The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience

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Patrick Parkinson*  The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience

A fierce argument is raging in various jurisdictions around the world about whether legislation should encourage shared parenting when mothers and fathers live apart. Much attention has been paid to changes to the law in Australia in 2006; however, there are many myths about the impact of those legislative changes. This article explains the changes and places them in the context of developments across the western world in the law of parenting after separation. It then reviews the research evidence on the effects of the 2006 reforms, particularly in terms of the encouragement of shared care. The article concludes by considering what can be learned from the Australian experience both in terms of the payoffs and pitfalls of such legislation.

Un vif débat a cours dans divers ressorts de tous les coins du monde : la loi devrait-elle encourager la garde partagée des enfants quand la mère et le père ne vivent pas ensemble? L'attention s'est tournée avec intérêt vers les modifications apportées à la loi en Australie en 2006; cependant, de nombreux mythes entourent les incidences de ces modifications législatives. L'article explique les modifications et les situe dans le contexte des développements, dans le monde occidental, dans le domaine de la responsabilité parentale après la séparation. L'auteur passe ensuite en revue les données de recherche sur les effets de la réforme de 2006, en particulier pour ce qui est des encouragements à la garde partagée. Il conclut en examinant les leçons à tirer de l'expérience australienne, tant en ce qui concerne les bénéfices que les pièges de ces dispositions législatives.

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Introduction
Should legislation encourage shared parenting? This is the latest debate in the long-running argument that has been occurring around the world on the shape of legislation governing post-separation parenting arrangements. Many jurisdictions, including Australia, have gone a long way down this track. Others, such as England and Wales,\(^1\) and Hong Kong,\(^2\) have had more recent debates on this issue, with concerns being expressed by some that any change to the existing law will lead to serious adverse consequences.\(^3\) Of course Canada had its own vigorous debates on law reform in this area more than a decade ago.\(^4\)

One of the many complications in answering this question is the sometimes confused use of the language of “shared parenting” or “shared care.” There is no set definition of what shared care means, but there is widespread agreement that it need not mean equal time. In the academic and professional literature, a common minimum definition is thirty per


cent of nights per year. In some jurisdictions, the definition is set by legislation. In Utah, for example, “joint physical custody” is defined to mean that the child stays with each parent overnight for more than thirty per cent of the year. In Australia, as a result of changes made in 2008 to the child support legislation, shared care is defined as thirty-five per cent of nights or more per year for each parent. In Canada, “shared custody” is defined in the 1997 Federal Child Support Guidelines as at least forty per cent of the time with each parent.

In the recent debates about (minor) changes to the Children Act 1989 in England and Wales, the term “shared parenting” has been used to mean almost any arrangement that does not involve sole custody to one parent while denying access to the other. In this usage, it may mean nothing more than joint parental responsibility (a fundamental feature of the Children Act 1989 from its inception) and some regular contact. An amendment made to the Children Act 1989 in 2014 provides that where a parent can be involved in the child’s life in a way that does not put the child at risk of suffering harm, the court should presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare. A reform of this kind was originally promoted as a means of encouraging ‘shared parenting.’ It is little more than a presumption in favour of some kind of contact between the non-resident parent and the child in the absence of risk factors.

The difficulty with the use of the language of “shared parenting” in this way is that “shared parenting” is understood by some as being synonymous with “shared care” while others mean merely the equivalent of joint legal custody. The consequence is that even when two people on opposite sides of this debate use the same language, they may mean quite different things.

In considering the value of laws that seek to encourage shared parenting, it is worth exploring the extent to which such laws can bring about significant shifts in terms of the physical care of children. The reality is that substantially shared care of children will always be a minority post-separation parenting arrangement, and one which comparatively few

7. Child Support (Assessment) Act 1989 (Cth), s. 5.5(3).
11. See Department for Education and Ministry of Justice, Co-operative Parenting, supra note 1.
parents can sustain for many years after they separate. Australian research has shown that some families try shared care soon after separation but change to another care arrangement in the course of time.\textsuperscript{12}

The most obvious requirement for shared care to occur is that the parents live within a reasonable proximity of one another. What that means will no doubt depend on whether the parents are living in a relatively small town or in a major urban centre. Driving time and availability of school transport are perhaps better indicators of proximity than distance. Proximity is hard to sustain in the aftermath of parental separation.

Proximity is a precondition for shared care, and such an arrangement may work for a while. However, if the family home has to be sold, or it is not possible for the parents to afford two homes in the area where once they had only one, one or both parents will have to move to an area where housing is cheaper. In Australia's major cities, those areas tend to be on the edges of the city or beyond it, and so separation has a centrifugal effect on many parents, scattering them through economic necessity from the more central areas of a city to its outer edges or beyond. If one parent is tied to their original location because of work commitments or other such factors, the economic consequences of the separation may mean that parents come to live some distance from one another.\textsuperscript{13}

Lack of suitable accommodation for the children may also limit the capacity of the non-resident parent to have the children stay overnight. Shared parenting requires a certain level of financial well-being for the parents to be able to afford two adequate homes for the children, together with sufficient furnishings, toys, and computer equipment so that children will feel at home in both places.\textsuperscript{14} For some parents that may not be achievable.

Another factor is work schedules. There are many non-resident parents for whom the traditional residence/contact model is the only realistic option. Fathers or mothers whose orientation towards the world of work makes it difficult to take on the primary care of children for significant periods, especially during school holidays, are likely to recognize the sense in a traditional residence/contact arrangement if the other parent does not have the same level of work commitments.


\textsuperscript{13} Ibid at 139-140.

\textsuperscript{14} In the Canadian context, see Sharon Moyer, \textit{Child Custody Arrangements: Their Characteristics and Outcomes} (Ottawa, Ont: Department of Justice, 2004) at ch 5.
Practically, then, shared care is likely to be only for the comparatively few, and in many cases will represent a transition stage from parenting together to parenting apart. Sooner or later, the outcome of the search for cheaper housing, changes in work location, repartnering, children's needs or choices, and a multitude of other factors in the lives of either parent or the children, may lead the shared care arrangement to be no longer appropriate or feasible. Whatever else law may do, it can do little to change these practicalities.

Despite the fact that substantially shared care is feasible only for comparatively few, legislating to encourage “shared parenting” has become a very significant issue for emotional, ideological, and political reasons. For some men’s groups it is the prize; for some women’s groups it represents defeat, or at least a significant burden on maternal autonomy. Advocacy groups tend to present their cases in terms of nirvana or apocalypse. The issue arouses passionate debate. For these reasons, the path of careful policy making must be one of dispassionate analysis of the evidence together with an awareness of the socio-economic realities of life after separation. Sorting out evidence from advocacy, however, is not necessarily straightforward.

This paper will consider in detail the evidence from Australia, which reformed its laws in 2006 to provide significant encouragement to shared parenting arrangements, including equal time. First, however, it is necessary to put the Australian experience—and indeed the Canadian legislation—into an international context, by examining the enormous changes that have occurred in the law across the western world in the last thirty or so years, and by examining the extent to which, in other jurisdictions, the law encourages shared parenting.

I. The transformation of the law of post-separation parenting

1. The indissolubility of parenthood

In the last thirty years, profound changes have occurred in family law all around the Western world. The model on which divorce reform was predicated in the late 1960s and early 1970s has irretrievably broken down. Under that model, the parents' legal divorce necessarily required a divorce between them not only as partners but also as parents. Only one
of the two parents could continue in that role after the divorce, and would be awarded custody, while the other’s role would in most cases be no more than a visiting one. The future upbringing of the child depended on a choice between two alternatives: the home of the mother or the home of the father. It followed that the marriage breakdown marked the dissolution of the nuclear family. Parental authority was awarded to the custodial parent and there was a strong differentiation between the roles of the custodial and non-custodial parent.

This model of the post-separation family has gradually been displaced by a new concept of post-separation parenting, one which French sociologist Irène Théry called the idea of the “enduring family.” Separation and divorce is not the end of the family, but a “transition between the original family unit and the re-organisation of the family which remains a unit, but a bipolar one.” This idea of post-separation parenting typically involves the rejection of a choice between parents in favour of joint parental authority, although in some cases, sole custody will be seen as appropriate.

Change has occurred only very gradually in family law around the Western world, but the trend has been in this direction. The age of sole maternal custody—as a norm at least—is over. The default position across the Western world is that the breakdown of the intimate relationship of parents does not end their joint responsibilities towards their children. As Margo Melli has written: “Today, divorce is not the end of a relationship but a restructuring of a continuing relationship.”

2. From joint legal custody to shared parenting
That process began in the early 1980s with the movement towards joint legal custody. Courts and legislatures began to respond to a shift in emphasis from the need of the child to have an attachment to one "psychological parent" to a need for children to maintain relationships with both parents. Pressure for a legal presumption that the court should

21. The work of Wallerstein and Kelly was perhaps most influential in bringing about a shift in emphasis: Judith Wallerstein & Joan Kelly, Surviving The Breakup (New York: Basic Books, 1980).
award joint legal custody was particularly strong in the United States. The joint legal custody movement also affected practice in Canada.\textsuperscript{22}

The movement towards joint custody reached its zenith as a legislative reform movement in the late 1980s. Since then, in other jurisdictions there has been a move onwards to different language entirely, which reflects another understanding of post-separation parenting. This may be observed in the new language of parenting plans in a number of U.S. states,\textsuperscript{23} led by Washington State in 1987.\textsuperscript{24} Legislative change in Canada has come much more recently. The law changed in Alberta in 2003\textsuperscript{25} and in British Columbia with effect from March 2013.\textsuperscript{26} Both statutes use the language of “guardianship” and “parenting time,” rather than custody. The change is not merely linguistic. Central to such reforms is the notion that parental responsibility continues after parental separation, except insofar as parental agreement or court orders change it.\textsuperscript{27}

Similar developments have occurred in Europe. In England and Wales, the \textit{Children Act 1989}\textsuperscript{28} provided that each parent has “parental responsibility” and retains that responsibility after the marriage breakdown. Instead of making a custody order giving one parent, to the exclusion of the other, a bundle of rights and powers to make decisions about the welfare of the child, the new law provided that court orders should focus on the practical issues, in a way similar to the approach taken in the “parenting plan” jurisdictions of the United States. The \textit{Children Act 1989} introduced the new terminology of “residence” and “contact” orders. Scotland passed legislation using similar terminology and concepts, in 1995.\textsuperscript{29} The \textit{Children and Families Act 2014} makes further reforms to the law in England and Wales, replacing residence and contact orders with “child arrangements orders” regulating with whom a child is to live, spend time, or otherwise have contact.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{22} See generally Susan Boyd, \textit{Child Custody, Law, and Women's Work} (Oxford: Oxford University Press, 2003).
\item \textsuperscript{23} See, e.g., Mont Code § 40-4-234; NM Stat § 40-4-9.1; TN Code § 36-6-404.
\item \textsuperscript{24} Wash Rev Code § 26.09.181. Washington State law requires each of the parents on divorce to propose a parenting plan, and if agreement cannot be reached, a plan can be determined by the court.
\item \textsuperscript{25} \textit{Family Law Act}, SA 2003, c F-4.5.
\item \textsuperscript{26} \textit{Family Law Act}, SBC 2011, c 25 [Family Law Act BC].
\item \textsuperscript{27} \textit{Ibid}, s 39.
\item \textsuperscript{28} \textit{Supra} note 9.
\item \textsuperscript{29} \textit{Children (Scotland) Act 1995} (UK), 1995, s 11.
\item \textsuperscript{30} \textit{Supra} note 10, s 12.
\end{itemize}
Developments along the same lines have occurred in France, where the law is now based upon a principle of "coparentalité." In 1993, the Civil Code was amended to remove the language of "custody." It was replaced with the language of "parental authority." The legislation provided that parental authority is to be exercised in common and that parental separation does not change this.

In many other European jurisdictions, the law has also been amended to encourage or provide for continuing joint parental responsibility after divorce. A common legislative approach that has had the effect of encouraging joint custody has been one of non-intervention. Instead of allocating custody as one of the matters to be dealt with in granting a divorce, joint custody is deemed to continue after separation unless one parent seeks a court order to the contrary. This is the position in the Scandinavian countries. A similar approach has been adopted in Germany by the Gesetz zur Reform des Kindschaftrechtes, 1997, which amended the Civil Code to provide that parents have joint parental responsibility during marriage (unmarried parents may agree to joint parental responsibility by formal declaration). Joint responsibility continues after separation unless the court orders otherwise on the application of one of the parties.

3. Legislative support for shared parenting

The abandonment of the idea of sole custody as a "winner takes all" approach to the breakdown of the parental relationship is just the first phase of the revolution that has been occurring in post-separation parenting. There is now a trend towards legislative encouragement for courts to give serious consideration to shared parenting in disputed cases, other than those in which there are issues of domestic violence or child abuse.

In most jurisdictions, to be sure, legislatures have resisted the temptation to be too prescriptive. Courts have retained the flexibility to
attempt to discern the best interests of the child. As Fehlberg and others note:

Overall, the legislative trend has been more clearly and consistently towards encouraging both parents to be actively involved in their children’s lives post-separation, including maximising contact, rather than specifically towards legislating for shared time.\(^4\)

An example of this is the long-standing position under Canada’s Divorce Act which provides that

[T]he court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.\(^4\)

The boundary line between “maximizing contact” and shared time is, however, an exceedingly unclear one. Some statements of principle go a long way toward promoting shared parenting. For example, Illinois law provides that:

Unless the court finds the occurrence of ongoing abuse ... the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional wellbeing of their child is in the best interest of the child.\(^4\)

Another example of the trend towards shared parenting is the law in Iowa, where the legislative formulation of policy is that:

The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.\(^4\)

The law provides for a presumption in favour of joint custody,\(^4\) and if joint custody is awarded, then

\(40\) Fehlberg et al, supra note 5 at 319-320.

\(41\) Divorce Act, RSC 1985 c 3, s 16(10). For criticisms, see Cohen & Gershbain, supra note 4.

\(42\) 750 Ill Comp Stat 5/602(c).

\(43\) Iowa Code § 598.41(1)(a).

\(44\) Ibid, §598.41(2)(a) and (b).
[T]he court may award joint physical care to both joint custodial parents upon the request of either parent ... If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.45

There is a similar provision in Maine.46

Another example is Florida, where the law states the public policy of the State as being “to encourage parents to share the rights and responsibilities, and joys, of childrearing”47 despite parental separation. Amendments to the law in 2008 provided that the court must approve a parenting plan which includes provisions about “how the parents will share and be responsible for the daily tasks associated with the upbringing of the child” and “the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent.”48 In cases of violence or abuse, the court may make an order for sole parental responsibility.

4. The move towards equal time: North America
What about shared care? While there is a consensus that shared care is contra-indicated in cases where there are safety concerns, and for infants and pre-school children, in other cases, the new frontier is working out ways of achieving substantially shared parenting time to the extent that the logistics of the parents’ circumstances allow.

In a number of jurisdictions, there has been pressure for change from fathers’ groups based upon the idea that for parents to be treated equally, there ought to be a presumption that children should spend an equal amount of time with each parent after separation. Some United States legislatures have responded to that issue by explaining that joint custody does not mean necessarily that there is entitlement to an equal time arrangement.49 British Columbia has adopted a similar approach in its new law, stating that

45. Ibid, § 598.41(5)(a).
46. See also Maine: Me Rev Stat 19A § 1653(2)(D)(1) (1995): “If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child.”
47. Fla Stat Title VI, 61.13(2)(c)(1).
48. Fla Stat Title VI, 61.13(2)(b). There was also a Bill (Senate Bill 718) to amend the law in 2013, creating a presumption that equal time was in the best interests of the child in certain circumstances, which passed the legislature with significant majorities in both Houses. It was vetoed by the Governor. The Bill also made significant retrospective changes to alimony law, and this was the Governor’s expressed reason for the veto. See James Roxica, “Gov. Scott vetoes bill to end permanent alimony,” The News Herald (2 May 2013), online: The News Herald <www.newsherald.com>.
In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed...

(b) that parenting time should be shared equally among guardians.\textsuperscript{30}

By way of contrast, Louisiana is one jurisdiction that has responded affirmatively, if somewhat ambiguously, to the idea of promoting equal time. In that jurisdiction, there is a presumption in favor of joint custody.\textsuperscript{51} In determining what the arrangements for joint parenting should be, the courts are instructed that “[t]o the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.”\textsuperscript{52} This may be little more than a rhetorical flourish, however, as the Court is also required to identify a “domiciliary parent” who is the parent with whom the child “shall primarily reside.”\textsuperscript{53} Thus, while including a presumption in favor of equal time arrangements on the one hand, Louisiana law also assumes that there will always be a primary caregiver.

In Oklahoma, the legislation states:

It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage, provided that the parents agree to cooperate and that domestic violence, stalking, or harassing behaviors ... are not present in the parental relationship. To effectuate this policy, if requested by a parent, the court may provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that shared parenting would be detrimental to the child.\textsuperscript{54}

The presumption in favor of substantially equal access does not carry through to the legislative requirements governing final orders.

\textsuperscript{50} Family Law Act BC, supra note 26.
\textsuperscript{51} Article 132 of the Civil Code provides: “If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award. In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.”
\textsuperscript{52} Ibid, 9-335 A(2).
\textsuperscript{53} Ibid, 9-335 B.
\textsuperscript{54} Okla Stat Ann §43-110.1. This provision is confined to temporary orders. See Redmond v Cauthen (2009) Ok 46; 211 P (3d) 233 (Ct Civ App). There is neither a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody when making final orders: Okla Stat Ann §43-112 C(2).
Arizona is another jurisdiction with strong shared parenting norms. It amended its laws in 2012 to provide that consistent with the best interests of the child (and in the absence of risk factors such as a history of violence, child abuse or substance abuse), “the Court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”

How the parenting time of both parents is “maximized” no doubt depends on the circumstances, including how far they live apart from one another and what constraints work schedules impose.

5. The move towards equal time: developments in Europe

Demands for an equal time presumption have also been occurring in parts of Europe. In France, an intermediate position has been adopted in response. Two commissions were established to advise the Government concerning possible reforms to the law of parental authority in the 1990s. One took a sociological view, under the presidency of Irène Théry. The other focused more on legal issues under the presidency of Françoise Dekeuwer-Défossez. Dekeuwer-Défossez recommended that the notion of principal residence should be removed from the Code because it led judges to refuse shared residence arrangements when such arrangements would not have been contrary to the child’s best interests.

The consequence of these proposals for reform, and subsequent governmental consideration, was legislation, passed in 2002, on parental authority. This legislation was intended to promote alternating residence arrangements. Mme Ségolène Royal, the Minister for Family Affairs, indicated in the legislative debates that the reform’s purpose was to encourage the parents to reach agreement on the principle of alternating residences, arguing that it had the advantage of maintaining parity between them. In the Senate, however, concerns were expressed about the imposition of an alternating residence arrangement on parents without

55. Arizona Rev Stat 25-403.02B.
59. Ibid at 82.
In the result, a compromise position was adopted. Article 373-2-9 of the Civil Code now provides, as a result of the 2002 amendments, that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residences first, before sole residence, was intended to indicate encouragement of this option.

In Belgium, the law was amended in 2006 to provide encouragement for alternating residences—indeed that emphasis was expressed in the title of the legislation. A decade earlier, in a law of 13 April 1995, Belgium had enacted reforms similar to France adopting the principle of “coparentalité” and endorsing as a norm continuing co-parental authority (autorité coparentale) which is unaffected by parental separation. The language of “custody” was removed from the law. The 2006 law provides that when parents do not agree on residency, the court is required to examine “as a matter of priority,” the possibility of ordering equal residency, if one of the parents requests it to do so.

This is not the same as saying that there is a presumption in favour of equal time. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless, according to Belgian law, it is the first option that ought to be considered when parents cannot agree on arrangements.

II. The Australian law reforms
This international context helps to put the Australian reforms of 2006 and 2011 into perspective. The Australian reforms went further towards encouraging shared parenting than some countries, but not as far as others. The reasons why Australia has been the subject of so much attention in other English-speaking countries is first, that there was a significant level of opposition to both the 1995 and 2006 Australian reforms from advocates and academic writers, and so from an overseas perspective it may have appeared as if the Australian experience has been overwhelmingly negative. Secondly, because Australia has invested so much into evaluation of its reforms, it has a much richer body of data than is available anywhere else in the world. The family law reforms in Australia in 2006 have become a

62. The Act of 18 July 2006 is entitled: Loi tendant à privilégier l’hébergement égalitaire de l’enfant dont les parents sont séparés et réglementant l’exécution forcée en matière d’hébergement d’enfant, which translates to “law tending to favour equal residency for children of separated parents and regulating enforcement (in child residency matters).”
63. For research on the impact of these changes see An Katrien Sodermans, Koen Matthijs & Gray Swicegood, “Characteristics of joint physical custody families in Flanders” (2013) 28 Demographic Research 821.
focus of attention precisely because we know so much about the community experience and professional perceptions concerning the operation of the legislation. This body of research is unprecedented in its size and scale. The research involved some 28,000 respondents in a number of different studies. This provided a wealth of information on what was happening in the Australian community both before and after the 2006 reforms.

It will be argued that both positive and negative lessons can be learned from the Australian experience. To focus only on the negatives is to present a partial and inaccurate picture. It does not assist the sensible development of public policy in other countries that look to Australia for a better understanding of the payoffs and pitfalls of such legislation. Both the payoffs and pitfalls need to be analyzed in a balanced and nuanced way with proper attention to the evidence.

1. The background to the 2006 amendments in Australia
The 2006 changes to the law in Australia followed on from reforms that occurred in the mid-1990s. The *Family Law Reform Act 1995* adopted an approach that was similar in many respects to the reforms enacted in England and Wales by the *Children Act 1989*. The legislation provided that all parents have parental responsibility irrespective of whether they had ever been married or had lived together. The separation of the parents—or indeed the fact that they had never lived together—made no difference to the parental responsibility that they acquired as a consequence of biological parenthood. They may not have continued to be partners, but they continued to be parents subject to the effect of any court order diminishing or removing parental responsibility. The court would be able to make orders about residence and contact, as well as specific issue orders. "Contact" was the equivalent, in Canada, of "access." The *Family Law Act* as a result of the 1995 reforms also stated as principles that "children have the right to know and be cared for by both their parents" and have a "right of contact, on a regular basis."

The 1995 legislation did not only make changes to the language of the law. It also introduced numerous provisions concerning domestic violence. The court was instructed to take account of any history of family violence in determining what parenting arrangements would be in the best interests of the child. It was also required to ensure that parenting orders did not expose a parent or other family member to an unacceptable risk of family violence.

66. *Family Law Act 1975* (Cth), s 61C.
violence, subject to the paramountcy of children’s best interests. Other provisions sought to deal with conflicts or potential conflicts between the terms of restraining orders and orders concerning contact between the non-resident parent and the children.

There is some controversy about whether the 1995 reforms had much impact. One view is that they did little more than change the language of the law. Another view is that the changes were seriously detrimental to women. It has been argued, for example, that the legislative provisions enacted in 1995 concerning the child’s right to contact represented a significant change and that this right to contact “trumped” the provisions concerning violence. In fact there had long been a pro-contact culture in family law, and the notion of contact as a right of the child was well established in the case law. For example, Samuels JA, of the New South Wales Court of Appeal, wrote in a 1977 case that it was only in exceptional circumstances, and upon solid grounds, that a father should be denied contact with his child. Denying access, he noted, “may well have grave consequences for the child’s future development.” In a concurring judgment, another judge wrote that access is a right of the child, not the parent, anticipating the children’s rights focus of the 1995 legislation by nearly twenty years.

Some research also presented a bleak picture of the outcomes of the 1995 reforms. The research was largely based on qualitative data, however, the study was not peer-reviewed, and there was reason to

68. See, e.g., Helen Rhoades, “The ‘No-Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’” (2002) 16 Int’l JL Pol’y & Fam 71 at 82: “concerns about the effects of domestic violence have been displaced by a desire to maintain contact.”
69. Cooper v Cooper, (1977) FLC 90-234 at 76, 250.
70. Ibid at 76, 253.
question the reliability of the research findings. Perhaps for this reason the research did not have much of an impact on public policy in Australia, although it had more traction overseas (particularly in Canada).

While, in the years after 1995, women's groups who had opposed the changes continued to express significant concerns, the message that resonated most strongly politically was that the 1995 legislation had failed to make much difference to the prevailing norms. Fathers' groups continued to campaign for further change. Those complaints resonated with backbench members of the Coalition government, and in 2003, the then Prime Minister, John Howard, asked the Family and Community Affairs Committee of the House of Representatives to examine, inter alia, whether there should be a presumption that children spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted.

The committee, consisting of both government and opposition members, delivered a unanimous report six months later. Committee members favoured significant reform of the law in order to get away from what they saw as the standard pattern of contact for non-resident parents of every other weekend and half the school holidays. This, they dubbed the 80-20 rule, on the basis that it gave non-resident parents approximately twenty per cent of the time with their children. In the end, the committee decided against a legislative presumption of equal time. However, it opined that "the goal for the majority of families should be

72. No peer-reviewed articles resulted from this study. A shortened version of the executive summary was published in “Family Law Update” (2001) 58 Family Matters 80, with an invitation to readers to comment. Critiques of the methodology and findings were then published in the following issue of the Journal. See Lawrie Moloney, “Researching the Family Law Reform Act: A Case of Selective Attention?” (2001) 59 Family Matters 64; Patrick Parkinson, “A Plea for Greater Rigour in Socio-Legal Research” (2001) 59 Family Matters 77. The authors’ response to these criticisms was published at page 68. Other research also had limitations. A study was conducted in Brisbane based on interviews with four people in each of four professional groupings involved in family law work: John Dewar & Stephen Parker, “The Impact of the New Part VII Family Law Act 1975” (1999) 13 Aust J Fam L 96. While the research led the authors to some interesting insights, the findings, so far as they purported to describe the impact of the legislative changes, can not be generalized given the very small and unrepresentative sample of interviewees.


one of equality of care and responsibility along with substantially shared parenting time.\textsuperscript{76}

The committee also clearly heard the concerns of women's groups about the issue of domestic violence. It wrote:

The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse.\textsuperscript{77}

As a result, it made several recommendations. The committee proposed that in the statement of principles for the legislation, there should be a specific reference to a child's right to preservation of their safety.\textsuperscript{78} The committee also recommended a winding back of the notion that parental responsibility should continue unaffected by separation, unless the court turned its mind to the issue and made orders reducing or removing a biological parent's authority in relation to parenting. The effect of the committee's recommendations was to require the court to turn its mind to the issue of continuing parental responsibility in every case, and to decide whether to make an order for what it called "equal shared parental responsibility." The term "equal shared parental responsibility" was a linguistic formulation to emphasize the equality of the parents. The committee recommended that there should be a presumption against shared parental responsibility in cases of entrenched conflict, family violence, substance abuse or child abuse.\textsuperscript{79}

In the period between the Parliamentary Committee report at the end of 2003 and the enactment of legislation in 2006, the government's position evolved further as it sought to satisfy the different interest groups. Nonetheless, in broad terms, the legislation as enacted in 2006 reflected the intentions and recommendations of the committee.\textsuperscript{80} The legislation passed with the support of the opposition Labor Party, which was to form a government within 18 months.

\textsuperscript{76} Ibid at 30.
\textsuperscript{77} Ibid at 26.
\textsuperscript{78} Ibid at 28.
\textsuperscript{79} Ibid at 41.
The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience

2. The changes made by the 2006 amendments in Australia

The legislation amending the Family Law Act 1975 was the Family Law Amendment (Shared Parental Responsibility) Act 2006. The Australian legislation is not prescriptive, but it does encourage consideration of a greater degree of time-sharing between parents than the formerly traditional norm of contact every other weekend and during school holidays. It made a variety of changes: to the law concerning parental responsibility and to the factors the court should consider in determining the best interests of the child. It also introduced a requirement that the court consider certain options for shared parenting time. About the same time, reforms to the child support scheme were announced, which had as one objective the reduction of strategic bargaining in order to gain some collateral financial advantage in terms of child support. The two reforms were designed to work together.

a. Parental responsibility

The Parliament did not enact a presumption against equal shared parental responsibility in cases of violence, abuse or entrenched conflict, as the Parliamentary Committee had recommended. It did, nonetheless, go most of the way to implementing the spirit of that recommendation by stating that the presumption in favour of equal shared parental responsibility is not applicable where there is reason to believe there is a history of violence or child abuse. “Parental responsibility” is defined as “all the duties, powers, responsibilities and authority which, by law, parents have

81. Supra note 66.
83. The idea that child support issues drive many parents’ negotiations about parenting time is a widely held perception among family lawyers. There is, however, mounting empirical evidence that most parents either have no knowledge of how parenting arrangements affect financial gains and liabilities, or they operate on the basis of misinformation. For a review of the literature see Bruce Smyth & Bryan Rodgers, “Strategic Bargaining over Child support and Parenting Time: A Critical Review of the Literature” (2011) 25 Austl J Fam L 210. For recent Australian data, see Bruce Smyth et al, “Separated Parents’ Knowledge of how Changes in Parenting-time can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A pre-/post-reform Comparison” (2012) 26 Austl J Fam L 181.
84. The reforms, implemented in 2008, sought to eliminate the “cliff effects” of the previous law, in which a non-resident parent’s child support liability reduced substantially at 30% of overnights and again at 40% of overnights. Under the new formula, there is a standard reduction in child support for parents who have “regular care” of the child, which is defined as between 14% and 34% of overnights. Above this, the arrangement is described as “shared care,” but the formula is so designed that between 34% of nights and 50-50 care, the changes to child support liabilities change very gradually, reducing a little with each percentage increase in overnights with the minority care parent. The effect is that arguing over one night here or there will make little practical difference to the child support liability. See further, Patrick Parkinson, “The Future of Child Support” (2007) 33 UWA L Rev 179.
85. Supra note 66, ss 61DA, 61B, 65DAC.
in relation to children”: “Shared parental responsibility” involves a duty to consult on major long-term issues, which are defined so as to include issues about education, religious upbringing, the child’s health, the child’s name and “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.” In practice, the position was not much different from the meaning and effect of parental responsibility under the 1995 legislation as interpreted by the subsequent case law.86

b. The twin pillars
Central to the 2006 amendments are what have been called the “twin pillars” of supporting the meaningful involvement of both parents and protecting children from harm.87 One of the objectives of the 2006 amendments is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.”88 This is balanced by another stated objective which is reflected in other aspects of the legislation: the need to protect children from physical or psychological harm, and from abuse, neglect, or family violence.

The legislation is structured, reflecting these objectives, so that there is a strong emphasis on maintaining the involvement of both parents where it is safe to do so. This does not translate, however, into a presumption of shared parenting, and still less, of equal time. The most that the legislation imposes by way of presumed outcome is the rebuttable presumption in favour of equal shared parental responsibility.

The objectives contained in section 60B are mirrored in establishing two primary considerations, also introduced in 2006, which guide the judge in determining what is in the best interests of the child. The first is the “benefit to the child of having a meaningful relationship with both of the child’s parents.” The second is “the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.” There are then a large number of other factors that are described as “additional” considerations.

One practical expression of the requirement to consider the benefit to the child of a meaningful relationship with both parents is that when deciding cases in which it is appropriate to make an order for equal shared parental responsibility, courts must consider making an order for equal

88. Family Law Act 1975, supra note 66, s 60B.
time if this is in the best interests of the child and reasonably practicable.\textsuperscript{89} If that is not appropriate, the court must go on to consider the option of “substantial and significant” time. That is time which gives the parent an opportunity to be involved in the child’s daily routine and occasions and events that are of particular significance to the child or the parent. Thus, while an order for equal shared parental responsibility says nothing about how time is allocated between parents, what follows from it is a duty imposed on judges to at least consider whether some kind of shared care arrangement might be appropriate. This, together with misunderstandings of the new law in the media, may well have contributed to an impression among some members of the Australian public that because judges must consider equal time, there is accordingly a default presumption of equal time, or at least that fathers have a high prospect of success in the courts if they seek equal time. That impression is not justified by the legislation, but it has undoubtedly led to some public confusion,\textsuperscript{90} and to some shared care arrangements that are not satisfactory for children.\textsuperscript{91}

Although the \textit{Family Law Amendment (Shared Parental Responsibility) Act 2006} was not a triumph of legislative drafting,\textsuperscript{92} its general intent was clear enough. The Full Court of the Family Court of Australia summarized it as follows:

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children’s lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.\textsuperscript{93}

The Australian Parliament enacted some amendments to the legislation in 2011 to address concerns about domestic violence, and to delete relatively unimportant provisions that had caused anxiety.\textsuperscript{94} Now, in the evaluation of what arrangements are in the best interests of the child, greater weight

\textsuperscript{89} \textit{Ibid}, s 65DAA.
\textsuperscript{91} Fehlberg et al, supra note 5.
\textsuperscript{92} Lawyers and judges found the legislation both complex and cumbersome, making it harder to give advice and write judgments: Kaspiew et al, supra note 90 at 361-366.
\textsuperscript{93} \textit{Goode v Goode} (2006), FLC 93-286 at para 72.
is to be given to the need to protect children from harm than to the benefit to the child of a meaningful relationship with both parents.

These amendments, however, do not alter the emphasis in the legislation on encouraging the involvement of both parents in children's lives following separation where the child will benefit from a meaningful relationship with both of them in the absence of safety concerns. The 2006 amendments to the law in that regard remain substantially unaltered.

c. **Obligations of lawyers, mediators and counsellors**

There was another aspect of the 2006 legislation that deserves mention. It was that it imposed obligations on lawyers, mediators, and counsellors to discuss certain options for parenting arrangements with their clients. The typical way in which legislation is drafted in other common law jurisdictions is that the legislature instructs judges on how they should determine the issues for that very small group of parents who are unable to settle their disputes by agreement or compromise. All other parents are guided by lawyers' perceptions of how a judge might decide. The Parliamentary Committee in 2003 saw legislation as a means of reaching a wider group than lawyers and judges. It saw legislation also as a means of reaching those parents who at some level may be influenced by the law in resolving their disputes, but who do not go to trial. It sought to do so in a more direct way than simply relying on normative messages to emanate from the judges in those cases that go to trial. The committee wrote:

> Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it.\(^\text{95}\)

The 2006 legislation gave effect to this recommendation by requiring lawyers, mediators and counsellors to advise their clients that they should consider the options of equal time, and substantial and significant time.\(^\text{96}\) Parliament thus sought to reach the majority of families through their professional advisers and through mediators with the intention that the content of discussions in mediation would be informed by the types of parenting arrangement being promoted in the statute.

d. **A revolution in the service system**

The Australian Government not only changed the law in 2006, it also brought in a comprehensive package of reforms to the entire family law

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95. *Every Picture, supra* note 75 at 39.

96. *Family Law Act 1975, supra* note 66, s 63DA.
system, involving new services and processes. Parents were mandated to attempt "family dispute resolution"—that is, mediation—before being permitted to file an application for parenting orders in court, unless exempted because of issues of violence or abuse, or because the case was otherwise deemed not suitable for mediation.97

Mandatory mediation before filing was supported by the creation of Family Relationship Centres (FRCs). The FRCs are community-based services funded by the Australian Government, which seek to provide support to parents, in particular those who have either separated or who are contemplating separation. FRCs provide information, advice, referral and mediation. There are sixty-five centres all over the country, one for approximately every 300,000 of the population. They operate both in major cities and regional areas.98

The FRCs emerged as a strategy for reform of the family law system as the result of debates about recommendations made by the Parliamentary Committee in 2003.99 The first centres were established in July 2006 and others in July 2007 and in 2008.

The FRCs operate in accordance with guidelines set by the government.100 They are run by non-government organizations with professional staff and experience in counselling and mediation, selected on a tender basis. Although operated by different service providers in different localities, the FRCs have a common identity (and logo) to the public.

While FRCs have many roles, including support for parents in intact families, a key one is as an early intervention initiative to help parents work out post-separation parenting arrangements and manage the transition from parenting together to parenting apart. FRCs help parents to access the different services they may need to assist them during this difficult period. They also provide educational programs for parents which emphasize keeping the children in focus after separation and they offer free or at least heavily subsidized mediation.

97. Ibid, s 601.
The FRCs are there to help resolve disputes not only in the aftermath of separation, but also in relation to ongoing conflicts and difficulties as circumstances change. The FRCs are thus about organizing post-separation parenting, but they are much more than this. They are also intended to be the gateway to services that will help people cope with the emotional sequelae of relationship breakdown and to address issues such as domestic violence. They operate primarily by making referrals to appropriate services. This might include relationship counselling or services to address problems such as gambling, alcohol addiction, financial problems, or anger management.

Central to the concept of the FRC network is that the centres should be highly visible and accessible. The organizations that were chosen to establish each Centre were required to find a location that is central for the community being served, such as shopping and business centres.

The Family Justice Centres in British Columbia, which are free, community-based mediation centres, and the Justice Access Centres in Nanaimo and Vancouver, provide the closest international analogies to the FRCs, but in design the FRCs are more holistic. The FRCs are about much more than mediation, although that is a primary focus of their work.

One of the aims of the FRCs is to achieve a long-term cultural change in the ways people resolve disputes about parenting arrangements after separation. The concept behind the FRCs is that when parents are having difficulty agreeing on post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one. If no solution can be found, the dispute may need to go to an adjudication by someone who can make a binding decision, but it should not be seen, at least initially, as a legal issue.

As a result of these significant changes in the service system, family dispute resolution is community-centric rather than court-centric. It is independent of the family justice system, although connected in a cohesive way with that system.

III. Research evidence on the Australian reforms
The most valuable data on the 2006 reforms came from the comprehensive evaluation of the Australian Institute of Family Studies (AIFS). A further

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101. Parkinson, supra note 98.
103. A parenting dispute is of course one in which the parents' perceptions of legal norms may have some influence on their positions and expectations from the beginning. This does not mean that the problem requires a legal solution.
104. Kaspiew, supra note 90.
study examined the experience of parents a year after separation, providing further insights into the way in which parents adjusted over time, and how parenting arrangements changed even in a twelve month period.\(^{105}\)

Other research was also commissioned; for example a study on shared care.\(^{106}\) Reports were also published in relation to issues concerning the law of parenting after separation, although those reports relied on submissions that recorded people's perceptions of problems rather than research that could provide objective evidence about those problems.\(^{107}\)

The AIFS report produced a vast amount of information and it is, of course, possible for that research to be read in different ways depending on what aspects of it are emphasised.\(^{108}\) Indeed, different emphases and perspectives are represented in the research findings themselves, with family relationship professionals generally having a more positive view of the 2006 reforms than family lawyers. The tendency, particularly in Britain, has been for negative readings of the research evidence to be dominant.\(^{109}\) The Norgrove Committee, which recommended major changes to the family law system in England and Wales, was strongly influenced by these negative readings, but also made some factual errors of its own.\(^{110}\) It is important therefore that other readings and interpretations of the evidence be heard.

A starting point is with the "consumers" of the system—separated parents. From their perspective, the reforms were generally positive. Most parents reported that, overall, they were satisfied with the parenting arrangements. Most indicated that they communicated with each other on issues concerning their child once a week or more often, although that level of communication diminished somewhat by the second wave


\(^{106}\) Cashmore et al, *supra* note 12.


\(^{108}\) For a largely negative reading based on a few findings from the research, see John Dewar, "Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia" (2010) 24 Austl J Fam L 139.

\(^{109}\) UK, Justice Committee, *Operation of the Family Courts, supra* note 1; *Norgrove Report, supra* note 1; Helen Rhoades, "Legislating to promote children's welfare and the quest for certainty" (2012) 24 Child & Fam LQ 158.

of interviews a year later. The report on the wave two interviews with parents indicated that most parents considered that their arrangements were flexible and worked well for each parent and the child.

1. Reduced filings in court and increased use of mediation

There was particularly strong evidence of the benefits of requiring most parents to attempt mediation, combined with the availability of free mediation in the FRCs. The total number of applications for final orders in children’s matters (including cases where there were also property issues) fell from 18,752 in 2005–2006 to about 12,815 in 2010–2011, a fall of thirty-two per cent over the five years following 2006.

One of the concerns that has been expressed in England about giving any legislative support to the inclusion of both parents in children’s lives after separation is that it will increase litigation. It was expected by the Australian government that after 2006 there would at least be a temporary surge. (Mandatory mediation before filing was not introduced until July 2007.) In the first year after the reforms were introduced, filings were actually lower than in 2004–2005. In this period, only fifteen FRCs were operative, and were receiving clients on a voluntary basis. In the three years following 2006, the use of counselling and mediation services by parents during and after separation increased from sixty-seven to seventy-three per cent, while recourse to lawyers diminished to a corresponding degree. Client satisfaction with relationship services was high.

While the AIFS report indicated that the family dispute resolution initiatives were working well, there were issues about whether there was sufficient awareness of the grounds for exemption by those referring to

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111. Qu & Weston, supra note 105 at 156.
112. Ibid at 159.
113. Figures calculated from Federal Magistrates' Court of Australia Annual Report 2010–2011, at 28-29; Family Court of Australia, Annual Report 2010–2011, at 49. The Federal Magistrates Court Report gives a total number of applications for final orders and then the percentages of these that are attributable to children’s matters and children and property matters respectively. The figures for this court are, therefore, worked out as a percentage of all applications for final orders and subject to rounding. The Family Court’s annual report provides the precise numbers. In 2011–2012, the total number of applications for final orders in children’s cases was about 12,898, a very slight increase on 2010–2011 figures, suggesting that the decline in applications has now bottomed out.
114. Kaspiew et al, supra note 90 at 306. The report indicates that nationally, from July 2004–June 2005, there were 19,188 applications filed involving children’s matters. In 2006–2007, the year after introduction of the amended legislation on 1 July 2006, there were 18,880 applications.
115. Ibid at 50.
these services. There were also concerns about whether cases involving an incapacity to mediate were being screened out of mediation sufficiently. 116

2. Levels of shared care
One of the objectives of the Parliamentary Committee was to encourage greater levels of shared care by requiring at least consideration of arrangements that provide for time with the non-resident parent other than just at weekends and in the school holidays. The question is to what extent did that occur and whether this impact was more positive than negative in terms of children's well-being? In this regard, the evidence requires very careful evaluation.

a. The role of law in affecting social change
Confident assertions about the outcomes of legislative reform ought to be treated with caution. The vast majority of parenting arrangements were resolved without adjudication by a judge. The AIFS research indicated that less than three per cent of parents who had sorted out their parenting arrangements nominated courts as their main pathway. 117 It is impossible to know, in most cases, what motivated the parents to agree between themselves on parenting arrangements. They may have had many different motivations for settling.

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

b. Judicial decision-making and shared care after 2006
Since the legislative reform, there has been no evidence to suggest that judges have had to change their decision-making, feeling compelled to decide cases in a way they felt was not in the best interests of the child. It is unlikely that this will ever be the case, for Australian judges continue to have a very broad discretion and remain guided by the lodestar of what is in the best interests of the child as the paramount consideration.

116. Lawrie Moloney et al, "Mandatory Dispute Resolution and the 2006 Family Law Reforms: Use, Outcomes, Links to Other Pathways, and the Impact of Family Violence" (2010) 16 J Family Studies, 192. The exceptions are given in s.60I(9) of the Act. The main grounds are that the court is satisfied that there are reasonable grounds to believe that there has been abuse of a child, or there is a risk of abuse, that there has been family violence or there is a risk of violence, or that there are circumstances of urgency.

117. Ibid at 66. 71% of fathers and 73% of mothers reported that they had sorted out the parenting arrangements. Another 19% of fathers and 16% of mothers indicated that they were in the process of doing so. The remaining 10% reported that nothing had been sorted out. Ibid at 65.
The legislative encouragement to consider shared care may nonetheless have affected judicial perceptions of what is in the best interests of the child. That is, judges, influenced by the legislation, and required to give reasons for their decisions that address those considerations, may reach different conclusions to those they reached prior to 2006.

In the Australian legislation, there is now a range of options for court orders in parenting disputes. No longer are judges asked to make a stark and binary choice between "custody" for the mother and "custody" for the father, with "access" being given to the losing parent. Now there is a spectrum of choice, particularly in allocating time to the non-resident parent. This might involve some midweek time as well as weekend and holiday time. An equal time arrangement could be structured in a number of different ways. In any given case, various options could reasonably be said to be in the best interests of a child, and judges might reach different outcomes by reference to that test on the same evidence about the circumstances of the children and family. It may well be, however, that the 2006 legislation opened up a wider range of possibilities for parenting orders than the courts might have been inclined to consider prior to its enactment, particularly as a consequence of the requirement to consider "substantial and significant time." There is certainly evidence, from statements of the judges themselves, that the legislation has had an effect on outcomes by changing the process of their decision-making.\textsuperscript{118}

There is also some evidence from the AIFS study that there has been a very substantial increase in shared care orders in contested cases since 2006. Indeed, the figure has been widely reported that just over a third (33.9\%) of all judicially determined cases involved orders for shared care of at least thirty-five per cent of nights per year for each parent.\textsuperscript{119} This represents a very substantial increase compared to cases decided prior to 2006.\textsuperscript{120}

Much has been made of this one-third figure as an indication that judges are often making inappropriate decisions.\textsuperscript{121} The figure, however, requires more careful examination. The statistics from the AIFS evaluation on judicially determined cases after 2006 show that 12.6\% of all orders in children's cases gave each parent at least thirty-five per cent of nights per year.\textsuperscript{122} In the majority of these cases, the researchers reported that

\textsuperscript{119} Kaspiew et al, supra note 90 at 125 and 133.
\textsuperscript{120} Ibid at 133.
\textsuperscript{121} See, e.g., Fehlberg et al, supra note 5 at 328.
\textsuperscript{122} Kaspiew et al, supra note 90 at 125 and 133.
the level of contact was not defined. It was either specified to be as agreed between the parents or not dealt with at all (presumably because the case involved other issues). Only ninety-eight cases out of 253 met the research team’s criteria for analysis. The figure of one third of cases involving shared care refers only to this group of ninety-eight cases out of the 253 files examined, that is, about thirty-two cases in total. Other, more recent data on judicially determined cases in the Family Court of Australia do not show the same increase in substantially equal time arrangements (45-55% of nights for each parent). Smyth et al found that in the five years following the introduction of the legislation, rates of substantially equal time were never higher than 10% of cases in which parenting arrangements were determined by the judge. In the period that parallels the AIFS data collection, (2007–2009) only 6-7% of such cases involved orders for substantially equal time. The data sets are different (the AIFS study included data from the Federal Magistrates Court and used a broader definition of shared care), but suggest the possibility at least that the AIFS findings represent a statistical anomaly as a consequence of the relatively small number of cases examined.

What is happening then in this small number of cases where judges order shared care arrangements? Prior to 2006, essentially there were just two choices: a residence order in favour of the mother or a residence order in favour of the father. Joint residence orders were very unusual indeed. After 2006, there were three choices: primary care to the mother, primary care to the father, or shared care. It appears that given the requirement to actively consider the third option, judges who hitherto would have opted for either maternal or paternal care are now more inclined to the view that shared care is in the best interests of the child, based on all the evidence available. There is no evidence that any of the thirty-two or so decisions that the AIFS evaluation identified as involving judicially determined shared care arrangements were inappropriate decisions regarding best interests of the children. Judges still have a broad discretion to determine what is in the best interests of the child, since it is the paramount consideration under the legislation. Nor is there any evidence in the AIFS study that in

123. Ibid at 125.
124. This seems very surprising, but it is not possible independently to reassess data that was obtained from a reading of court files.
125. Kaspiew et al, supra note 90 at 125, Table 6.4.
127. For example in 2000–2001 only 2.5% of residence orders in the Family Court were for joint residence; Every Picture, supra note 75.
any cases where shared care was ordered, that there had been a history of violence or concerns expressed by either parent about his or her safety or the safety of the children in the other parent’s care. It is true, of course, that the families that require a judicial decision regarding parenting arrangements are often those where there are issues of violence, abuse, addictions, mental illness and other issues concerning parenting capacity. They are also more likely to have high levels of conflict. Even in this group though, it needs to be considered whether shared care may be the best option where there are serious issues about the mother’s parenting capacity and about the safety of the children in her care, but where removal entirely from the mother would not be in the best interests of the children. An order for shared care may be a way of moderating the risk to the children and providing them with some stability, while still giving the mother a prominent role in her children’s lives. It may, therefore be wrong to jump to the conclusion that shared care is a risk to children where there are safety concerns. It might be the best option in a bad situation, and preferable to a transfer of primary care to the father.

c. Shared care in the general population of separated parents

Judicially determined cases are just a drop in the ocean of all parenting arrangements reached in any given year between parents who do not live together. The question is what is happening in the general population. The AIFS evaluation, based on interviews conducted in 2008, found that overall, amongst people who had separated since 2006, sixteen per cent had a shared care arrangement of thirty-five per cent of nights or more. Seven per cent had an equal time arrangement. On these statistics, among the parents who had separated since 2006, ninety-three per cent did not adopt an equal time arrangement and eighty-four per cent did not adopt an arrangement within the wider Australian definition of “shared care.” While there may well have been an increase in substantially shared care among newly separated parents, this trend had been seen for many years before the reforms, albeit from a low base.
New evidence indicates that after a jump in shared care arrangements among newly separated parents between 2006 and 2009, the rates have settled back to around the levels seen in 2006. That is, the effect of the changes to the law (and to child support in 2008) seem to have produced only a temporary spike in shared care levels in the general community.\textsuperscript{132}

Other research indicates that according to mothers' reports, shared care arrangements are the least likely parenting arrangement to result from litigation.\textsuperscript{133} There is simply not either an abundance or an epidemic of shared care in Australia (depending on one's point of view). Where shared care arrangements are made, the parents generally have not been involved in litigation. Across the population of separated parents, including those who separated many years ago, the preponderance of the evidence is that levels of shared care in Australia are relatively low. In 2006–2007, nearly eight per cent of children who had a parent living elsewhere had a shared care arrangement of thirty-five per cent of nights or more with each parent. Four per cent were in an equal time arrangement.\textsuperscript{134} Other data indicates that in 2009–2010, eleven per cent had a shared care arrangement involving thirty per cent of nights or more and this percentage has remained stable in the subsequent two years.\textsuperscript{135} The figures for many European and North American jurisdictions are much higher.\textsuperscript{136}

Nonetheless, it is reasonable to suggest, from all the available evidence in Australia, that the legislation contributed to an increased awareness and acceptance of shared care arrangements as a viable and "normal" option for parenting after separation. There is evidence also from the AIFS research that the requirement to consider arrangements for "substantial and significant" time is playing a valuable role in shifting community attitudes.\textsuperscript{137} The legislation has encouraged consideration of how non-resident parents who live close to the other parent could be involved in looking after their children during the school week, for example, taking children to after-school activities or providing care on non-weekend days to assist with different work schedules.

The AIFS research found that the majority of parents who had a shared care arrangement thought that it was working well for both the parents and the child, although mothers who had concerns about the safety of the

\textsuperscript{132} Smyth et al, supra note 126.
\textsuperscript{133} Cashmore et al, supra note 12 at 63-64.
\textsuperscript{134} Ibid at 18.
\textsuperscript{135} Smyth et al, supra note 126.
\textsuperscript{136} Parkinson, supra note 19 at 91-97.
\textsuperscript{137} Kaspiew et al, supra note 90 at 365.
children in the other parent’s care were more likely to be negative about shared care arrangements.

3. **Concerns about violence and abuse**

   Despite the bipartisan approach adopted in Parliament, the legislation did not pass without strong opposition from women’s groups, and criticism from academics and legal professionals. Central to those concerns was that the legislation, taken as a whole, placed too much emphasis on encouraging the involvement of non-resident parents, and too little on protecting women from the risk of violence and abuse.\(^1\) The problem of domestic violence has thus taken centre stage in campaigns against changes to the law which promote shared parenting, and greater contact between non-resident parents and children. Typically, in the criticisms of a pro-contact culture, there is no differentiation between patterns of intimate partner violence; only violence against women is addressed as an issue. This reflects international trends\(^2\) and certainly has its parallels in Canada.

   a. **The spectrum of violence**

   One of the problems in developing evidence-based policy in this area is that a great diversity of circumstances are included within the definition of a “history of family violence.” Violence is a pervasive and common problem in intimate relationships. Family violence and abuse is one reason why parents separate, so it is unsurprising to find that many separated parents report such a history. The AIFS in its evaluation of the 2006 reforms, found that twenty-six per cent of mothers and seventeen per cent of fathers reported being physically hurt by their partners. A further thirty-nine per cent of mothers and thirty-six per cent of fathers reported emotional abuse.

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1. There were various concerns expressed about the likely effects of the legislation. One of them, for example, was that women in particular may feel pressured into accepting an inappropriate parenting arrangement when they have significant safety concerns for themselves or their children because they feel the system is weighted in favour of involvement by the non-resident parent. See, e.g., Zoe Rathus, “Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?” (2007) 21 Austl J Fam L 87. Another was that a clause in the legislation that required the court to give consideration to “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent” would deter women from making allegations of family violence: Tracey de Simone, “The Friendly Parent Provisions in Australian Family Law—How Friendly Will You Need to Be?” (2008) 22 Austl J Fam L 56. See also Armstrong, *supra* note 74; Regina Graycar, “Family law reform in Australia, or frozen chooks revisited again?” (2012) 13 Theor Inq L 241.

defined in terms of humiliation, belittling insults, property damage and threats of harm during the course of the relationship.\textsuperscript{140}

The social science evidence has now established clearly that there are different patterns of family violence and much violence occurs in the context of people losing control in the course of domestic arguments.\textsuperscript{141} The AIFS study found that a history of family violence does not necessarily impede friendly or cooperative relationships between the parents following separation. In a survey of some 10,000 parents, sixteen per cent of mothers who reported being physically hurt by their ex-partner during the course of the relationship reported friendly relationships at the time of the interview, and a further 23.5 per cent reported having a cooperative relationship. While others reported distant or conflictual relationships, only 18.5 per cent reported a continuing fearful relationship. Fifty-five per cent of mothers and fifty per cent of fathers who reported emotional abuse by their ex-partner during the course of the relationship reported friendly or co-operative relationships by the time of interview.\textsuperscript{142} It follows that a history of violence or emotional abuse does not necessarily mean that parents cannot develop co-operative relationships after separation with no ongoing safety concerns.

b. System capacity for addressing violence and safety issues

The AIFS report indicated that while the family law system has some way to go in being able to respond effectively to issues of violence, abuse, mental health problems and addiction, there was also evidence that the 2006 changes had improved the identification of families where there were issues about family violence and child abuse. Furthermore, a majority of respondents in all professional categories thought that "the need to protect children and other family members from harm from family violence and abuse is given adequate priority" in the family law system. A substantial minority in each professional category felt otherwise.\textsuperscript{143}

\textsuperscript{140} Kaspiew et al, \textit{supra} note 90 at 26.


\textsuperscript{142} Kaspiew et al, \textit{supra} note 90 at 31-32.

\textsuperscript{143} \textit{Ibid} at 236.
Many reasons might be advanced for the difficulty in dealing adequately with issues of abuse and violence—the inherent limitations involved in seeking to restrain violent behaviour in families by means of court orders, the cost and difficulty of litigation, the restrictions on availability of legal aid, the need to prove the violence or abuse in the face of denial, the frequent absence of corroborative evidence, the division of responsibility in Australia between state and federal systems, the attitude of judges, and the legislation.

In the aftermath of the 2006 reforms, advocacy groups emphasized the legislative changes. The government was urged to make further legislative amendments. The question is to what extent can these concerns be substantiated.

There is no reliable research evidence to indicate that the 2006 amendments had the effect of putting any woman, man or child at greater risk of violence or abuse. The most comprehensive study, by the AIFS evaluation, certainly produced no data to this effect. Nor is there any evidence of systemic failure by the courts to take proper account of issues of domestic violence when the evidence is presented to them, although no doubt there are individual cases where people might legitimately take different views of the strength of the evidence or have reached different conclusions from the trial judge. Even one of the fiercest critics of the 2006 legislation, who predicted that it would make it harder to protect children from violence and abuse, conceded in a 2009 article that “courts appear to be making careful, sensitive, and for the most part, protective and appropriate orders.”

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

The legislation also states:

In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child’s best interests being

144. Submissions to this effect were made to a review by a former Family Court judge and are summarized in his report: Chisholm, supra note 107.
146. Family Law Act 1975, supra note 66, s 61DA(2).
the paramount consideration, ensure that the order... does not expose a person to an unacceptable risk of family violence.\textsuperscript{147}

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

c. \textit{Shared care in cases where there are safety concerns}

One of the major issues arising out of the AIFS evaluation is that families in which a parent had safety concerns were no less likely than other parents to indicate that they had shared care-time arrangements,\textsuperscript{148} although there was a slight diminution in these safety concerns over time.\textsuperscript{149} The question is, to what extent might this be attributed to the effects of the legislation.

The AIFS study provides some detail about these shared care arrangements made in the context of a parent’s safety concerns. One of the surprising findings from the AIFS research was that many more fathers than mothers in shared care arrangements held concerns about their children’s safety. