Reconfiguring Post-Divorce Parenting in a Risk Society Panic

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In family law and policy, both in Australia and elsewhere in the English-speaking world, the period between about 1990 and the present has been a period of rapid change. One well-known scholar has characterised the chronic uncertainty as the 'normal chaos of family law'.[1] Against the background of yet another government inquiry into family law in Australia, this time one ostensibly seeking evidence and opinion regarding a proposal to incorporate a rebuttable assumption of equal time shared parenting into Australian family law, we argue that the current situation, far from representing 'normal chaos' is a political response to a risk society panic whose gravitas is masculinity, and represents an attempt to revalidate masculinity through binding fathers to families.

Under conditions of a risk society panic both members of the public and decision makers are relatively resistant to reasoned argument and particularly susceptible to 'implied warrants', statements that are presented as self-evident truths with which any reasonable person would agree. The statement that equal time shared parenting is the optimal post-separation arrangement for children is a classic example of an implied warrant. It has an easy egalitarian appeal; seems — at least to a non-critical gaze — obvious and non-controversial. The empirical evidence that is offered by proponents involves American studies comparing 'joint custody' with

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1 John Dewar, 'The Normal Chaos of Family Law' (1998) 68 *Modern Law Review* 467.

'sole custody', and, in fact the term joint custody has re-entered Australian discourse, the Prime Minister, the Review Committee itself and others involved in the hearings preferring joint custody to the statutory language of parental responsibility, contact and residence. This is curious, both because Australian law abandoned 'custody' for parental responsibility and residence/contact some 8 years ago, and because no effort is made to spell out what is meant by 'joint custody'. No distinction is made between joint legal custody, which is common in the United States and the legal norm in Australia,[2] and joint physical custody, which is rare in both jurisdictions even on a voluntary basis and essentially untried on a coercive basis. Most American literature uses the term 'joint custody' to refer to joint legal custody. Thus, when the literature states that most American states have introduced a presumption of joint custody, it is very important to go behind the statement and interrogate the actual legal arrangements. To complicate matters further, joint physical custody also has many different meanings, and frequently includes arrangements similar to the 'symbolic' residence/residence awards that are becoming more common in Australia.[3]

Despite the prevalence of implied warrants holding out shared parenting as an unproblematic social good and as the optimal post-separation arrangement for children, the evidence available does not support this rosy assessment. Commentators such as Richard Collier emphasise that 'research suggests that post-divorce co-parenting is far from the unproblematic social good it is presented as being within the new father discourse.'[4] In reviewing the available evidence on children's outcomes under different post-separation arrangements Lye suggests that the available evidence allows only three unequivocal conclusions to be drawn: that 'household income is the most important influence on child well-being post-divorce';[5] that high levels of inter-parental conflict have a negative impact on child well-being;[6] and that higher levels of contact are positively associated with willingness to pay child support although the motivation

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2 While the term joint legal custody does not appear in Australian law, s 61B of the *Family Law Act* 1975 provides that each parent has parental responsibility and that this is not affected by any changes in the relationship of the parents. Joint parental responsibility can only be altered by an order of the court. See also s 60B providing that parents share duties and responsibilities in respect of their children. These provisions are substantively identical to what is termed joint legal custody or simply joint custody in the United States.

3 The linguistic pitfalls and the various meanings ascribed to 'joint custody' will be discussed a little later. Nye notes that studies of joint physical custody have been based on very different samples, ranging from eight overnight visits per month to strict 50/50 residential arrangements. See Diane Lye, *Washington State Parenting Plan Study: Report to the Washington State Supreme Court Gender and Justice Commission and Domestic Relations Commission* (1999) 4-12.

4 Richard Collier, 'A Hard Time to be a Father: Reassessing the Relationship between Law, Policy and Family (Practices)' (2001) 28 *Journal of Law and Society* 520, 540. See further Lye, above n 3, 4-12–4-17.

5 Lye, above n 3, 4-19.

6 Lye, above n 3, 4-9–4-10.

for paying varies. She notes that it is not clear whether the correlation between payment of child support and higher levels of contact is due to greater involvement or a desire to monitor expenditure and ensure that support payments are exclusively used for the children's needs.[7]

Against this background, we evaluate the arguments for equal time shared parenting and unpack the assumptions upon which they rely. We conclude that the facile appeal of the 'implied warrants' providing the impetus for the inquiry blinded decision makers to the potential consequences of a concerted attempt to ensure the equal involvement of fathers in post-divorce parenting.

The Theoretical Context

While 'risk society panic'[8] is usually used to describe the social and political response to a mass technological disaster, and, more recently, to terrorist attacks such as 9/11, we believe that it is peculiarly apt to denote the political and social response to the ongoing anxiety about 'masculinity' and 'the family' in 21st century Australia (and elsewhere).[9] Risk society panics can be differentiated from the more familiar 'moral panics' by, *inter alia*, the inability of political claims-makers to direct (and deflect) public anxiety, the competition of multiple claims makers to define the problem and allocate blame and the fear that an alienated public will turn against powerful entities rather than fixing blame on a marginalised and deviant other, ultimately encouraging authorities to defuse the crisis and thus minimise the need for decisive action.[10]

According to Ungar, characteristic risk society dangers are:

> 1) very complex in terms of causation; 2) unpredictable and latent 3) not limited by time, space, or social class (ie, globalised); 4) not detectable by our physical senses; and 5) are the result of human decisions.[11]

We argue that a coalition of pervasive social (and political) fears concerning divorce rates, the prevalence of female-instigated divorce, uncertainty

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7 Lye, above n 3, 4-19. The desire to monitor the expenditure of support payments is, of course, a well known control tactic, and disregards the impossibility of isolating 'child oriented' expenditure in areas such as food, housing and utilities — in most families accounting for more than three quarters of the weekly budget.

8 Ulrich Beck, *Risk Society: Towards a New Modernity* (1992).

9 A recent manifestation of this anxiety may be found in Mark Latham, 'Work, Family & Community: a Modern Australian Agenda' (Speech delivered at the National Press Club, Canberra, 18 February 2004). See Michael Bachelard and Rebecca DiGirolamo, 'Latham Targets the Boy Crisis', *The Australian*, 19 February 2004, 1; 'Boys Suffering "Crisis of Masculinity" Says Latham', *Sydney Morning Herald*, 18 February 2004, 1 at 19 February 2004.

10 Sheldon Ungar, 'Moral Panic Versus the Risk Society: The Implications of the Changing Sites of Social Anxiety' (2001) 52 *British Journal of Sociology* 271, 273.

11 Ungar, above n 10, 273.

about masculinity and the masculine role, both within the family and in the wider society, concern over 'underachieving boys' and the feminisation of education, and broader concerns about the changing role of women and falling birth rates represent the human equivalent of the technological dangers most often associated with the risk society. While these fears are diverse, and some are independently capable of generating moral panics and have done so, collectively, we would argue, their core lies in a perceived crisis of masculinity. As the breadwinner role becomes increasingly fragile for many men in the wake of a shift from an industrial economy to a services and information economy[12] fatherhood is seemingly under threat, not simply from the demographic changes summarised above, but from its apparent inability (both legal and social) to escape the limitations of the breadwinner role.[13] Figured against the background of what Beck describes as:

> The revolt of women, unlike the explosion of the French Revolution, is a creeping revolution, a sub-revolution proceeding like a cat: on cat's paws but always with claws. Wherever it touches it changes industrial society's sensitive underside, the private sphere and reaches from there...into the peaks of male domination and certainty... As social science studies show, the broad variety of fundamentalisms are patriarchal reactions, attempts to reordain the masculine 'laws of gravity'.[14]

We would argue that the media valorisation of fatherhood, epitomised in Australia by the writings of Bettina Arndt,[15] and the increasing use of moral warrants emphasising the essential role of post-divorce fathering in raising the 'normal child' is both the most recent and the most potent recalibration of the masculine role. Several features of this valorisation are significant. First, little attention is given to the actual role of the father

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[12] For a telling account of the impact of this shift on American masculinities see Susan Faludi, *Stiffed: The Betrayal of the Modern Man* (1999).

[13] For a discussion of these issues see: Richard Collier, *Masculinity, Law and the Family* (1995), especially 174–214; Collier, 'A Hard Time to be a Father: Reassessing the Relationship between Law, Policy and Family (Practices)', above n 4, especially 537–8; and Nancy Dowd, *Redefining Fatherhood* (2000). For a more general discussion of the interaction of law and the construction of masculinity see Nancy Levit, *The Gender Line: Men, Women and the Law* (1998), especially 15–63. For media commentary on these and similar concerns see Angela Shanahan, 'Social Engineering Aside, Mum is not a Dirty Word', *The Australian*, 25 August 1999, 13; Anne Manne, 'Children Ignored as Martyrs go to War', *The Australian*, 4 July 1998, 28; George Megalogenis, 'Women Win the Jobs Race', *The Australian*, 12 November 1999, 1; Pat Byrne, 'Families: The Hollowing of the Middle Class Continues', *News Weekly*, 15 July 2000.

[14] Ulrich Beck, 'The Reinvention of Politics: Towards a Theory of Reflexive Modernisation' in Ulrich Beck, Anthony Giddens and Simon Lash (eds), *Reflexive Modernisation: Politics, Tradition and Aesthetics in the Modern Social Order* (1994), 1, 26–7.

[15] See Bettina Arndt, 'Fathers May Get Justice at Last', *The Age*, 20 June 2003, 15; 'Goward Joins the "Blame Dad" Brigade on Custody', *The Age*, 29 July 2003, 11; 'After Divorce, Kids Need Both Parents', *The Age*, 29 August 2003, 13; 'Young Men in Fear of a Life Stifled by Marriage', *Sydney Morning Herald*, 5 June 2003, 11; Janet Albrechtsen, 'Fathers are not optional', *The Australian*, 7 May 2003, 13. These are a representative current sample.

in the pre-separation household, despite an increasing body of scholarly literature on different models of fatherhood.[16] This is either assumed or asserted, as for example the assertion that fathers today share equally in the work of parenting. Only at the point of separation does fatherhood become critical. Over the last decade, increasingly vocal and articulate interest groups have polarised debate over family issues, both in Australia and overseas. Media and popular attempts to apportion blame for an increasing catalogue of 'family ills' have nominated numerous scapegoats — the collapse of 'traditional family values', false allegations of domestic violence, an image of children increasingly at risk from predatory new male partners, working mothers — the list is almost as endless as the catalogue of newly discovered disadvantaged groups, such as devoted fathers unjustly deprived of their children by vengeful former wives. Against such a litany, direct action is politically untenable. While it is politically viable to legislate to prevent the release of sexual offenders deemed likely to re-offend if released at the end of the term of imprisonment to which they were sentenced, in a risk society panic no clear target emerges. Ungar suggests that because of the politically fraught nature of risk society panics authorities respond with rhetoric intended to defuse expectations and minimise the political fallout, for example launching a political inquiry rather than moving directly to legislative action.[17]

The Inquiry: History and Outcomes

Against this background, it is hardly surprising that the Australian government recently launched an inquiry into parenting arrangements post-divorce, one specifically focused upon whether a rebuttable presumption of equal time shared care ought to be legally entrenched in the *Family Law Act* 1975. With the apparently enthusiastic support of the current Prime Minister, who publicly announced his support for the enquiry and his belief that equal time shared parenting would ensure that all Australian children had an appropriate male role model,[18] this inquiry reported its findings on 29 December 2003. Those relevant to the present paper will be discussed below.

Several features of the inquiry were remarkable. First, the volume of submissions, a volume substantially exceeding those received by other government inquiries in the recent past,[19] emphasised the extent to which the inquiry is tapping into widespread public dis-ease (and seeking to

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[16] See Michael Flood, 'Fatherhood and Fatherlessness' (Discussion Paper No. 59, The Australia Institute, 2003), 8–11. See also Collier, 'A Hard Time to be a Father: Reassessing the Relationship between Law, Policy and Family (Practices)', above n 4, 542.

[17] Ungar, above n 10, 284.

[18] See Emma McDonald, 'Govt Inquiry into Child Custody Rights', *The Canberra Times*, 25 June 2003, 3.

[19] More than 1100 submissions were lodged. See Flood, above n 16, 1.

manage and deflect it). Carol Smart suggests that:

> whilst there is a dominance of wishful thinking on the unchanging nature of family life and whilst policy often refuses directly to facilitate change in the private sphere, change is nonetheless occurring. But this change is now constantly construed as illegitimate and undesirable and is popularly depicted as arising from 'unbridled individualism' or from a lack of moral restraint. Changes that are occurring because of social, historical or cultural changes are constantly reduced, in popular discourse, to symptoms of individual moral decline.[20]

The extraordinary volume of submissions concerning the proposed 'reforms' is consistent with the public behaviour characteristic of a risk society panic. The 'blaming process' is diffuse: no fault divorce, the Family Court, the Child Support Agency, 'feminists' — but while the particular targets of public anger include popular and readily demonised targets the overarching target is best described as powerful institutions which have been captured by morally corrupt forces (or 'folk devils'). Janet Albrechtsen's Christmas Eve piece in *The Australian* exemplifies this 'blaming process'. After attacking all of the predictable targets — feminists, the Family Court, Family Court Chief Justice Nicholson — Albrechtsen concludes:

> There is another reason for restoring fatherhood. Every young boy needs to know that he is important and that society treats fathers with respect. If fatherhood matters, every young boy matters.[21]

Her message, that the optimal recuperation of masculinity is to be found in the validation of post-separation fatherhood, is clear. Like the Prime Minister's lauding of the proposal as ensuring an appropriate masculine role model for every Australian child, Albrechtsen's message highlights the fragility of masculinity and the symbolic potency of shared parenting.

The history of the proposal emphasises the degree to which the government has tapped into populist fears and is seeking both to manage them and to respond to them. A Bill embodying the substance of the proposals before the inquiry[22] was brought before Parliament in 2002 and remains live. The Family Law Amendment (Joint Residency) Bill 2002 (Cth) was introduced, not by the Government, but by Senator Len Harris (One Nation, Queensland). Why, one might ask, has a private member's Bill that has languished in the Senate for more than a year become a major focus of a formal and widely publicised government inquiry? A part of the answer lies in the history of the Bill and intensive lobbying efforts by, *inter*

[20] Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy' (1997) 26 *Journal of Social Policy* 301, 303.
[21] Janet Albrechtsen, 'Fathers Given Raw Custody Deal', *The Australian*, 24 December 2003, 1.
[22] Family Law Amendment Bill 2002 (Cth).

alia, the President of the Joint Parenting Association, Juri Joakimidis and a former Deputy Director of the Liberal party in South Australia, Geoff Greene. According to a report in *The Age* newspaper on 21 June 2003, Senator Harris tabled the bill at the behest of Joakimidis (who was also the author of the first reading speech). After languishing in the Senate for the better part of a year, increased pressure by Greene, by now a full time Federal Director of the Shared Parenting Council of Australia (an alliance of father's rights groups, conservative religious organisations such as the Festival of Light, and political neo-conservatives)[23] and by John Abbott, the Political Officer of the Richard Hillman Foundation, succeeded in having the proposal formally raised with the Prime Minister and taken up by influential members of the Government.[24] A cursory glance at the 'Fact Sheets' on Richard Hillman Foundation web site[25] reveals its links with fathers' rights groups and with their by now conventional attempt to demonise feminists and discredit professionals dealing with cases of child sexual abuse and domestic violence.[26]

Some media accounts of the inquiry's hearings suggest that, far from seeking to understand the wider ramifications of the proposal, some members of the Standing Committee on Family and Community Services had, in effect, decided that they knew all of the arguments for and against the proposal and that the hearings were a formality.[27] A number of the proposal's proponents publicly asserted that the outcome of the hearings was a foregone conclusion.[28] The final stance taken by the Committee did not become clear until the it tabled its recommendations on 29 December 2003. While it ultimately recommended against the introduction of a rebuttable presumption in favour of equal time shared care[29], it did indicate

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[23] The organisations for which it serves as an umbrella are listed at <http://www.spca.org.au> at 15 October 2003.

[24] Murray Mottram, 'Why Howard Suddenly Started to Talk about Custody Battles', *The* Age, 21 June 2003, 1 at 15 October 2003.

[25] Richard Hillman Foundation Fact Sheets can be accessed at <http://www.rhfinc.org.au/articles.html> at 15 October 2003. Its Links page is even more revealing. See <http://www.rhfinc.org.au/links.html#aas> at 15 October 2003.

[26] One of the articles on the Richard Hillman web site, Stephen Baskerville, 'The Real Crisis of Fatherhood', *The Washington Post*, 4 February 2001, B07 at 25 February 2004, is an excellent example of the rhetoric involved, effectively demonising mothers, especially single mothers, judges, lawyers, psychotherapists, child support enforcement agents and child protection officers. Its central assertion, a classic example of a moral warrant, is that fathers are driven away from their children by mothers and governments.

[27] See eg Margaret Wenham, 'Lives in the Imbalance', *Courier-Mail*, 12 September 2003, 19, at 15 October 2003. According to Margaret Wenham, those leading the attack were NSW MPs Alan Cadman and Roger Price and Tasmanian MP Harry Quick. Wenham suggests that the 'committee was not so much inquiring as pursuing an agenda.'

[28] See comments in Mottram, above n 24 quoting Geoff Greene as saying 'Cabinet sets policy and Attorney-General's will do what it's told. I think it's possible we'll have legislation before Christmas. I think we have very good odds of success.'

[29] House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) at 29 December 2003. See [2.35]. See also [2.43], where the Committee expresses the view that 50/50 shared residence or physical custody should always be the starting point for negotiation.

that 'the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time.' The full text of the report makes the Committee's expectation — that shared residence will become the norm — clear.[30] The key recommendations in the report are as follows:

- that Part VII of the *Family Law Act* 1975 (Cth) be amended to provide a clear rebuttable presumption of equal shared parental responsibility;
- that Part VII be amended to provide a clear presumption against equal shared parental responsibility where there is entrenched conflict, family violence, substance abuse, or child abuse including sexual abuse;
- that Part VII be amended to provide that its objects are to ensure that children receive adequate and proper parenting and that parents have the opportunity for meaningful involvement in their children's lives to the extent consistent with their best interests, to define parental responsibility, to clarify that each parent may exercise parental responsibility when the child is actually in his or her care subject to any court orders and the need to consult, to require specific orders to each parent following litigation, and to require the court to make specific orders;
- that Part VII be amended to remove the language of residence and contact and replace them with family friendly language such as parenting time; and
- that Part VII be amended to require mediators, counsellors and solicitors working with parents to whom the presumption of equal shared parental responsibility applies to assist them to develop a parenting plan, to require the court to consider its terms in making orders, to require mediators, etc to encourage parents to consider a starting point of equal time shared parenting where practicable, and to require the court to consider substantially shared parenting time in cases where each parent wishes to be the primary carer.[31]

While the Committee also made numerous procedural recommendations, the most significant was for the establishment of national statute-based non-adversarial Families Tribunal to decide disputes about shared parental responsibility, future parenting arrangements and, by the agreement of the parents, property matters.[32] The panel would be comprised of a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member, and the specific mandate was for child-inclusive simple procedures adhering to natural justice. News reports suggest that this aspect of the Committee report is

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[30] *Every Picture Tells a Story*, above n 29 [2.38].
[31] *Every Picture Tells a Story*, above n 29.
[32] *Every Picture Tells a Story*, above n 29, Recommendation 12.

likely to be rejected by the Prime Minister.[33]

The overall pattern of recommendations represents a classic response to a risk society panic. The substantive recommendations, particularly the introduction of a rebuttable presumption of equally shared parental responsibility and the proposed 'object' of ensuring that parents have an opportunity for meaningful involvement in their children's lives respond to the pervasive angst over the 'absent father' and over masculinity, specifically a masculinity unmoored from the 'civilising' influence of fatherhood. The first is, in essence, a recommendation that Parliament make explicit what is already implicit in Part VII — that parental responsibility is not changed by separation or divorce unless a court order provides otherwise. The second recommendation suggests that parents have a right to be involved in their children's lives. This proposal is potentially significant. To the extent that couples negotiate parenting arrangements in the shadow of the law, the insertion of an object aimed at ensuring 'meaningful involvement' can be read as a statement that current patterns of post-divorce residence do not permit meaningful involvement and that these patterns should change. Recommendations treating equal time shared parenting as a starting point for negotiation or judicial decision making reinforce this perception.

Particularly interesting, when the report is read as both a response to an alleged 'crisis of masculinity' and an attempt to recuperate fatherhood as the core of 21st century masculinity, is the recommendation rebutting equally shared parental responsibility where there is evidence of family violence, substance abuse, or child abuse. On one level, this recommendation 'fleshes out' the operational conception of fatherhood and signals a shift from the legal/genetic and the financial to the relational. While it has angered the fathers' rights movement,[34] it is a clear statement of the value of a particular form of nurturing fatherhood and a statement that violence and abuse are incompatible with nurture. That it is also a response to mounting evidence that following the 1996 reforms interim contact orders were made in favour of violent contact parents despite the risk to residence parents is undeniable. In the context of a risk society panic inputs from different pressure groups are often not carefully and objectively evaluated, but simply managed and taken up where feasible.

Why Now? – The Timing of the Inquiry

Given that the current legal regime poses no barrier for couples wishing to adopt equal time shared care arrangements consensually, and the

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[33] Annabel Crabb, 'PM likely to reject custody tribunal', *The Age*, 20 January 2004, 2.

[34] See, eg, Sue Price, *CSA Report Fails Australian Fathers and Their Children* (2004) Men's Rights Agency <http://www.mensrights.com.au/index.php?article_id=180 > at 25 February 2004.

evidence suggests that only a tiny minority of Australian families have chosen this pattern,[35] it is important to ask why these proposals have surfaced and gained substantial political support at this particular time. Existing legal arrangements treat joint parental responsibility (in essence what is termed joint (legal) custody in other jurisdictions) as the norm but encourage parents to settle their own arrangements within a framework that provides that each child has a right to contact with its genetic and/or legal parents and with relevant others.

Proponents of equal time shared parenting such as Janet Albrechtsen conflate outcomes in fully defended family court hearings, typically involving high conflict families, with negotiated outcomes culminating in consent orders filed with the court after negotiation between the parties or their solicitors. For this latter group of parents, a move to a rebuttable presumption of shared care (a regime similar to what is termed joint physical custody in other jurisdictions) represents a significant diminution in parental choice and, more importantly, an apparent rejection of the principle that the optimal arrangements are those which are in the best interests of the children involved and ought not be predetermined by legislative preference. Such a presumption (while rebuttable) presumes that equal time shared care arrangements are in the best interests of the children unless determined otherwise by a court of law and requires a parent seeking to challenge the presumption to demonstrate that such an arrangement will not, in the particular case, advance the interests of those particular children.

While some couples will, as at present, negotiate alternative arrangements among themselves it is important to note that the introduction of such a presumption will, given present patterns of residence, decisively shift the balance of power towards fathers, a process which commentators such as John Dewar have argued began with the 1996 reforms.[36] More significantly, given that only a tiny minority of high conflict couples currently have recourse to the Family Court to settle parenting arrangements, it will also have its greatest impact on that sub-set of the divorcing population who are, arguably, least able to co-parent successfully.

While superficially radical, the proposals before the Committee were, in fact, retrograde. During the 19th century and the early part of the 20th century, the legal presumption was, as is well known, that the children's legal father was the appropriate physical custodian. This presumption was later modified by the presumption that, unless she was 'unfit', the mother was the appropriate custodian for young children (up to about age 7), and later still by a maternal preference — which both reflected the social reality that most care work was performed by women and tied the

[35] Relevant statistical information will be discussed in the next section of this article. See the text and the sources cited in n 45 below.

[36] John Dewar and Stephen Parker 'The Impact of the New Part VII' (1999) 13 *Australian Journal of Family Law* 96.

fitness of the mother as custodian to her conduct as wife thus affirming male control.[37] In each case, the legal regime made particular assumptions about the appropriate post-separation parenting arrangements and the legal onus to establish that these assumptions were inappropriate fell on the party wishing to disturb the presumption.

Mandating fully shared care as the starting point for negotiation does far more than ensuring a continuing role for the father in divorced families, as argued by proponents. It also requires ongoing negotiation between separated parents, effectively compels relatively compatible parenting styles, and affords those parents who are inclined to maintain ongoing oversight (and potentially control of) the conduct of a former partner an ideal mechanism through which to do so.

Even the more modest recommendations in the report tabled in Parliament, despite their apparent even-handedness, have the potential to constrain the conduct of mothers to a far greater extent than that of fathers, given that most children reside with their mothers post-separation (through consent arrangements). Fathers remain free to avail themselves of contact only if they choose; mothers can be compelled to facilitate contact. Carol Smart suggests that such

> principles have in fact introduced a new marriage contract by another name. This new marriage contract ends the possibility of confluent love for mothers (although not necessarily for fathers) – by which I mean that it ends the possibility of divorce finishing a relationship with a person one no longer loves or cares for.[38]

The Committee Recommendations: More Questions than Answers

Potentially, as will be argued subsequently, both the principles expressed in the terms of the inquiry and those ultimately embodied in the recommendations are likely to drive far more parents away from negotiated private arrangements for children into various forms of court determined parenting arrangements. If conflict arises, the presence of statutory presumptions provides an incentive for the parent either seeking to maximise their contact or to play a greater role in decision making to pursue litigation rather than private negotiation. While the Committee's recommendations are somewhat more moderate than the

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[37] For a general history of the relevant arrangements see Sandra Berns 'Living under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Cases' (1991) 10 *University of Tasmania Law Review* 233 and Sandra Berns, 'The Ties that No Longer Bind: Tension and Contradiction in Family Law' (1999) 21 *Adelaide Law Review* 19.

[38] Smart, above n 20, 315. Remarkably, in Australia, this 'new marriage contract' applies to all parents, whether formerly legally married, living in a defacto relationships, or casual partners.

terms of the inquiry foreshadowed, they have the potential for considerable mischief. Because the recommendations move more than half way towards the ultimate goal of shared care, we believe that they will increase pressure for shared care in those segments of the community favouring it and that it will remain on the agenda for a considerable period. For this reason, much of what follows will explicitly canvass the arguments for and against shared care and seek to locate the debate in the current context. As noted above, we believe that the incorporation of statutory presumptions, even in the modest form recommended by the Committee, is likely to fuel litigation rather than minimise it, not least because they seemingly rule out negotiation as an option for a parent seeking to rebut them.

Some of the reasons why, in the current social and political climate, an inquiry into the advantages of shared care has appeal for political decision makers were set out above. In an era of pervasive social and economic change and persistent efforts to portray 'the family' as uniquely under threat, the mantra of shared care has obvious appeal. It is facially egalitarian (after all, both parents are treated in a formally equal fashion), mirrors alleged changes in parenting practices over recent decades and, most importantly, in an era when the importance of 'responsible fatherhood' is regularly asserted, it is alleged to ensure that children have equal access to and input from both mother and father following separation and divorce.[39] It has been suggested that the desire for a 'clean break' following divorce is now characterised as 'a form of selfish individualism generated by a combination of moral decline and feminist inspired self-interest'[40] pursued by an *'implacably hostile parent'*,[41] almost invariably the mother.

Drawing on several years of a media-fuelled 'risk society panic' about masculinity and the suffering of 'good fathers' unjustly deprived of access to their children and driven to suicide (and sometimes murder) by a 'feminist' Family Court[42] the recent inquiry is an obvious way of defusing populist anxiety over the future of 'the family' and an ideological platform whose time has come. Caution is, however, warranted. How have these claims succeeded in capturing the popular mood and securing the ongoing attention of political elites? One persuasive answer is that put forward by Coltrane and Hickman. They suggest that activist groups representing both extremes of the debate routinely rely upon 'implied warrants' to elevate their claims to the level of 'moral imperatives'. According to Coltrane and Hickman:

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[39] The Committee's ultimate recommendation, that a presumption of equal shared parental responsibility be incorporated in Part VII also meets this goal and, against the background of a risk society panic, has the advantage of creating the appearance of action whilst in fact doing very little.

[40] Smart, above n 20, 317.

[41] Ibid.

[42] See the references cited above, n 13 and n 15.

> Warrants are statements that explain why a social problem deserves attention. They bridge the gap between grounds and conclusions. Warrants allow claims makers to demand that something be done to correct the injustices typified by the horror stories. Warrants ... [are] advanced as self-evident truths with which any reasonable person would agree.[43]

Two such 'implied warrants' have featured prominently in the ongoing debate over family law. The first is one of the foundational principles of 'soft patriarchy' — specifically the essential role of the father in parenting. The second, which assumed the status of a given by the late 1980s, is the need to reduce the poverty of female sole parents and their children. As the Australian welfare state 'downsized' and social welfare payments including those for sole parents were targeted as unsustainable the demand that 'absent parents' or more precisely absent fathers, support the children of failed relationships became a leitmotif. Despite the very different origins of these demands, Coltrane and Hickman suggest both are grounded in a conservative gender ideology, one which increased men's power and reaffirmed women's dependence (both social and economic) upon the male (read patriarchal) order.[44]

The implied warrants that are pivotal in the current risk society panic have already been discussed. For present purposes, most directly relevant is the assertion, long a staple of fathers' rights groups, that equal time shared care is the optimal post-divorce parenting arrangement and that it has the potential to reduce divorce rates. The following section of this paper attempts to probe the factual evidence in the areas of greatest controversy and to provide a balanced view. Against this background we will attempt to answer the following questions. What do we know about the factors likely to make shared care successful? What are the characteristics of parents voluntarily opting for shared care? How widely are these characteristics shared in the Australian divorcing population? What empirical evidence is there that shared care is, as asserted, the optimal post-divorce parenting arrangement and how reliable is the evidence put forward?

What characteristics are needed to make shared care successful?

We argue that shared care is a model of post-separation parenting that necessitates particular parent characteristics and financial resources, making it difficult to extrapolate to the broader separating and divorced population. In Australia, post-separation shared-care is currently quite

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[43] Scott Coltrane and Neal Hickman, 'The Rhetoric of Rights and Needs: Moral Discourse in the Reform of Child Custody and Child Support Laws' (1992) 39 *Social Problems* 400, 406.

[44] Ibid 417.

rare.[45] A recent report by the Australian Institute of Family Studies (AIFS) presents a detailed review of national and international research findings on shared care.[46] Research suggests that parents who successfully share care are distinguished from the broader divorcing population by highly specific relational and financial characteristics. These will be summarised in the paragraphs that follow.

Parents who successfully share care typically have a cooperative and businesslike relationship.[47] They are careful to support and not undermine each other, regardless of their own feelings. They are focused on the children's needs, and work assiduously to ensure that their children are not involved in any relationship issues that they might have.[48] In short, they are parents who are able to maintain a cordial relationship and give priority to the interests of their children over their own individual interests and needs. Such a post-separation parental relationship is likely to be beyond many parents, most particularly in the short-term, both because of high levels of conflict and violence and because many of these parents will not yet have had time to work through their own feelings and relationship problems post divorce. Research suggests that where the decision to separate was not consensual, the parent who wished to continue the relationship often will go through an extended period of mourning before adjusting to the new reality. During this transition period, such a parent may well have great difficulty isolating his or her interests from those of the children, and is likely to presume that furthering his or her individual interests will necessarily advance those of the children.[49]

Research by the Australian Institute of Family Studies (AIFS) suggests

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[45] Australian Bureau of Statistics (ABS), *Family Characteristics, Australia*, Cat No 4442.0 (1998). Less than 3 per cent of children living with a natural parent had shared care arrangements in 1997. Patrick Parkinson and Bruce Smyth, 'When the Difference is Night and Day: Some Empirical Insights into Patterns of Parent-Child Contact After Separation' (Paper presented at the 8th Australian Institute of Family Studies Conference, Melbourne, 12–14 February 2003). Parkinson and Smyth estimate that shared care occurs in about 10 per cent of all separated households, and in about 16 per cent of households where contact is occurring. While these respective estimates rely on a different definition of 'shared care', they are both based on national random samples, and the conclusion is the same — shared care is adopted by a small minority of separating and divorcing families.

[46] Parkinson and Smyth, above n 45.

[47] Alice Abaranel, 'Shared Parenting after Separation and Divorce: A Study of Joint Custody' (1979) 49(2) *American Journal of Orthopsychiatry* 320; M Brotsky, Susan Steinman and Steven Zemmelman, 'Joint Custody Through Mediation: A Longitudinal Assessment of the Children' in Jay Folberg (ed), *Joint Custody and Shared Parenting* (2nd ed, 1991) 167; Isolina Ricci, *Mom's and Dad's House: Making Shared Custody Work* (2nd ed, 1997); Bruce Smyth, Catherine Caruana and Anna Ferro, 'Some Whens, Hows and Whys of Shared Care: What Separated Parents Who Spend Equal Time with Their Children Say About Shared Parenting' (Paper presented at the Australian Social Policy Conference, Sydney, 9–11 July 2003) 21–2.

[48] Ricci, above n 47; Smyth, Caruana and Ferro, above n 47, 21–2.

[49] In this context it is significant that men appear to have significantly greater difficulty adjusting to separation and divorce than do women, particularly when, as is usually the case, the separation was initiated by the woman. See Peter Jordan, 'The Effect of Marital Separation on Men — 10 Years On' (Research Report No 14, Family Court of Australia, 1996).

that violence between men and women is not the exception for those who separate and divorce but the norm. Data from a national random sample finds that around 30 per cent of divorced women and 5 per cent of divorced men report having been the victim of severe and ongoing violence during the marriage and/or post-separation.[50] When experiences of less severe family violence are taken into account these rates increase to include the majority of divorced women and men surveyed.[51] These findings suggest that conflict and violence provide the context in which many parents negotiate (legally and otherwise) the parenting aspects of separation and divorce. They suggest that not only is the original proposal of equal time shared care untenable for a majority of families, but also that the somewhat more moderate proposals flagged in the report share in these difficulties.

The Committee report attempts to strike a balance between competing perspectives. While it recommends enacting a rebuttable presumption of equal parental responsibility, and makes it clear that equal time shared care should be the starting point in negotiations and judicial proceedings, it also recommends enacting a presumption against equal parental responsibility where there is entrenched conflict, family violence, substance abuse or the physical or sexual abuse of children. In addition, it specifically recommends that agreements and judicial decisions spell out the exact division of responsibility between parents, thus acknowledging that for many families even shared parental responsibility is not feasible without clear lines of authority.[52] Given the context of its proceedings, the conflicting messages in the report are predictable, clearly reflecting the impact of 'implied warrants' from various interest groups.[53]

If fully shared parental responsibility is difficult for many parents, equal time shared care is not only dependent on the parents' ability to cooperate for the benefit of the children; it is dependent on the financial capacity of both parents to establish two households adequate to provide a residence for the children for extended periods. For the arrangement to be successful there must be a reasonable proximity between the two households and between the households and the children's school, indeed one study found that in most shared care households parental residences are a short walk apart.[54] This geographical proximity is essential to facilitate the children's access to school, extra curricular activities and peer group

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[50] Grania Sheehan and Bruce Smyth 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* 102, 109.

[51] Ibid 109. When broadly defined, a majority of women (65 per cent) and a majority of men (55 per cent) reported experiencing some form of physically abusive or threatening behaviour during the marriage and/or post-separation.

[52] There is also a suggestion of this in recommendation 4, which requires the decision maker to specify in some detail the manner in which parental responsibility is to be shared. See *Every Picture Tells a Story*, above n 29.

[53] See n 43 above and the associated discussion in the text.

[54] Michael Benjamin and Howard H Irving, 'Shared Parenting: Critical review of the research literature' (1989) 27 *Family and Conciliation Courts Review* 21.

interaction and to minimise dislocation and anxiety on their part.[55] The alternative patterns sometimes proffered as ways around these difficulties by activist groups such as the Joint Parenting Association,[56] such as the children spending alternate years with each parent, may satisfy the desires of one or both parents, but only at the cost of significant dislocation for the children who will inevitably be deprived of the opportunity of forming normal peer group relationships.

How widely are these characteristics shared?

In contemporary Australia, the reality is very different from the financial stability and flexibility needed for successful shared parenting. For the great majority of couples, separation can lead to a financial crisis because the available resources are insufficient to meet the costs of two newly formed households.[57] At the point of separation shared care is often a costly arrangement and out of reach for many families. Research by the AIFS suggests that on separation many families have most of their assets tied up in the family home and superannuation with high levels of debt, and little accessible cash.[58] This scenario is very different from that characterising successful shared care arrangements in other jurisdictions, which typically involve two parents with secure and stable employment and sufficiently substantial incomes to permit either purchasing or renting two properties adequate to provide accommodation for a parent and his or her children. While it is sometimes argued that a reduction in the quantum of child support owing will free up adequate resources to establish and maintain a second family residence, it seems unlikely that this could be done without compromising the financial welfare of the other parent and the children.

Housing costs are unlikely to diminish substantially. While there will be some reduction in expenditures for food and other consumables in individual households, and perhaps (although not necessarily) in child care expenditures in the case of an employed parent, these reductions are unlikely to offset the loss of child support income. We have been unable to locate any empirical research, in Australia or elsewhere, that tests the oft-made assertion that shared care reduces the cost of care for a former resident parent. Indeed, Alice Mills Morrow, a family economics specialist at Oregon State University in the United States, suggests that shared care substantially increases the overall costs of caring for children.

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[55] Smyth, Caruana and Ferro above n 47, 21.

[56] See Murray Mottram, 'Report card plan for child cases', *The Age*, 4 August 2003, 5.

[57] Bruce Smyth and Ruth Weston 'Financial Living Standards After Divorce: A Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, 2000) 1.

[58] Grania Sheehan, 'Financial Aspects of the Divorce Transition on Australia: Recent Empirical Findings' (2002) 16 *International Journal of Law, Policy and the Family* 95, 103.

According to Morrow, both housing and transportation costs increase and some duplication of equipment is needed, there being a need to duplicate those items that the children require on a daily basis, including play pens and cribs for younger children and computers, books and sporting equipment for older children. While in some cases it may be practicable to move these items between residences, particularly where the residences are in extremely close proximity, in most cases it will be simpler and less stressful to duplicate them, imposing substantial costs.[59]

Research in the United States suggests that successful shared care arrangements typically involve relatively affluent families in which both parents are employed with above average incomes in family friendly workplaces, enabling them to stagger working hours and minimise child care costs.[60] Typically both parents are well educated, highly motivated as parents, financially secure and employed in professional or semi-professional fields. Often, these are couples that substantially shared care work responsibilities while the relationship remained intact, and the shared care arrangements adopted following separation (and often over substantial opposition) represent a continuation of the pre-divorce arrangements. The Australian data suggest that the tiny minority of Australian parents with shared care arrangements have very specific characteristics, distinguishing them from the broader divorcing population. Like their overseas counterparts, they are typically tertiary educated, own their own homes, live in close proximity to a former partner and a significant number are able to work from home. They are less likely to have repartnered than other separated or divorced couples. Significantly, mothers in shared care arrangements were significantly more likely to be in full time employment than other mothers (married or divorced), emphasising the link between successful shared parenting and relative affluence.[61]

The picture for most separating Australian couples is very different. Australian women are still far more likely than their American counterparts to withdraw from the workforce while their children are young or to restrict themselves to part-time casual employment, often because the welfare/taxation interface makes paid work non-viable

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[59] Alice M Morrow, 'Shared Custody: Financial Considerations' FS 324 February 1995, Oregon State University at Corvallis <http://eesc.orst.edu/agcomwebfile/edmat/FS324.pdf> at 5 October 2003.

[60] Jessica Pearson and Nancy Thoennes, 'Custody After Divorce: Demographic and Attitudinal Patterns' (1990) 60 *American Journal of Orthopsychiatry* 233; Smyth, Caruana and Ferro above n 47, 21–2.

[61] Data sourced from Wave 1 of the Melbourne Institute of Applied Economic and Social Research, Australian Council for Educational Research and Australian Institute of Family Studies, *Household, Income, and Labour Dynamics in Australia (HILDA) Survey*, suggests that 46.6% of mothers and 67.5% of fathers with shared care arrangements are in full time employment. These figures should be compared with those for resident mothers with some contact where only 23.4% are in full time employment. Almost 3 times as many mothers with shared care arrangements are tertiary educated as for other resident mothers generally. See <http://www.melbourneinstitute.com/hilda/>.

for many married women.[62] While time use studies suggest that men have in recent years increased their participation in care work, the pre-divorce picture typically falls far short of equal time shared care and could be better described as helping with child care rather than assuming responsibility for it. On separation, this pattern is currently replicated, fathers often delegating much of the care work to new partners or female kin while maintaining their role as breadwinners, while mothers rely on benefits or continue with part-time casual work and maintain their marital role as primary parents.

Powerful structural, cultural and legal forces have, in Australia, encouraged men to invest heavily in their breadwinning roles, often equating that role with responsible fatherhood while women have been encouraged by the same forces to remain primarily absorbed in care work, finding in the mother role both their primary identity and their sole source of power and control. Both of these absorptions militate against successful shared care arrangements. Fathers are often unprepared to assume the day-to-day care of children and primary (or shared responsibility) for their physical, social and emotional well being while mothers are often unprepared to relinquish even a part of their central identity and allow their sole source of power and control to be weakened.[63]

Given that post-divorce parenting and financial arrangements tend to mimic those that obtained during the marital relationship, patterns such as those described in the last paragraph tend to persist after separation. Such households are unlikely to have the degree of financial security necessary for shared parenting on an ongoing basis and this picture is born out by Smyth and Weston's research into post-divorce financial and living standards in Australia.[64]

Understanding the relational and financial characteristics of parents who establish and sustain shared care also makes it easy to see why these families are a small and distinctive group.[65] As a consequence, we would argue that the introduction of rebuttable presumption installing equally shared parental responsibility as the default parenting arrangement post-separation and divorce would inevitably cause considerable hardship for parents and children who lack the capacity to sustain it.[66]

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[62] Anne Sommers, 'PM Loads the Dice Against Working Mothers', *Evatt News*, 22 September 2002, Evatt Foundation <http://evatt.labor.net.au/news/111.html> at 19 January 2004. See also Christine Jackman, 'Working a Poor Deal for Battling Mothers', *The Australian*, 24 February 2004, 6.

[63] See the discussion of these issues in William J Doherty, Edward F Kouneski and Martha F Erickson (1998) 60 *Journal of Marriage and the Family* 277, 286–7.

[64] Smyth and Weston, above n 47, 11–12.

[65] Smyth, Caruana and Ferro above n 47, 21. Jessica Pearson and Nancy Thoennes, 'Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments' (1988) 22(3) *Family Law Quarterly* 319.

[66] It is quite possible that one of these consequences would be an increase in attempts by either parent to alienate the children and thus frustrate the shared care arrangement. The late Dr Richard Gardner has, in various writings, argued that a factor pushing vulnerable parents into overtly alienating behaviours has been a threat of the diminution of their

Most of the research cited above is well-known and reasonably readily available, which makes the current push in favor of equal time shared care puzzling as well as problematical, particularly against the backdrop of entrenched government programs and policies designed to support the single income family and which assume that women's labor force participation will be substantially restricted when they have children. Given the lack of support aimed at encouraging women to maintain labor force participation while their children are young, the current push towards shared care seems paradoxical: a move to implement a regime which, to be successful, is predicated on a history of substantial workforce participation and sharing of care work by both parents upon families whose life history prior to separation has been very different. Rather than imposing shared care on families who will struggle to establish and maintain it, government resources would be better spent on programs that build parents' capacity in these two areas prior to marital breakdown and post-separation although this would undoubtedly be a politically less palatable approach and one which might be perceived as undesirably intrusive into entrenched cultural practices.[67]

Does shared care provide optimal outcomes for children?

The appropriateness of shared care also depends to a substantial degree on the needs of the children, the parents' capacity to prioritise these needs, and their skills in recognising and responding to children's changing needs (and desires) at different ages and in different circumstances. Their understanding of appropriate parenting must be child-focused. Child-focused parenting is necessarily sensitive and flexible, evolving in harmony with the needs of the child rather than rigid and imposed by law or mandated by the needs or desires of the parents. For some families this may mean changing the arrangements from shared care to alternative arrangements that better suit the children's needs at particular ages or in particular circumstances.[68] A presumption of joint residence will compromise this flexibility by introducing a new proposition into family law — that shared care is *the* parenting model that accords with the best interests of children,

relationship with their children, and in particular, the threat of litigation. See Richard A Gardner 'Joint Custody is Not for Everyone' in J Folberg (ed) *Joint Custody and Shared Parenting* (2nd ed, 1991) 88, 93, where he argues that 'Joint custody is a terrible compromise for warring parents...Neither parent has power or control, and the children find themselves in a no-man's land exposed to their parent's crossfire and available to both as weapons.'

67 In this context it is relevant that Smart notes that 'at the level of rhetoric the family has been constructed as the one site where change should not occur and where change is seen as positively undesirable unless it is in a backwards direction.' Smart, above n 20, 303.

68 In this context it is significant that Australian data suggests that in the minority of Australian families opting for shared care arrangements most of the children tend to be between 6 and 11, with shared care being rare for other age groups. See HILDA survey, above n 61.

effectively irrespective of their wishes and desires.

Parents and children for whom this model does not fit, whether for economic or for interpersonal reasons, may well perceive themselves as forced to litigate to rebut the presumption and adopt an alternative arrangement. While parents who have successfully maintained a harmonious co-parenting style will be able to reach alternative arrangements consensually, effectively by-passing the legal presumption, parents whose working relationship is less harmonious are likely to be pushed towards litigation because the scope to negotiate an alternative agreement through mediation would be restricted by the legislative presumption. Such parents would be bargaining in the shadow of a legal regime that has replaced a relatively open-ended inquiry into the individualised needs of particular children with a presumption that can only be displaced by expert evidence that shared parenting is not in the best interests of these children at this time, imposing substantial costs on the parties. This would be counter to a fundamental principle laid out in the existing legislation, which also underpins the Family Law Pathways Advisory Group's recommended family law system — that the use of non-adversarial dispute resolution processes to resolve children's matters in family law be a priority.[69]

Likewise, as research into the impact of the 1995 reforms has emphasised, the presence of the legislative presumption is likely to generate a sense of entitlement[70] in parents who desire to spend greater time with their children. Given that statistical data suggests that 75 per cent of non-resident fathers would like more contact[71] and that an 1997 AIFS study suggested that 41 per cent of non-resident fathers wished to change their children's living arrangements (2/3 seeking sole residence and 1/3 seeking shared care) while this desire was not shared by the vast majority of resident mothers (97 per cent)[72], it seems likely that the introduction of a presumption of equal time shared care would both raise the sense of entitlement of non-resident fathers and lead to many legal challenges to existing arrangements. The rather more modest proposals in the Committee report as tabled would undoubtedly have a similar effect if enacted.

Despite claims by interest groups that equal time shared parenting has been shown to be beneficial for children in those jurisdictions that have implemented it, there is scant empirical evidence[73] providing unequivocal

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[69] Family Law Pathways Advisory Group, Commonwealth of Australia, *Out of the Maze — Pathways to the Future for Families Experiencing Separation* (2001).

[70] See Dewar and Parker, above n 36, 102. The authors note that one effect of the introduction of joint parental responsibility was to raise expectations among non-resident parents, encouraging them to demand increased contact and in some cases joint residence.

[71] Data from the HILDA survey as analysed by Parkinson and Smyth, above n 45.

[72] Bruce Smyth, Grania Sheehan and Belinda Fehlberg 'Patterns of Parenting after Divorce: a Pre-Reform Act Benchmark Study (2001) 15 *Australian Journal of Family Law* 114.

[73] Lye has concluded from a review of the scholarly research currently available that no single post divorce pattern is appropriate for all families and that there are substantial risks involved in imposing any legal presumption. See Diane Lye 'Scholarly Research on Post-Divorce Parenting and Child Wellbeing' (Report to the Washington State Gender and Justice Commission, 1999).

support for these assertions, which have assumed the status of moral warrants. While 18 US jurisdictions provide for joint legal custody either by way of presumption (16) or preference (2) these arrangements are not materially different from the presumption of joint parental responsibility in current Australian law. Only 11 of the 16 American states have enacted legislation specifically providing for a presumption of joint legal and physical custody and, of those, only 2 have given the presumption universal application. In the other 9, the presumption applies only where both parents agree and directs the court to award joint legal and physical custody in these circumstances.[74] Only in New York (1999) and Pennsylvania (1998) has anything approaching a universal presumption in favour of shared care been enacted, and there is as yet no empirical research available on the impact of these arrangements on children's well-being. Further difficulties arise because the meaning of joint physical custody is notoriously fuzzy and differs substantially between US jurisdictions. The descriptor joint physical custody can and has been applied to a wide variety of parenting arrangements, ranging from a 10/90 split (roughly equivalent to the symbolic residence/residence orders sometimes made in Australia) to equal time shared parenting.

While there is some evidence that children in joint custody are better adjusted than children in sole custody, the most frequently cited review[75] found few differences between children in joint legal custody arrangements (Australia's current default position) and those in joint physical custody arrangements. The significance of the available data is further compromised by lack of information as to the actual arrangements, given the variability of the living arrangements termed joint physical custody. Most available research on shared care and outcomes for children is based on small samples of parents who voluntarily agreed to joint physical custody despite the absence of explicit legislative directives.[76] A majority of these parents were equally engaged in hands-on parenting before separation and remained so after divorce. Many studies cited as providing evidence in favour of shared care do not make any distinction between joint legal custody and joint physical custody, simply referring to 'joint custody' and contrasting outcomes in joint custody arrangements with those in sole custody arrangements.[77]

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[74] American Divorce Network, *Child Custody Legislation in the United States*, <http://www.americandivorce.net/divorce-statistics/joint-custody-legislation.htm> at 7 August 2003.

[75] Robert Bauserman, 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review' (2002) 16 *Journal of Family Psychology* 91.

[76] Elaine E Maccoby and Richard H Mnookin, *Dividing The Child: Social And Legal Dilemmas Of Custody* (1992).

[77] See, for example, Bauserman n 75 above. Bauserman not only did not distinguish outcomes as between joint legal and joint physical custody arrangements, he failed to define joint physical custody with any precision, and included many arrangements which resemble extensive contact, say 25/75 split.

Even enthusiastic American supporters of shared care such as fathers' rights advocate Sanford Braver have conceded that the present evidence does not support its legal imposition and that equal time shared care may not be in the interests of the children — a view shared by Wallerstein who suggests that children whose 'lives are ruled by rigid time-share arrangements ultimately feel like prisoners deprived of the freedom their peers take for granted'.[78] Overall, the available empirical evidence does not suggest that any one parenting arrangement is sufficiently advantageous to warrant the adoption of a prescriptive model. Instead, the bulk of the evidence suggests that all possible arrangements can yield both positive and negative outcomes and that outcomes are determined by parental capacities and skills and by the practical resources available to support parenting rather than by the structure of parenting arrangements.[79]

In the absence of strong empirical evidence that legally imposed shared care produces beneficial outcomes for children, imposing such a model of post-separation parenting would be out of step with the United Nations' Convention for the Rights of the Child because a statutory presumption of shared care would replace a broad based inquiry into the best interests of the child with a model of parenting which is logistically complex and imposes substantial demands on parents,[80] many of whom are extremely vulnerable as a consequence of the relationship breakdown. For many parents, male and female, added sources of stress, particularly in the first months and even years post-separation, could prove the proverbial straw!

Will shared care diminish litigation?

Given that shared care will challenge the parenting and relational skills of many parents, we believe equal time shared care would increase litigation of children's matters in the Family and Federal Magistrates' Courts. While we are aware that some overseas research has suggested that joint physical custody lowered re-litigation rates,[81] in high-conflict families Brotsky's 1991 study found that of the 47 families in the study of shared physical custody, outcomes in 12 were considered successful, 20 stressed, and 15 failed at the 12 month reassessment.[82] Such findings suggest that even with well-developed intervention strategies, a significant proportion

[78] Sanford Braver (with D O'Connell), *Divorced Dads: Shattering the Myths* (1998) 223–4; Judith Wallerstein, *Unexpected Legacy: A Twenty-Five Year Landmark Study* (2000) 181–2.

[79] See the studies cited in n 47 above. See also Paul Amato and Joan Gilbreth, 'Nonresident Fathers and Children's Well-being: a Meta-analysis' (1999) 61 *Journal of Marriage and the Family* 557.

[80] Michael Benjamin and Howard H Irving, 'Shared Parenting: Critical Review of the Research Literature' (1989) 27 *Family and Conciliation Courts Review* 21, 25.

[81] Deborah Luepnitz, 'A Comparison of Maternal, Paternal and Joint Custody: Understanding the Varieties of Postdivorce Family Life' (1986) 9 *Journal of Divorce* 1.

[82] Brotsky, Steinman, and Zemmelman, above n 47, 167.

of families will ultimately require a litigious resolution. In this context it is important to recognise that in Australia very few children's matters (less than 5 per cent overall) proceed to fully defended litigation. This is not necessarily the case in overseas comparators, making comparisons extremely difficult and unreliable. Any increase in litigation will have resource implications for the government and the Courts. For the Courts it will increase backlogs and waiting times, and reduce the Courts' capacity to resolve matters in a timely and effective manner. In turn, this will create pressure on the government to increase court resources.

Any increase in family law litigation will also affect demand for legal aid. Legal aid for family proceedings is scarce and many applicants are unable to obtain it.[83] Any increase in litigation could lead to a funding crisis,[84] creating pressure on the government to inject more funds into legal aid or face a further, and perhaps unsustainable increase in the number of self-represented litigants. Many, perhaps most, self-represented litigants in family law proceedings are unsuccessful applicants for legal aid.[85] Between 1995 and 1999 approximately 31 per cent of Family Court litigants at first instance were unrepresented at some stage and 18 per cent of litigants on appeal were unrepresented and the number of fully unrepresented litigants at first instance increased steadily.[86] In short, increased litigation will lead to an increase in demand for legal aid in an environment where restrictions on the provision of legal aid do not decrease litigation but simply yields more self-represented litigants.[87]

Family law clients[88] who are refused legal aid have limited funds to outlay for legal services and high needs for legal information and for emotional and practical support.[89] While the Family and Federal Magistrates' Courts have taken a pro-active role in assisting self-representing litigants,[90] judicial officers and judges struggle with a duty to remain impartial while ensuring a fair and just outcome for all parties, including the self represented party. The difficulties faced by self-represented litigants were highlighted in *T v S* (2001) 28 Fam LR 342. Nicholson CJ indicated that victims of domestic violence might be unable to present

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83 Rosemary Hunter, Jeff Giddings and April Chrzanowski 'Legal Aid and Self-Representation in the Family Court of Australia' (Research Report, Socio-Legal Research Centre, Griffith University, 2003). Recent research shows a particular family law funding shortfall in Queensland.

84 Rosemary Hunter, Ann Genovese, Angela Melville and April Chrzanowski, 'Legal Services in Family Law' (Justice Research Centre, 2000).

85 Hunter, Giddings and Chrzanowski, above n 83.

86 Rosemary Hunter, Ann Genovese, April Chrzanowski, and Caroline Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Law and Justice Foundation of NSW, 2002).

87 John Dewar, B Smith, and Cate Banks, 'Litigants in Person in the Family Court' (Research Paper 20, Family Court of Australia, 2000); Hunter, Genovese, Chrzanowski, and Morris, above n 86.

88 Hunter, Genovese, Chrzanowski, and Morris, above n 86.

89 Dewar, Smith and Banks, above n 20.

90 Justice John Faulks, 'Self Represented Litigants — A Challenge' (Project Report December 2000–December 2002, Family Court of Australia, 2003).

their cases unaided, resulting in an unfair trial and stated 'The present legal aid system does not appear to be able to cope with these problems.'[91] While we are aware that other jurisdictions have developed a range of innovative processes intended to assist couples in negotiating shared care and prevent resort to litigation,[92] it must be emphasised that some of the most promising interventions entail years of support and work with the family and carry substantial costs both in development and in implementation.

How can victims of violence be protected?

The Committee recommended that there be a presumption against shared parental responsibility in cases of intense conflict and domestic violence. Commentators[93] on the 1995 reforms have already highlighted the essential paradox embodied in the *Family Law Reform Act* 1995: on the one hand, recognition of the impact of family violence was, for the first time, embedded in the legislation[94] while on the other, the presumption of joint parental responsibility and the presumption of the child's right to contact have meant, in practice, that violence is often discounted at interim hearing level; the child's right to contact taking priority over evidence of violence.[95] Given this evidence, despite our concerns about the overall agenda of the Committee report, and our belief that many of the recommendations rely uncritically upon the 'implied warrants' put forward by the various interests groups who made substantial submissions, the Committee's recognition of the fact that violence and abuse are incompatible with any form of co-parenting following separation represents a positive step.

The importance of developing an effective response to these safety concerns was highlighted in *Out of the Maze: Pathways to the Future for Families Experiencing Separation* — the report of the Family Law Pathways Advisory Group. Recommendation 18 specifies that the safety of children and adults is paramount. Violence and abuse should be screened for at the earliest point of contact with the legal system. Once assessed the family

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[91] *T v S* (2001) 28 Fam LR 342, [202–3].

[92] See Janet R Johnson, 'Developmental threats for children in high conflict separated families: What mediators, mental health and legal professionals need to know' (Paper presented at the Family Mediation Centre Winter School, Melbourne, 13 June 2003); Laurence Moloney and Bruce Smyth, 'Therapeutic Divorce Mediation: What is it, Does it Work and where Might it Take Us?' (Unpublished manuscript prepared for Pathways Forum: Out of the Maze: Steps Towards an Integrated Family Law System, Canberra, 19 June 2003)

[93] See Juliet Behrens 'Ending the Silence, But...Family Violence under the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 37 and Dewar and Parker, above n 36, among others.

[94] *Family Law Act* 1975 (Cth) s 43, ss 68F(2)(g), (i), (j), 68J, 68K, 68R, 68S, and 68T.

[95] See Dewar and Parker, above n 36, 103–4.

would be guided to the most appropriate pathway so that their immediate needs for safety can be addressed.[96] It would appear that recommendation 2 could be interpreted as mandating such screening.

Is a presumption of shared care appropriate in a multicultural society?

In a multicultural society such as Australia, particularly one in which cross-cultural marriages already confront the Family Court system with intractable problems, any move to implement a presumption of shared care must necessarily give thorough and careful consideration to cultural factors. A trawl of the relevant literature reveals an essentially total lacuna in this area; indeed it is difficult to escape the conclusion that both the American and Australian literature have avoided dealing with cultural difference, and the interaction between cultural difference and difficulties in settling residence and contact arrangements. In Australia this is a remarkable oversight given that a cursory survey of reported judgments in parenting cases suggests that an unexpectedly high proportion involve cross-cultural marriages. The literature on outcomes from various post-divorce patterns of parenting also discounts cultural and class differences, although both culture and social class undoubtedly affect parenting practices in intact families and it is reasonable to assume that these differences will persist after separation and divorce.

Without a clear understanding of parenting practices among the different cultural groups in modern Australia, it will be almost impossible to provide culturally appropriate support services to support shared parenting. In the case of many migrant or refugee families there will also be a significant need for the provision of interpreters, both to assist the parents in resolving their differences and to ensure that they are able to plan appropriately. In addition, many such families lack the economic stability seemingly essential for effective shared care arrangements. Such groups are less likely than other Australians to enjoy flexible employment arrangements, to have substantial incomes and to be able to provide two appropriate residences for the children in close geographical proximity. Many are likely to be tenants and, as a consequence are more likely to need to move to alternative accommodation relatively frequently. In addition, some cultural traditions have expectations concerning appropriate male and female roles that make it relatively unlikely that they will be able to negotiate the various issues that are likely to arise as equals and reach a consensual resolution.

A presumption of joint residence will be particularly difficult for Aboriginal and Torres Strait Islander communities, given the high rates

[96] Family Law Pathways Advisory Group, above n 69, Recommendations 18 and 19, 63–8.

of family violence in many such communities, and the incompatibility of the presumption with culturally appropriate patterns of care. Where a former partner is not Indigenous, the presumption may disrupt the child's cultural and social integration, leading to alienation and jeopardising the child's access to his or her cultural heritage and relationship with the Indigenous community.[97] As is well known, Indigenous people remain the most disadvantaged community in Australia. Given the profile of successful shared care families both in Australia and elsewhere, only a small minority of Indigenous families would have the financial, educational and social resources to make shared care feasible, even where cross-cultural issues are not a complicating factor. Where only one partner is Indigenous, common sense suggests that shared care could put the children at substantial risk, not least because the children may well be required to negotiate a different cultural and social milieu in each home and because isolation from their Indigenous extended family for substantial periods would compromise their integration into the Indigenous community and disrupt Indigenous child rearing practices. For these reasons and others, we believe that until more is known about the impact of cultural difference on the success of shared care arrangements and until adequate cross-cultural research is completed any move in the direction of a statutory presumption of shared care is premature, whether in the form originally considered by the Committee or in the form that emerged in the final report.

Conclusion

As argued earlier, pervasive dis-ease over masculinity, a dis-ease sufficiently profound to be labelled a 'crisis of masculinity' by Opposition Leader, Mark Latham, has, over about the last decade coalesced into a risk society panic. At the outset of this paper, we sought to frame the recent Joint Committee inquiry into shared parenting and the Committee's report as an attempt to manage a risk society panic over masculinity and fatherhood and to minimise the risk that the government will be perceived as ineffectual and unwilling to intervene as major institutions[98] are captured by morally corrupt forces.

As set out above, both the terms of reference of the Committee and its ultimate report focus upon what might be termed a moral imperative, the absolute necessity of reinserting fathers into families following separation and divorce. While the proposal for equal time joint custody has been substantially modified and what remains is a recommendation

[97] For a discussion of some of the issues see Stephen Ralph, 'Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12 *Australian Journal of Family Law* 140.

[98] The chief targets are, of course, the Family Court and the Child Support Agency.

for a presumption of equal parental responsibility, the shadow of that proposal animates many of the substantive recommendations, for example, the recommendations that mediators, counsellors and legal advisors assist clients to consider a starting point of equal time where practicable and that courts consider substantially shared parenting in all cases where each parent wishes to be the primary carer.[99]

While there are subsidiary foci, for example, recommendations 11 and 12 propose a 'shop front' single entry point into the family law system and a national statute-based Families Tribunal, and these subsidiary foci come close to suggesting that the Committee was persuaded by those who argued that existing institutional structures had been captured by particular, father unfriendly, interest groups, the Committee's overall response takes on board the clearest moral warrants — that equally shared responsibility is an unproblematic good, that family violence and abuse is an unproblematic evil and that equally shared care following separation is the ideal arrangement, although not universally feasible.

As with the Committee report, the political response has been muted. While the Prime Minister has not embraced the proposed 'shop front' entry point and Families Tribunal[100] he has indicated that he finds some of the Joint Committee proposals 'interesting'. Both the approach taken by the Committee and the cautious political response are classic responses to a risk society panic — seeking to deflect unreasonable expectations while minimising political fall-out.

The community and professional response to the Committee report suggest that while immediate pressure upon government to take decisive action may have been defused by the hearings process and by the fairly cautious and moderate report ultimately tabled, the matter is likely to remain on the political agenda in Australia as in other jurisdictions. For this reason, we believe that it remains important to canvass the evidence as to the benefits of shared parenting and to attempt to unpack the moral warrants which are often substituted for evidence and debate. While we believe that the desire to increase the role of fathers in caring for children is an important and praiseworthy policy direction as noted earlier we find it puzzling that this policy agenda is not extended to all Australian families rather than apparently being triggered by separation or divorce. Although shared parenting can benefit both parents and children, we believe that this model is unlikely to become the norm because of:

- the large number of families who lack the capacity to establish and maintain shared care;
- the absence of clear empirical evidence supporting the assertion that shared care is in the best interests of all Australian children; and
- and the resource implications for government and the courts.

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[99] *Every Picture Tells a Story*, above n 29, recommendation 5.
[100] See above n 33.

Given the fact that some form of shared care remains firmly on the political horizon, it remains important to address the available evidence and to canvass the arguments for and against shared parenting. Attempts at family law reform have, over the last decade, become a given. We have explored some of the reasons why this is so, and located the persistent dis-ease over family law in the context of a risk society panic over masculinity and an attempt to recuperate 'proper', that is, relational and nurturing fatherhood as a way to avert the perceived 'crisis of masculinity'. The emphasis upon fatherhood as essential and as a uniquely masculine practice elevates fatherhood and the role of the father within the family dramatically; indeed one might describe the effect as the affirmation of a 'new patriarchy'! As Albrechtsen noted, if fatherhood matters, then every boy (and indeed, every man) matters.[101]

[101] See above n 21 and the accompanying text.