

# Equal Shared Parental Responsibility and Children's Rights in Australia

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- 1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1) ('CRC').
- 2 *Family Law Act 1975* (Cth) s 61DA(1) ('FLA').
- 3 *Ibid* s 61DA(2).
- 4 Philip Alston, 'Foreword' in Philip Alston and Glen Brennan (ed), *The UN Children's Convention and Australia* (The Human Rights and Equal Opportunity Commission, 1991) iii.
- 5 John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33(2) *Melbourne University Law Review* 579, 585 ('Judging the Judges').
- 6 Paula Fass, 'A Historical Context for the United Nations Convention on the Rights of the Child' (2011) 633(1) *The Annals of the American Academy of Political and Social Science* 17, 17.
- 7 Didier Reynaert, Maria Bouverne-De-Bie and Stijn Vandeveld, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16(4) *Childhood* 518, 521.
- 8 *CRC* (n 1) art 3(1).
- 9 *Ibid* art 3(2).
- 10 Tobin, 'Judging the Judges' (n 5) 585–6.
- 11 Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 44.
- 12 Lisa Young, 'Mature Minors and Parenting Disputes in Australia: Engaging with the Debate on Best Interests v Autonomy' (2019) 42(4) *UNSW Law Journal* 1362, 1382.
- 13 Editorial, 'A Lexicon for Research on International Children's Rights in Troubled Times' (2019) 27 *International Journal of Children's Rights* 595, 596.
- 14 *FLA* (n 2) s 61DA.

## I Introduction

The United Nations *Convention on the Rights of the Child* ('CRC') has made it unequivocally clear that promoting the best interests of the child should be a primary consideration in decision-making regarding the wellbeing of children.<sup>1</sup> Australia has arguably gone further by making the best interests of the child as the paramount consideration under s 60CA of the *Family Law Act 1975* (Cth) ('FLA'). However, the idea of promoting the best interests of the child is a contested field which varies based on culture and values. In Australia, the paramountcy principle is statutorily understood to mean that the best interests of the child are promoted by a legal presumption of equal shared parental responsibility.<sup>2</sup> The presumption does not apply if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.<sup>3</sup> This article shall explore the rise of parental responsibility in Australia, particularly the presumption of equal shared parental responsibility and children's rights.

## II The Australian Ratification of the CRC

The *CRC* was adopted by the United Nations General Assembly on 20 November 1989 and was ratified by Australia on 17 December 1990.<sup>4</sup> The drafting and adoption of the *CRC* demonstrated the emerging awareness and promotion of children's rights.<sup>5</sup> The *CRC* sets forth the rights and needs of children universally, promoting a commitment to both children's wellbeing and rights.<sup>6</sup> The *CRC* is quite comprehensive in scope, affording 'provision, protection and participation' for children's rights.<sup>7</sup> Article 3(1) of the *CRC* states, '[i]n all actions concerning children ... the best interests of the child shall be a primary consideration'.<sup>8</sup> This is accompanied by art 3(2) which stipulates that the rights and duties of parents, legal guardians or other responsible caregivers are to be taken into account in decision-making for children.<sup>9</sup>

The model of rights given to children recognises that children are vulnerable and developing in nature, but they are entitled to the right to have their interests protected by virtue of their humanity.<sup>10</sup> These rights create obligations owed to children, typically by parents who become 'duty bound to protect or promote certain interests of the right-holder'.<sup>11</sup> Children should be protected from serious harm, but views formed by a mature minor should be respected.<sup>12</sup> To enable children to exercise their own decision-making promotes not only the protection of children, but also their participation in asserting their rights.<sup>13</sup> Decisions regarding parenting orders are made in the best interests of the child with parental responsibility starting from a procedural presumption of equality.<sup>14</sup> The principles of the *CRC* have been adopted into Australian domestic legislation and given effect

through the paramountcy principle found in pt VII of the *FLA*, as the *CRC* is not given separate consideration under Australian law.<sup>15</sup>

