² The trial judge's decision on the relocation issue, then, was not based upon a view of the law that he needed to promote a meaningful relationship between the children and their father despite the risk of sexual abuse, but rather, on the strong evidence that the children had a very close relationship with the father than needed to be maintained by regular supervised contact for the children's sake. Cases in which children are closely bonded to a parent who may present a risk to their safety or wellbeing are particularly difficult to resolve,⁵³ and reasonable minds may differ on the best options.

Yet the mother was by this time married to another man with whom she had a baby. They wanted to remain living in New South Wales. Rightly, the refusal to allow the mother's relocation was overturned on appeal.⁵⁴ This is not a decision in which interpretation of the law led to a compromise of either the children's or the mother's safety. It did compromise her freedom of movement and right to live in the place of her choosing with a new partner, and that was an important issue, but a different one.

The Committee went on to indicate yet further problems in Australian family law. Judges, it said, "have made repeated attempts to reach a definitive position on the meaning of a 'meaningful relationship'", and citing a respondent for the view that there was ongoing confusion about this.⁵⁵

There is of course, room for individual opinion about whether there is ongoing confusion about something or not. The experience of being "confused" is a subjective, rather than an objective one. To this writer, the process of interpreting the term "meaningful relationship" seems to have been entirely unexceptional. A new

⁴⁶ Norgrove Report at 140-41.

⁴⁷ The Committee did follow this assertion by stating that the "Australian government has recently felt compelled to amend this provision to affirm that protection from harm must take priority". This new amendment will be discussed further below (section 3). The amendment certainly reflects a political perception that the courts are not giving enough weight to protection from harm, but that perception may itself not be based upon any reliable evidence. The amendment might, on one view, simply be seen as a response to lobby groups that asserted there is a problem.

⁴⁸ Annexure G.

⁴⁹ *Partington and Code* [2008] FamCA 945.

⁵⁰ Above n. 48.

⁵¹ *Partington and Code* [2008] FamCA 945 at para 168.

⁵² *Ibid* at para 173.

⁵³ On these issues, see Elizabeth Jones and Patrick Parkinson, "Child Sexual Abuse, Access and the Wishes of Children" (1995) 9 *International Journal of Law and the Family* 54.

⁵⁴ *Partington and Code* [No 2] [2009] FamCAFC 230.

⁵⁵ Norgrove Committee at 141.

word and concept is introduced into the Act; a few judges at trial level offer observations on its meaning in different contexts by reference to dictionary definitions and other aids to interpretation; each trial judge courteously cites the observations of those who have previously commented on the phrase, and there is little, if any, apparent disagreement.⁵⁴ In due course, the appeal court collates these different observations and summarises the interpretation given to the term.

In a helpful judgment in 2009,⁵⁵ the Full Court of the Family Court of Australia, having reviewed the case law, identified three possible interpretations that might be given to the term 'meaningful relationship', and then indicated its preferred interpretation, one which was not at all inconsistent with the previous observations of the trial judges. In a later case, it also offered a further helpful summation of the law.⁵⁶ It is difficult to see any confusion at all here. It might be appropriate to refer to 'ongoing confusion' in circumstances where trial judges have widely differing interpretations and there are inconsistent decisions of an appeal court. Nothing like that has occurred in relation to the interpretation of this phrase.

Another erroneous claim of the Norgrove Committee was that, as an outcome of the 2006 amendments, judges are now making shared care orders in many cases where there has been a history of violence or where a parent has concerns about his or her safety or the safety of the children in the other parent's care. Its Report indicates that it thought that in approximately a quarter of judicially determined cases involving orders for shared care, "these arrangements involved children with a family history entailing violence and a parent concerned about the child's safety."⁵⁷

This claim is, quite simply, without any foundation. The AIFS evaluation certainly reported that families in which a parent had safety concerns were no less likely than other parents to indicate that they had shared care-time arrangements.⁵⁸ However, these statistics do not relate to judicial decisions or court orders. They come from a general population survey of 10,000 people who had separated after 2006, not from the very small group of cases which were determined by a judge, as the Norgrove Committee seem to have thought. The data on the judicially determined cases came from a study of court files. There is no indication from this study of the files whether in any of those judicially determined cases, either parent had concerns about their own safety or the safety of the children, and if so, in what proportion of cases this was the situation.⁵⁹

What then, is the evidence from the AIFS study about the etiology of shared care arrangements where there are safety concerns? Around one in four fathers and one in ten mothers with shared care-time arrangements indicated that they held safety concerns for themselves or the children as a result of ongoing contact with the other parent.⁶⁰ Not all these concerns related to family violence or child abuse perpetrated by the other parent. The safety concerns could also be about harm inflicted or that might be inflicted by someone other than the other parent, such as a new partner or a relative, or because the parent engages in activities with the children that the other parent does not consider to be safe for them.⁶¹ Nonetheless, 44% of fathers with safety concerns, and 42% of mothers with such concerns indicated that they had been physically hurt by their partner.⁶² Most of the remainder reported some emotional abuse.⁶³

How did these shared care arrangements come into being? Of all the mothers and fathers who had safety concerns, between 41% and 42% had resolved the parenting arrangements mainly by discussion with the other parent.⁶⁴ Others had used counselling, mediation or family dispute resolution services. Lawyers were seen as the main means of sorting out arrangements by 15–18% of fathers and mothers. Courts were the main

⁵⁴ For a relatively early analysis and commentary on the interpretation of 'meaningful relationship', see R Chisholm, 'The Meaning of "Meaningful": Exploring a Key Term in the Family Law Act Amendments of 2006' (2008) 22 *Australian Journal of Family Law* 175.

⁵⁵ McCall & Clark (2009) FLC 95-405.

⁵⁶ Sgley & Ever (2011) FamCAFC 22.

⁵⁷ Norgrove Report, p.140 at 15.11. It cited the AIFS evaluation for this rather alarming statistic, but without giving a page reference.

⁵⁸ Kasprow et al., at 233.

⁵⁹ This court data is presented in chapter 6.

⁶⁰ Kasprow et al., at 233.

⁶¹ *Ibid* at 266.

⁶² *Ibid* at 32.

⁶³ *Ibid*.

pathway to resolution of the dispute for only 15% of fathers and 8% of mothers.⁶⁵ The AIFS evaluation found that overall, amongst people who had separated since 2006, 16% had a shared care arrangement of 35% of nights or more, 7% had an equal time arrangement.⁶⁶ If, as the AIFS found, those with safety concerns had shared care arrangements at about the same rate as those who did not have safety concerns⁶⁷ then it would seem that 2.4% of fathers who had safety concerns for themselves or about their children in the mother's care, ended up with a shared care arrangement that resulted from court. The percentage with an equal time arrangement was 1%. Only 1.3% of mothers who had safety concerns ended up with shared care arrangements resulting from court, and the percentage with an equal time arrangement was 0.56%.

In other words, the numbers of fathers and mothers with safety concerns who had shared care arrangements resulting from court involvement seems to have been vanishingly small. Certainly, a few such arrangements did result from court. While even this small percentage is a reason for concern, we know too little about the circumstances of these cases to pass judgment on whether a shared care arrangement was clearly inappropriate. If such arrangements were the result of court orders made after proper consideration, either on an interim or final basis, then at least there is some assurance that the circumstances were considered and the safety concerns evaluated. Interim hearings in Australia are nonetheless typically brief and conducted without the benefit of cross-examination.

No doubt, cases can be found where judges have made final orders for shared care even though one parent was worried about the children's safety while in the other's care. An evaluation of whether the judge was wrong to have determined that was in the best interests of the child in any given case would require a careful examination of the evidence and the reasons for decision. The judge might have considered that the safety concerns (for example, a mother's concern about the children's safety when the father is driving)⁶⁸ were not sufficient to counter the evidence in favour of shared care.

The possibility also needs to be considered that if a judge does make orders for shared care against a background of safety concerns, this is done as a way of protecting children. In the general population survey, fathers in equal time arrangements were more concerned about the safety of their children in the mother's care than the other way around.⁶⁹ It may well be that shared care could be seen as an option where there are serious issues about the mother's parenting capacity and about the safety of the children in her care, but where removal entirely from the mother would not be the best option. An order for shared care may be a way of moderating the risk to the children and providing them with some stability, while still giving the mother a prominent role in her children's lives. It may, therefore be wrong to jump to the conclusion that shared care is a risk to children where there are safety concerns. It might be the best option in a bad situation.

5. The government response to Norgrove

The English and Welsh governments have not accepted this aspect of the Norgrove Report. The governmental response stated:⁷⁰

The principle of continued shared parenting after separation underpins the approach which we have taken on private law. Both Governments believe that children benefit from both parents being as fully involved as possible in their child's upbringing, unless there are safety or welfare concerns....The Government believes that there should be a legislative statement of the importance of children having an ongoing relationship with both their parents after family separation, where that is safe, and in the child's best interests. We have established a working group of Ministers to develop proposals for legislative change, which will be brought forward for wide debate and consultation later this year.

The Government is mindful of the lessons which must be learnt from the Australian experience of legislating in this area, which were highlighted by the Review and led them to urge caution. We will

⁶⁵ *Ibid.*

⁶⁶ Eassey et al., at 119.

⁶⁷ Eassey et al., at 233.

⁶⁸ On the range of concerns for children's safety in high-conflict families, see Judy Cashmore & Patrick Parkinson, "Warnings for Disputes in High-Conflict Families", (2017) 17 *Journal of Family Studies* 195.

therefore consider very carefully how legislation can be framed to avoid the pitfalls of the Australian experience, in particular that a meaningful relationship is not about equal division of time, but the quality of parenting received by the child.

It seems, then, that the Australian experience, as it is perceived to be through the filter of commentators, continues to be influential in the thinking of the Government. It is therefore particularly important that consideration of the Australian experience proceeds upon an accurate understanding of that experience, supported by robust research evidence.

6. Correcting the record: outcomes from the 2006 amendments

Answering the question of the impact of the 2006 amendments on patterns of parenting after separation in Australia is far from straightforward, for one cannot know, in most cases, what motivated parents to agree between themselves on the arrangements that they did. They may indeed have had quite different motivations for settling. Confident assertions about what the outcomes of legislative reform have been ought therefore to be treated with great caution.

The law may influence outcomes at a number of different levels. It may influence how judges decide, how people settle on the basis of what they think or fear judges might decide, or more widely, by stimulating an erroneous "folk law" of what people believe the law to be, which at some level affects people's decisions about parenting arrangements.

Judicial decision-making and shared care after 2006

In terms of judicial decision-making, the clearest influence of legislative reform in a negative sense would be if judges, on a regular basis, indicated that prior to 2006, they would have done x, while after 2006, they have decided y, compelled to that result even though they do not think it is in the best interests of the child. That hasn't happened, and it is unlikely it would be the case, for Australian judges continue to have a very broad discretion, and remain guided by the lodestar of what is in the best interests of the child as the paramount consideration.

Another, more positive, impact of the legislation is if judges, influenced by the legislative considerations, and required to give reasons for their decisions that address those considerations, reach a different conclusion to the one they might have been inclined towards prior to 2006.

There is, of course, a range of options in modern parenting disputes that could reasonably be said to be in the best interests of a child. No longer are judges asked to make a stark and binary choice between "custody" for the mother and "custody" for the father, with the wooden spoon of "reasonable access" being given to the losing parent. Now there is a spectrum of choice, with options at either end of that spectrum reflecting the old sole custody norms.

There is certainly evidence, from statements of the judges themselves, that the legislation has had an effect on outcomes by changing the process of their decision-making.⁷¹ There is also the evidence of outcomes of contested cases. In its evaluation of the 2006 reforms, the AIFS found that there had been a substantial increase in shared care in judicially determined cases, compared to cases decided prior to 2006.⁷² These were cases where the trial judge reached a decision concerning what was in the best interests of the children concerned, but the conclusion that a shared care arrangement was in the best interests of the child in so many cases was not one which, it seems, many judges had seriously considered before 2006.

What is happening then in this small number of cases where shared care is being ordered? The evidence would seem to suggest that judges who hitherto would have opted for a choice between maternal and paternal care,

⁷¹ See eg Bryson *edit* *Franks-Bryson* (2007) FamCA 377 (a relocation case) per Strickland J at para 70: "In my view the changes brought about by the Family Law (Shared Parental Responsibility) Act do not alter the approach to be taken to these cases. The assessment of the competing proposals of the parties must still be carried out by reference to Part VII of the Family Law Act. However, the objects, the principles, and the factors to be taken into account in determining what is in the child's best interests have changed, and there is a presumption that needs to be addressed, and these changes may very well affect the outcome in individual cases". See also Edington and Edington (2007) FamCA 1299 at para

are now more inclined to compromise by awarding some form of shared care arrangement. This emerges from the comparison of the 95 cases decided prior to the 2006 reforms in which contact hours were specified (out of 255 children's cases analysed) with the 98 cases out of 253 in which contact hours were specified after 2006. Prior to the 2006 reforms, judges made residence orders in favour of mothers in 65.2% of the cases. After the reforms it was 47.8%, a 26.7% decrease as a proportion of the previous levels of maternal primary care. Judges made residence orders in favour of fathers in 30.8% of cases prior to the 2006 reforms, and this dropped to 18.3% afterwards, a 40.6% decrease as a proportion of the previous levels of paternal primary care.⁷³ That is, many more of these cases than hitherto were resolved by giving both mother and father substantial time with the child, but interestingly, it was statistically more likely that shared care would be preferred to paternal care than maternal care after 2006. It appears, from this evidence at least, that the compromise of shared care is disproportionately at the expense of making residence orders in favour of fathers.

Bargaining in the shadow of the law?

Judicially determined cases are just a drop in the ocean of all parenting arrangements reached in any given year between parents who do not live together. What is happening in the general population?

After the 2006 reforms, there was a significant increase in substantially shared care among newly separated parents. The trend had nonetheless been seen for many years before this.⁷⁴ The jury remains out on whether there has been an acceleration of the pre-existing trend towards shared care as a consequence of the 2006 reforms.⁷⁵ Some data suggests otherwise.⁷⁶

Even looking only at new shared care arrangements in the population that separated since 2006, 93% did not adopt an equal time arrangement and 84% did not adopt an arrangement within the wider Australian definition of 'shared care'. Other research indicates that shared care arrangements are the least likely parenting arrangement to have resulted from litigation, according to mothers' reports.⁷⁷ There is simply not either an abundance or an epidemic of shared care in Australia (depending on one's point of view). Where shared care arrangements are made, mostly the parents have not been involved in litigation.

Indeed, equal time arrangements, even after the 2006 reforms, would appear to be less common than in other comparable countries, including Britain.⁷⁸ Across the population of separated parents, including those who separated many years ago, the preponderance of the evidence is that levels of shared care in Australia are relatively low. In 2006-07, nearly 8% of children who had a parent living elsewhere had a shared care arrangement of 35% of nights or more with each parent. 4% were in an equal time arrangement.⁷⁹

Contrast those general population statistics with Britain.⁸⁰ In the most recent survey on this issue, involving responses from 619 parents who were identified as having a dependent child living apart from them, 22% reported that they saw their children several times per week. A further 14.6% said they saw them almost every day, and 3% had an equal time arrangement.⁸¹

Nonetheless, it is reasonable to suggest, from all the available evidence in Australia, that the legislation contributed to an increased awareness and acceptance of shared care arrangements as a viable and 'normal'

⁷³ *Ibid.*

⁷⁴ In the late 1990s, shared care was a comparatively rare phenomenon in Australia. In 1997, for example, the Australian Bureau of Statistics recorded that only 3% of children under 18 whose parents lived apart were in a shared care arrangement in which each parent cared for the child at least 30% of the time. Australian Bureau of Statistics, Cat No. 4442.0, *Family Characteristics Survey 1997*, (1998). By 2005, the ABS was reporting that 8% of children were in shared care. Australian Bureau of Statistics, Cat No. 4442.0, *Family Characteristics Survey 2005*, (2006).

⁷⁵ Gagliardi et al. at 131, 134.

⁷⁶ Child Support Agency data, provided at p 131.

⁷⁷ Judith Cashmore, Patrick Parkinson, Ruth Weston, Roger Faldut, Gerry Redmond, Liza Tsai, Jennifer Baxter, Marianna Rajkovic, Tomasz Szlach & Ian Katz, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government, Attorney-General's Department 68-94* (2010) (hereafter *Cashmore et al.*). Fathers' reports are similar, but indicate that about the same proportion of cases involving primary care to the mother had resulted from litigation.

⁷⁸ For analysis, see Patrick Parkinson, *Family Law and the Inflexibility of Parenthood* (Cambridge UP, New York, 2011), chapter 5.

⁷⁹ *Cashmore et al.*, 18.

⁸⁰ Data provided on p 3 in Salinda Fehdberg and Bruce Smyth, with Maria Maclean and Catherine Roberts, *Caring for children after parental separation: would legislation for shared parenting help children?* (COPAP, 2011). In another study, British researchers estimated that 12% reported that they shared the care of the child more or less equally. Victoria Peasegood & Joan Hunt, *Problematic contact after separation and divorce? A national survey of parents* 18 (2006).

⁸¹ The last statistic might have underestimated the frequency of equal time arrangements as equal time parents may not have seen themselves as non-resident and so might not have answered the relevant question in the survey.

option for parenting after separation. The requirement to consider arrangements for 'substantial and significant' time, that is, time that is not just at the weekends and in school holidays, has been particularly beneficial. The legislation has encouraged consideration of how non-resident parents who live close to the other parent could be involved in looking after their children during the school week, for example, taking children to after-school activities or having care on non-weekend days which fit well with the parents' different work schedules.

Whether a shared care arrangement is possible, and whether it will last very long, depends on a range of factors other than the law. As other Australian research has shown, some families try shared care soon after separation but change to another care arrangement in the course of time.⁸² As the researchers noted:⁸³

Proximity is a precondition for shared care, and such an arrangement may work for a while. However, if the family home has to be sold, or it is not possible for the parents to afford two homes in the area where once they had only one, one or both parents will have to move to an area where housing is cheaper. In Australia's major cities, those areas tend to be on the edges of the city or beyond it, and so separation has a centrifugal effect on many parents, scattering them through economic necessity from the more central areas of a city to its outer edges or beyond. If one parent is tied to their original location because of work commitments or other such factors, the economic consequences of the separation may mean that parents come to live some distance from one another.

Shared care arrangements in high-conflict families

The 'normalisation' of shared care as an option, and its greater occurrence in the population, has no doubt led to more problematic shared care arrangements than hitherto, in particular where the arrangement is inflexible and parent-centred, and levels of communication between the parents are poor. There are also problematic shared care arrangements in countries with legislation which is quite dissimilar to Australia, for example Britain⁸⁴ and Sweden.⁸⁵ In these countries, nothing in the legislation gives any indication that shared care is particularly to be considered as an option.

Shared care represents a compromise between competing claims for primary care, and so it is unsurprising that many of these problematic arrangements are made between parents in conflict, often through mediated agreements.

Clinical psychologist Dr Jenn McIntosh and former Family Court judge Richard Chisholm expressed particular caution about shared care arrangements in high conflict families, based upon findings concerning children's wellbeing in McIntosh's clinical sample.⁸⁶ McIntosh found that shared care was a risk factor for poor mental health where there was high, ongoing conflict between their parents. Conversely, children seemed most likely to benefit from shared care arrangements where there were low levels of hostility. Similar findings have been reached in another major study of shared care in Australia.⁸⁷

While high levels of conflict are problematic for children whatever the amount of time the non-resident parent spends with the children, it is particularly problematic in shared care arrangements given the greater degree of interaction between parents that is typically needed.

What can be done to make it less likely that parents will agree on shared care as a compromise when the relationship between them is highly conflicted and levels of cooperation are poor? It may be that going back to a strong sole custody or sole residence norm in which fathers can only expect to get primary residence or

⁸² Cashmore et al, 87-88, 129-40.

⁸³ *Ibid* at 129-40.

⁸⁴ In interviews with 83 children and young people in shared care arrangements in Britain, Smart et al. found that for some children, where the arrangement was inflexible and the idea of 'equal time' was invested with heavy ideological or emotional significance by a parent, it could be very oppressive and constricting. Carol Smart, Bren Neale & Amanda Wade, *The Changing Experience of Children: Families And Divorce* (2005); Carol Smart, 'From Children's Shows to Children's Voices', (2002) 40 Fam. Ct. Rev. 307 (2002); Bren Neale, Jennifer Henderson & Carol Smart, 'Drifting Towards Shared Residence?', (2003) 31 Fam. L. 304.

⁸⁵ Annika Newstrom, 'Shared residence: lessons from Sweden' (2011) 23 CPLQ 251; Margareta Carlberg, Anna Parry, Eva Elfvén Lindström & Suzanne Juhl, *Vårdnad Boende: Att ha två äldre föräldrar och barnen fast de inte bor tillsammans* (2006) [Alternating residence: living with both mother and father even though they do not live together] (trans. Hugh Sturges).

⁸⁶ Jennifer McIntosh & Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation', (2008) 14 J. Family Studies 37.

⁸⁷ Cashmore et al, at 88-89.

shared care when the mother is demonstrably unfit, would assist in that policy goal. This would need to be combined with generous legal aid provision to assist mothers to assert their claim for sole residence in the face of a competing application by the father. That would certainly allocate most of the bargaining chips in negotiation to mothers and make it less likely that they would feel a need to compromise by agreeing on some form of shared care.

But that world has long since gone. Generous legal aid is no longer going to be available in Britain.⁸⁸ There is also no point harking back to some golden age of a de facto maternal preference for sole custody. The Children Act 1989 marked the beginnings of a move away from a sole custody norm in Britain, and Australia later followed.⁸⁹ Most fathers no longer accept being relegated to the role of occasional visitor in their children's lives after separation.⁹⁰ The evidence from international research is also that substantial proportions of children want to spend more time with their fathers after separation than they do.⁹¹

The Australian legislation sought to address the issue of deterring inappropriate shared care arrangements by requiring that a shared care arrangement must be 'reasonably practicable' and providing guidance on when that might be so. Judges are required to consider the proximity of the parents' homes, the capacity of the parents to implement a shared care arrangement, their ability to communicate with one another, and the likely impact of the shared care arrangement on the child.⁹² This can be used by mediators and lawyers to 'reality test' the practicability of a proposed shared parenting arrangement. The Children Act 1989 provides no such guidance. The 'welfare' checklist is a useful but somewhat generic list of factors that applies in both public law and private law cases. Having clearer guidance on factors to consider in making parenting arrangements may assist the courts in private law matters, not least in assessing when shared care is, and is not, an appropriate option.

7. Did the 2006 reforms lead to a greater risk of violence or abuse?

Violence is a pervasive and common problem in intimate relationships. Family violence and abuse is one reason why parents separate, so it is unsurprising to find that many separated parents report such a history. The Australian Institute of Family Studies in its evaluation of the 2006 reforms, found that 26% of mothers and 17% of fathers reported being physically hurt by their partners. A further 39% of mothers and 36% of fathers reported emotional abuse defined in terms of humiliation, belittling insults, property damage and threats of harm during the course of the relationship.⁹³

The 2006 legislation did much to address the issue of family violence, building upon substantial legislative action in 1995. The 2006 amendments made it clear that the presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in abuse of the child or family violence.⁹⁴ The legislation also states that:⁹⁵

In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order...does not expose a person to an unacceptable risk of family violence.

That is, the Court must consider specifically how to protect mothers (and other family members) from violence when making arrangements about the children.

The AIFS report indicated that a majority of respondents in all professional categories thought that "the need to protect children and other family members from harm from family violence and abuse is given adequate priority" in the family law system. However, a substantial minority in each professional category felt

⁸⁸ Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (June 2011).

⁸⁹ John Garrow, 'The Family Law Reforms Act 1989 (UK) and the Children Act 1989 (UK) Compared - Twins or Distant Cousins?', (1996) 17 Australian J. Fam. L. 18.

⁹⁰ Patrick Parkinson and Bruce Smyth, 'Interference and Circumvention with Father-Child Contact Arrangements in Australia' (2004) 14 Child and Family Law Quarterly 289.

⁹¹ The literature is reviewed in Parkinson, above n.78, 79-81.

⁹² Family Law Act, s. 80DAA.

⁹³ Keppeler et al, 25.

⁹⁴ Family Law Act, s. 80DA(2).

⁹⁵ Family Law Act, s. 80CG.

otherwise.⁹⁶ Many reasons might be advanced for the difficulty in dealing adequately with issues of abuse and violence – the inherent limitations involved in seeking to restrain violent behaviour in families by means of court orders, the cost and difficulty of litigation, the restrictions on availability of legal aid, the need to prove the violence or abuse in the face of denial, the frequent absence of corroborative evidence, the division of responsibility in Australia between state and federal systems, the attitude of judges, or the legislation.

Of all these possible causes, surprisingly the loudest voices have been those saying the legislation is responsible, and that yet more changes to the legislation are the answer. Many advocates would say unequivocally that the 2006 reforms led to an increased risk of exposure of women and children to violence and abuse.⁹⁷ This view is not new. Academics and advocacy groups campaigning against the very modest and benign changes to the law in 1995 that replaced the language of 'custody' and 'access' with 'residence' and 'contact', made the argument that any legislative change that supported the greater involvement of fathers would expose women to a greater risk of violence.⁹⁸ Parliament's response to these arguments in 1995 was to include in the legislation numerous strong provisions to address the issue of domestic violence in children's cases.

Those arguments against legislative change were run again in the lead-up to the 2006 reforms. Parliament's response to those concerns was to add yet more legislative language to emphasise the importance of addressing violence and protecting children from harm. Still, the arguments were led after the 2006 amendments came in that the legislation exposed women and children to a greater risk of violence and abuse. One of the concerns is that women in particular may feel pressured into accepting an inappropriate parenting arrangement when they have significant safety concerns for themselves or their children because they feel the system is weighted in favour of involvement by the non-resident parent.⁹⁹

However, there is no reliable evidence that the 2006 amendments have had the effect of putting any woman, man or child at greater risk of violence or abuse as a consequence of provisions in the legislation than they would have been had the 2006 amendments not been passed. Indeed it may very well be that parenting arrangements which allow fathers a meaningful involvement in their children's lives after separation will actually reduce levels of anger that could result in incidents of post-separation violence. Nor is there any evidence of systemic failure by the courts to take proper account of issues of domestic violence when the evidence is presented to them.

One of the problems in this area is that a great diversity of circumstances is included within the one definition of a 'history of family violence'. The social science evidence has now established clearly that there are different patterns of family violence and much violence occurs in the context of people losing control in the course of domestic arguments.¹⁰⁰ The AIFS study found that a history of family violence does not necessarily impede friendly or cooperative relationships between the parents following separation. Sixteen percent of mothers who reported being physically hurt by their ex-partner during the course of the relationship reported friendly relationships at the time of the interview, and a further 23.5% reported having a cooperative relationship. While others reported distant or conflictual relationships, only 18.5% reported a continuing fearful relationship. Fifty-five per cent of mothers and 50% of fathers who reported emotional abuse by their ex-partner during the course of the relationship reported friendly or co-operative relationships by the time of interview.¹⁰¹

8. The 2011 amendments

Be that as it may, the Australian government felt the need to respond to the lobby groups who were concerned about domestic violence by enacting yet more amendments to the legislation in the *Family Law*

⁹⁶ Kasprow et al at 236. What aspects of the family law system are deficient in this respect was not clear from the responses to a broad question.

⁹⁷ Numerous submissions to this effect were made to a review by Richard Chisholm. See Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, Canberra, 2006). In the academic literature, see e.g. Tracey de Simone, 'The Friendly Parent Provisions in Australian Family Law – How Friendly Will You Need to Be?', (2006) 22 *Australian J. Fam. L.* 54.

⁹⁸ See the arguments reviewed in Susan Armstrong, 'We told you so ...' Women's Legal Groups and the Family Law Reform Act 1995' (2001) 15 *Australian J. Fam. L.* 129.

⁹⁹ See e.g. Zoi Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?', (2007) 21 *Australian J. Fam. L.* 87.

¹⁰⁰ Joan Kelly and Michael Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implication for Interventions' (2008) 46 *Ann. Ct. Rev.* 476.

Legislation Amendment (Family Violence and Other Measures) Act 2011.¹⁰² These amendments do not alter the emphasis in the Act on encouraging the involvement of both parents in children's lives following separation where this is of benefit to the child. The new amendments make changes at the margins of the 2006 reforms, rather than at their heart. However, even if they do little, if anything, to change the outcomes of judicially determined cases, they will be beneficial amendments if they promote a greater degree of confidence in the decisions of the family courts.

The major changes are the introduction of a new definition of family violence; a new prioritisation within the primary considerations, and certain other changes to the additional considerations, in determining what is in the best interests of the child. The other changes are mainly to legislative provisions about process.¹⁰³

In determining what is in the best interests of the child, the new law directs courts to give greater weight to the protection of children from harm than it does to the benefit to the child of having a meaningful relationship with both of the child's parents. However, the interpretation of the intentions of Parliament in this regard is not without difficulty. The interpretation given by the Norgrove Committee assumes that s.60CC(2)(a) requires the court to try to achieve a meaningful relationship with both parents. That is not actually what it says or how it has been interpreted by the courts. Section 60CC(2)(a) requires a factual assessment. Is it possible, in the circumstances of this case, for a child to have a meaningful relationship with both parents and will he or she benefit therefrom?

The legislation may assume that children will benefit from a meaningful relationship with both parents but not that a meaningful relationship is actually possible in every situation.¹⁰⁴ It may well be that one parent lacks the necessary commitment and capacity to provide a parental relationship that is meaningful to the child, or that the relationship between parent and child has irretrievably broken down.¹⁰⁵ The child may not be able to have a meaningful relationship with an abusive or violent parent. Thus where there are current concerns about violence and abuse, any consideration of the benefit to the child of a meaningful relationship with both parents may well lead to the same conclusion as consideration of the need to protect the child from harm.

9. Is there a case for change in Britain?

It is clear that the Norgrove Committee's misconceptions about the position in Australia played a significant role in its ultimate recommendation about legislative amendment to the Children Act 1989. This is not to criticise the Committee nor to detract from the excellent work it did overall. The law of parenting after separation is a difficult, sensitive and contested area of public policy. It is not easy to sort out the wheat from the chaff in terms of claims made by advocates for one position or another; but there is no substitute for evidence-informed policy.

Even if the arguments against change put forward by the Norgrove Committee cannot survive careful scrutiny, there is nonetheless a respectable argument to be made that no change to the law is needed. Levels of shared care are almost certainly higher in Britain than Australia even with its existing legislation. Amending the Children Act 1989 might run the risk that there will be negative effects. No new initiative in public policy is without any risk. Submissions made to the Norgrove Committee clearly reflected that anxiety.¹⁰⁶ Yet the Norgrove Committee could offer no cogent arguments or reliable evidence to justify those concerns.

Around the world, legislative statements of the kind it was considering are commonplace and operate without difficulty. For many years, Canada's Divorce Act has contained a provision that in making orders for custody and access, "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child."¹⁰⁷ The sky did not fall in. Similarly, in several US jurisdictions, of which California is one example¹⁰⁸ the law states it is public policy to

¹⁰² The amendments, so far as they concern the law of parenting after separation, are effective from June 7th 2012.

¹⁰³ For analysis of the new amendments, see Patrick Parkinson, "The 2011 Family Violence Amendments: What Difference Will They Make?" *Australian Family Lawyer* (forthcoming).

¹⁰⁴ *Hewett J in G and C* [2006] FamCA 954 at para 55-72.

¹⁰⁵ Patrick Parkinson, "Decision-Making About the Best Interests of the Child: The Impact of the Two Tiers" (2006) 20 *AJFL* 179.

¹⁰⁶ The Norgrove Committee, at 141 made reference to submissions that expressed a worry that any change to the law might risk creating "confusion, misinterpretation and false expectations".

¹⁰⁷ *Divorce Act* 1985 s 18(13).

¹⁰⁸ California Family Code §8620.

ensure that children have frequent and continuing contact with the non-resident parent unless it is contrary to the children's best interests.¹⁰⁹

The case for change

So is any change needed to the Children Act? What may be observed at least is that there is clearly now, and has for a long time been, a significant body of public opinion, including professional opinion, that considers the law does not currently strike the right balance. That is reflected in the majority of submissions to the Norgrove Committee.¹¹⁰ Evidently, the Government is also of the view that some change is needed.¹¹¹

It is important that, as far as possible, the law of the land commands confidence and general acceptance. The disaffected and disgruntled may be repeatedly assured that the law is fine as it is, but if the only response from their government is to tell them to eat cake, the result may be civil disorder. Even if legislation were to be amended to state principles and values that align with the case law, that may in itself be of value in improving public confidence in the family justice system. One of the beneficial aspects of the Australian legislation is that the emphasis which is given to the involvement of both parents in children's lives even after relationship breakdown is strongly in accord with community values.¹¹²

It is also somewhat questionable that the case law in England and Wales currently gives sufficient emphasis to the importance of both parents in children's lives. The law on relocation for example, has been the subject of considerable criticism by family law specialists and even judges,¹¹³ and it is only slowly evolving from a position of giving relatively little weight to the importance to children of maintaining a relationship with both parents.¹¹⁴ While there may be some evolution of the law on leave to remove children from the country, it would appear that a proper jurisprudence on leave to relocate within the British Isles remains in its infancy. This is an area where statutory reform may also be desirable.

Family law in a time of cutbacks

There is another reason for British family law legislation now to provide more norms for settlement than have been considered necessary in the past. With very substantial cuts to legal aid and the provision of free legal advice in family law matters, the Government ought to be giving serious consideration to reform of substantive family law to move away from broad judicial discretion in both children's cases and financial matters.

If there is to be a new emphasis on mediation to resolve family law disputes, the time has come for Parliament to assume the primary responsibility for laying down rules and guidelines that assist in dispute resolution, rather than conferring a broad discretion on the judges and leaving them to make social policy. It is simply not sensible, for example, for rules on property division to be governed by broad judicial discretion when so few people can afford to go before the courts and so little financial help will be available for them to do so. In terms of property division, the rough justice of fixed entitlements, or at least the establishment of guidelines that constrain discretion, will provide much more justice to the many than broad judicial discretion will provide to the few. It will also do so at much lower cost to people. Litigants cannot bargain in the shadow of the law if the law casts no shadow. In this new context, the recommendations for family law reform made by the Centre for Social Justice in its Review of Family Law deserve serious consideration.¹¹⁵

Children's cases cannot be dealt with by rules, but there are general principles that can be articulated. Appropriately framed guidance in legislation may help parents to resolve post-separation parenting arrangements more easily by establishing principles and norms which can help shape the way people view

¹⁰⁹ See also *House of Commons* (2010) 100, *Colo. Rev. Stat.* § 14-02-120(2).

¹¹⁰ The Norgrove Report (at 115) records that 49% of respondents were in favour of reform, 18% against, and 32% answered neither yes nor no but made comments in response to the question, some supportive, others opposed.

¹¹¹ Response to Norgrove, above n. 3.

¹¹² Seventy-nine per cent of fathers and 83% of mothers in 2009 agreed or strongly agreed with the statement that "children generally do best after separation when both parents stay involved in their lives". Kilgus et al., 133. Among separated parents, 80% of fathers and 77% of mothers agreed with the statement. *Ibid.* at 154-15.

¹¹³ See e.g. *Re D (Children)* [2010] EWCA Civ 90; *F v M* [2010] FWHC 1348.

¹¹⁴ See *Re F (Children)* [2011] EWCA Civ 793, reversing the principles established by *Thorpe LJ in Payne v Payne* [2003] 1 FLR 1293.

¹¹⁵ Centre for Social Justice, above n. 3. The author of this article was a consultant to the Committee.

what it means for parents to live apart.

If reform is contemplated, what lessons then can be learned from the Australian experience, and what are the pitfalls to avoid?

1. Emphasise the importance of maintaining children's relationships with both parents and with others who are important to them

The Australian legislation properly emphasises the rights of children to maintain a relationship with both their parents and others who are important to them, unless this is contrary to their best interests.¹¹⁶ This states an important principle. However, it is important that this principle is not overstated or too widely applied. The emphasis must be on maintaining children's relationships with parents, not creating them. There are particularly difficult issues when parents have never lived together. In Britain, 45% of all births were outside marriage in 2008.¹¹⁷ Less than two thirds of these ex-nuptial children are born to parents living at the same address.¹¹⁸ Can the parents develop a cooperative joint parenting relationship when they have never known what it is to live together and raise the child as a couple? Is it to be presumed that children will benefit from a relationship with a parent whom they do not know through the intimacy of the daily child-care tasks that occur naturally in most intact families?

This is an area where Australian law fails to make adequate distinctions. In 1995, principles were introduced that "children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together" and that they "have a right to spend time on a regular basis with both their parents."¹¹⁹ Many disputes in the family courts in Australia concern infant children of parents who have never lived together. Non-resident biological fathers may in many cases represent potentially important social capital to children if a relationship can be established and maintained, but it ought not to be presumed that children will benefit from a joint parenting relationship when there is no history of family life between the parents.

2. Avoid presumptions about time

The Parliamentary Committee in 2003 was clear in its recommendation that there should be no legal presumption in favour of equal time or indeed any other pattern of post-separation parenting. The Norgrove Committee took a similar view, and rightly so.

Shared care will always be a minority parenting arrangement. There are many non-resident parents for whom the traditional residence/contact model is the only realistic option. Fathers whose orientation towards the world of work makes it difficult to take on the primary care of children for significant periods, especially during school holidays, are likely to recognize the sense in a traditional residence/contact arrangement. So too may those fathers whose parenting skills are insufficiently developed to make them satisfactory custodians of children for long periods of time following separation. Geographical distance between homes when one or other parent has relocated after separation may make extensive contact impractical. Lack of suitable accommodation for the children may also limit the capacity of the non-resident parent to have the children stay overnight. Shared parenting might be an optimal arrangement for some families if it could be managed, but the logistics and expense of doing so may mean it is out of the reach of many separated parents. For these reasons, there can be no one-size-fits-all policy for post-separation parenting.

3. Avoid bifurcation in the law of parenting after separation

The 2006 amendments to the Family Law Act in Australia adopted an approach that had not been recommended by the Parliamentary Committee or any expert body. Two primary considerations were enunciated, one involving the maintenance of relationships with parents that are meaningful to the child, the other involving protection from harm. Prof. Richard Chisholm has argued that this bifurcation is

¹¹⁶ Family Law Act (1975) s.60D.

¹¹⁷ Louise O'Leary, Eva Ntandou, Julie Jeffries & Ben Wilson, 'Fertility and Partnership Status in the Last Two Decades', (2002) Population Trends No 140, 5.

¹¹⁸

unfortunate.¹²⁰

Good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled from responding properly to a child's needs by reason of adverse mental health, or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. In these and many other situations, difficult issues may arise in determining what arrangements will be best for children, even though the problems might not fall within categories such as 'violence' or 'abuse'.

For these reasons it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse.

He observed that it may well be appropriate to state these themes as part of the general principles or objects of the Act, but not as primary considerations in determining what is in the best interests of a child. To do so may obscure too many other issues that compromise good parenting.

The Norgrove Committee proposal, made in its interim report, likewise risked that kind of bifurcation.

10. Towards meaningful reform of the Children Act

There are numerous ways in which the Children Act 1989 could be amended to state more clearly the principles and norms that ought to guide parenting arrangements after separation. If a traditional approach to legislative drafting is adopted, this will involve giving guidance to judges on how to decide the cases before them in the hope that some slivers of light will filter through to the souls who crouch in the shadows. If that is the preferred approach, then the proposals made by the Centre for Social Justice to amend s.11 of the Children Act have much to commend them.

It may be, however, that it is time now to move away from a court-centric approach to family justice in favour of a community-centric approach to family relationships. That is, the courts that decide so very few cases (and atypical cases) at such great expense, should no longer be placed at the centre of the universe of family justice, with organisations like CAFCASS playing an ancillary support role. This is the most important lesson from Australia, which invested in a network of Family Relationship Centres all over the country to be the front-line services in assisting parents to work out difficulties in post-separation parenting arrangements.¹²¹ This was supported by legislation drafted to speak beyond the courts, and through voices other than judges and lawyers.

Legislative reform in Britain could begin to articulate a different conceptualisation of the relationship between courts and the wider community in terms of assisting parents to develop parenting plans that accord with legislatively declared principles and objectives.

CAFCASS might, when the fiscal situation of the country improves, evolve to become a community-based mediation and counselling service for parents who live apart, educating the community about children's needs and rights after parental separation, assisting parents to make arrangements which are age-appropriate and suitable in the circumstances of the case, helping parents to adjust those arrangements as time goes on, and writing family reports to assist a court if need be. Alternatively, that work could be done by non-government organisations funded by government.¹²² In this way, the very large amounts of legal aid money currently directed towards legal advice and assistance on parenting arrangements after separation, could be redirected

¹²⁰ Chisholm, above n.97 at 128.

¹²¹ See further Patrick Parkinson, 'Keeping in Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

¹²² This is the case, for example, in Australia's Family Relationship Centres which have a common badge and identity, but are in fact run by a range of non-government organisations which tender to run the Centre in each location. See Parkinson, *ibid*.

to fund educators, mediators and counsellors to assist people with their relationships. That may be both more effective and much better value for money. It is all very well having legal advice on what a judge might do with his or her broad discretion, but this is only of much value if people can afford to bring their case before a judge for decision, as an alternative to settlement.

That is a longer-term prospect, and now is not the time in post-GFC Britain. However, amendment of the Children Act could begin the process of shifting focus.

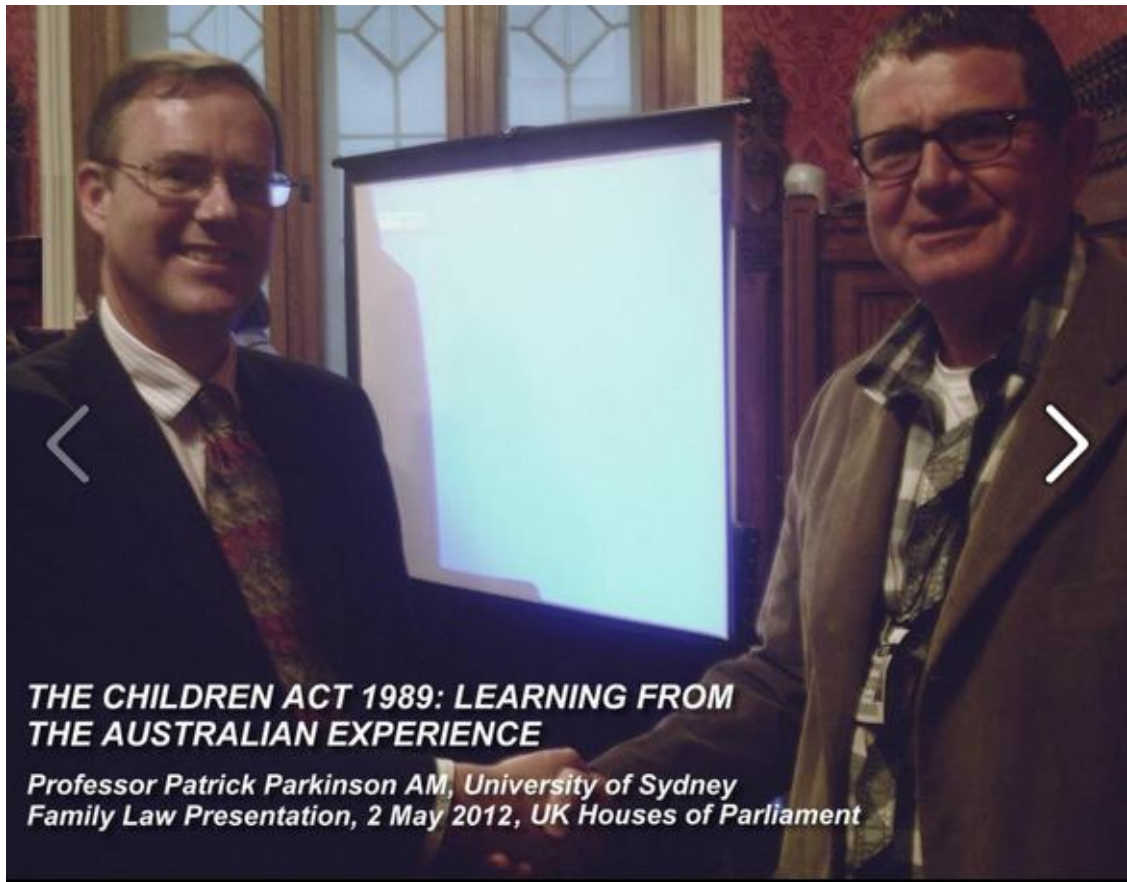
How might the Children Act be different if, instead of Part II of the Act being headed "Orders With Respect To Children In Family Proceedings", rather, a new Part were inserted called "Principles for Parenting Arrangements when Parents Live Apart"? The principles could then be expressed as follows:

Counsellors, mediators, lawyers and other professionals should have regard to the following principles in assisting parents to develop parenting plans when they do not live together:

- (1) Children have a right to maintain relationships with parents and other family members who are important to them, unless this is detrimental to their wellbeing.
- (2) Children have a right to protection from harm.
- (3) Children who have formed a close relationship with both parents prior to the parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, except when restrictions on contact are needed to protect them from abuse, violence or continuing high conflict.
- (4) Parenting arrangements for children ought to be appropriate to their age and stage of development.
- (5) Parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.
- (6) Arrangements for substantially shared care should not be made unless they are reasonably practicable and likely to benefit the child, taking account of the distance between the parents' homes, the level of conflict between the parents, the ability of the parents to communicate and to cooperate, and the age and developmental needs of the child.

This would leave the welfare checklist used by judges to decide cases unchanged, although judges should also be directed to have regard to these principles in deciding whether to make orders under s.8 or 13 of the Act.

That would certainly be meaningful reform, but legislative change is not for the faint-hearted. Lobby groups will no doubt clamour for attention, there will be apocalyptic visions about the end of the world if changes to the law are made, and yes, any reforms risk being misunderstood. Australia in 2006 embarked on a comprehensive package of reform, of which the provision of free education, advice and mediation through the Family Relationship Centres was by far the most important. Any reform of the Children Act 1989 needs to be adapted to the circumstances existing now in Britain, and to the resources that are available to assist parents who live apart.



**THE CHILDREN ACT 1989: LEARNING FROM
THE AUSTRALIAN EXPERIENCE**

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Family Law Presentation, 2 May 2012, UK Houses of Parliament*