### III The Rise of Parental Responsibility in Australia

The *Family Law Reform Act 1995* (Cth) (*FLRA*) introduced the concept of parental responsibility.<sup>16</sup> Under the reform, children had the 'right to know and be cared for by both parents'.<sup>17</sup> One of the main aims was to stop children being viewed as property of their parents in heated custody disputes, thus juxtaposing the rights of children with the responsibilities of parents.<sup>18</sup> In the years following the 1995 amendment, the evidence seemed to point towards little change in practice as the majority of child-rearing and caring work was still being undertaken by mothers.<sup>19</sup> Although there was a shift towards recognising the legal status of both parents as caregivers, many fathers did not attempt to become significantly involved in their children's lives.<sup>20</sup> The majority of parents who entered into shared parenting agreements did so without reference or even knowledge of the *FLRA*.<sup>21</sup> The 1995 amendment was also found to have been used by the non-resident parent to harass or control the resident parent because of the exploitation of continuing parental responsibility.<sup>22</sup> This concern has been articulated in recent years, whereby the legal presumption of equal shared parental responsibility leaves open almost 'endless possibilities of conflict, disagreement, power and control'.<sup>23</sup>

In 2003, the House of Representatives Standing Committee on Family and Community Affairs was formed to inquire into matters relating to parenting orders and arrangements.<sup>24</sup> The inquiry was in response to the widespread dissatisfaction with the family law process, particularly the negative effects that adversarialism had on families during litigation.<sup>25</sup> Despite data showing a significant increase in the number of parents who could not agree about the care of their children since the 1995 amendment, the movement towards shared parenting was desired.<sup>26</sup> The parents generally interested in shared parenting are the ones most likely to co-operate and least likely to use the family law system to solve their dispute.<sup>27</sup> Conversely, the sort of parents that are likely to use the family law system are less likely to cooperate on shared parenting.<sup>28</sup> The Committee recommended a rebuttable presumption to be implemented in favour of equal shared parental responsibility.<sup>29</sup> This is reflected in s 61DA(1) of the *FLA*. They also recommended a presumption against equal shared parental responsibility in cases of 'entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse'.<sup>30</sup> This is reflected in s 61DA(2) of the *FLA*, with parents also able to rebut the application of the presumption.<sup>31</sup> The Committee rejected a legal presumption for equal time because of concerns over a 'one-size-fits-all' model to the wide diversity of Australian families and their care arrangements.<sup>32</sup> The incorrect assumption that equal time is derived from the presumption of equal shared parental responsibility has led to much of the contention surrounding the presumption.<sup>33</sup>

### IV Equal Shared Parental Responsibility in Australia

Introduced on 1 July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) created a presumption of equal shared parental responsibility with the aim for both parents to be involved in their children's lives after separation.<sup>34</sup> The provisions were inserted into pt VII of the *FLA*, which provides the court with a wide and largely discretionary power to make orders about parental responsibility, the care and living arrangements of children, and any other parenting orders it deems relevant to a child's welfare.<sup>35</sup> There are often broader issues that may affect the realisation of children's rights, particularly the interests of parents.<sup>36</sup> There is potential for a winning mentality to result based on which parent is perceived to win the most rights held over the child.<sup>37</sup> This is heightened by the adversarial process of the Australian legal system. With the introduction of the presumption, it has promoted the rhetoric of parental responsibility with parents at the centre.<sup>38</sup>

The Commonwealth Parliament's intention behind the presumption was to 'change the culture of family breakdown from litigation to cooperation', with children having an undeniable right to know both parents.<sup>39</sup> However, the amendments required parents to participate in often litigious family dispute resolution meetings to resolve disputes about the care of children.<sup>40</sup> The amendments also sought changes aimed at protecting children from harm and family violence.<sup>41</sup> Some scholars have

- 15 *Ralton v Ralton* [2017] FamCAFC 182, [18].
- 16 *Family Law Reform Act 1995* (Cth) pt VII div 2 ('*FLRA*').
- 17 *FLA* (n 2) s 60B(2)(a).
- 18 Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Parliamentary Library, Australian Institute of Family Studies, December 2009) 8.
- 19 Helen Rhoades, Reg Graycar and Margaret Harrison, 'The Family Law Reform Act 1995: The First Three Years' (2001) 15(1) *Australian Family Lawyer* 1, 1.
- 20 *Ibid.*
- 21 *Ibid* 1–2.
- 22 *Ibid* 3.
- 23 Reg Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13(1) *Theoretical Inquiries in Law* 241, 267.
- 24 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* (Report, 29 December 2003) ('*Every Picture Tells a Story*').
- 25 Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, 1 March 2019) 68 ('*Family Law for the Future*').
- 26 Rhoades, Graycar and Harrison (n 19) 253.
- 27 *Ibid.*
- 28 *Ibid.*
- 29 *Every Picture Tells a Story* (n 24) 19.
- 30 *Ibid* 41.
- 31 It should be noted that s 60CC(2A) of the *Family Law Act 1975* (Cth) was introduced to give greater weight to the protection of children from harm and family violence as a competing primary consideration in determining the child's best interests over the benefit to the child of having a meaningful relationship with both parents: *Family Law Act 1975* (Cth) s 60CC(2). This section was introduced as a result of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
- 32 Helen Rhoades and Susan Boyd, 'Reforming Custody Laws: A Comparative Study' (2004) 18(2) *International Journal of Law, Policy and the Family* 119, 135.
- 33 *Family Law for the Future* (n 25) 172–6.
- 34 Richard Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143, 143.
- 35 *FLA* (n 1) pt VII; *Family Law for the Future* (n 25) 158.
- 36 John Tobin, 'Justifying Children's Rights' (2013) 21(3) *The International Journal of Children's Rights* 395, 419.
- 37 Clare Huntington, 'Rights Myopia in Child Welfare' (2006) 53(3) *UCLA Law Review* 637, 664.
- 38 Aleardo Zanghellini, 'Who is Entitled to Parental Responsibility: Biology, Caregiving, Intention and the Family Law Act 1975 (Cth)' (2009) 35(1) *Monash University Law Review* 147, 152.
- 39 Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 78 (Santo Santoro, Minister for Ageing) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansards/2006-03-27/0000%22>> ('*Parliamentary Debates 27 March 2006*').
- 40 *FLA* (n 2) s 60I.
- 41 *Parliamentary Debates 27 March 2006* (n 39) 79.

- 42 Lucy Daniel, 'Australia's Family Law Amendment (Shared Responsibility) Act 2006: A Policy Critique' (2009) 31(2) *Journal of Social Welfare and Family Law* 147, 156; Carol Smart, 'Equal Shares: Rights for Fathers or Recognition for Children' (2004) 24(4) *Critical Social Policy* 484, 485.
- 43 Jonathan Crowe and Lisa Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the Family Law Act' (2009) 33(2) *Melbourne University Law Review* 391, 393.
- 44 *Ibid* 392.
- 45 *Goode v Goode* [2006] FamCA 1346, [65].
- 46 *Ibid*.
- 47 (2017) 259 CLR 662.
- 48 *Ibid* 675.
- 49 Geoffrey Monaghan, 'In the High Court: Parenting Orders, Children's Views, Order in Favour of Strangers: *Bondelmonte*' (2017) 7 *Family Law Review* 68, 72–3.
- 50 *FLA* (n 2) s 4AB.
- 51 *Ibid* s 67ZBB.
- 52 *Family Law for the Future* (n 25) 41 [1.37].
- 53 *CRC* (n 1) art 18(1).
- 54 *Family Law for the Future* (n 25) 172–6.
- 55 Family Law Amendment (A Step Towards a Safer Family Law System) Bill 2020 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2020, 4320–2 (Graham Perrett) <[https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansardr/16283df1-dcd4-4919-bcd2-4f21c-8ca3c60/&sid=0000](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/16283df1-dcd4-4919-bcd2-4f21c-8ca3c60/&sid=0000)>.
- 56 *Family Law for the Future* (n 25) 176.
- 57 Zoe Rathus, 'Social Science or "Lego-Science"? Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Law and Justice Journal* 164, 176.
- 58 Kaspiew et al (n 18) 216.

expressed concerns over the idea of parents holding equal shares in children with the presumption having the potential to focus more on parents' rights than warranted for under the legislation.<sup>42</sup> The problem here is that there is too much focus on how much the interest of the parents should be taken into account when determining whether the presumption should apply equally. Instead, the focus should be about promoting the best interests of the child in having a meaningful relationship and spending significant time with both parents after separation in an appropriate way.

The *FLA* promotes the best interests of the child as the paramount consideration when judges exercise discretion in making parenting orders in Australia.<sup>43</sup> According to s 60CA of the *FLA*, 'a court must regard the best interests of the child as the paramount consideration'. The stronger expression of 'the paramount consideration' was chosen in the *FLA* rather than that of 'a primary consideration' found in the *CRC*. Australia has taken the view that the paramountcy principle in the *CRC* should be of chief importance.<sup>44</sup> This is accentuated by s 60B(4) of the *FLA*, which states: 'An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989'.

After the implementation of the presumption of equal shared parental responsibility in 2006, the Full Family Court of Australia ruled that the presumption should be applied, unless it would not be in the best interests of the child.<sup>45</sup> The court would be required to consider how the child would spend equal time or substantial and significant time with each parent in applying the presumption according to s 65DAA of the *FLA*.<sup>46</sup> In *Bondelmonte v Bondelmonte*,<sup>47</sup> the High Court of Australia stated, '[t]he term "consider" imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained'.<sup>48</sup> The best interest of the child continues to be the overriding consideration in Australia with a strong promotion of the child's right to express his or her views.<sup>49</sup>

While it is important to be attentive to both parents being given an equal opportunity to make decisions, abusive or highly conflicted relationships must be approached with caution. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) was introduced to protect children from the risk of child abuse or family violence. Family violence was given an expansive definition to include 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'.<sup>50</sup> The court can make an order that it considers appropriate to protect the best interests of the child as a result of family violence.<sup>51</sup> This helps to recognise that children's rights and interests are paramount.

In 2019, the Australian Law Reform Commission recommended that the presumption of equal shared parental responsibility should be replaced with a presumption of joint decision-making about major long-term issues.<sup>52</sup> This recommendation would be consistent with the changes in family law that have developed since 1995 on affirming shared parental responsibility. Moreover, it recognises the rights and duties of both parents to care and make decisions for their children under the *CRC*.<sup>53</sup> Significantly, the recommendation would help remove confusion by getting rid of any misconceptions that parenting orders require the child to spend equal time with both parents.<sup>54</sup> Such misunderstandings have partly contributed to Graham Perrett MP introducing a Bill in the House of Representatives on 15 June 2020 to abolish the presumption of equal shared parental responsibility from the *FLA*.<sup>55</sup> While the concept of equal shared parental responsibility as a starting point should be maintained, it must be clarified to avoid its conflation with equal time.<sup>56</sup>

## v Conclusion

The rhetoric of equal shared parental responsibility highlights two issues. The first is the issue of the Government being too influenced by political exigencies. There is no doubt that these changes were made with the best interests of the child in mind, but such significant amendments appear to have been influenced by fathers' rights groups and women's advocates.<sup>57</sup> This creates particular unease given that this legislative change is in relation to children, who are one of the most vulnerable groups in society. The second issue is that the rights-based rhetoric in the presumption of equal shared parental responsibility is centred on the parents rather than focusing on the best interests of the child.<sup>58</sup> Consequently, there appears to be a disparity between the perceived rights of a parent and the legal reality that the best

interests of the child are paramount in parenting orders. The introduction of equal shared parental responsibility was supposed to promote the child's right to have a meaningful relationship with both parents, but judges and lawyers continue to have to educate litigant parents on focusing on what is in the best interests of their children.<sup>59</sup> The issue here is that many parties confuse equal shared parental responsibility with equal time. A misunderstanding of the meaning of the presumption of equal shared parental responsibility and an assumption that it is about equal time with the child has led to an increasing focus on parents' rights rather than advancing the best interests of the child.<sup>60</sup>

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 220.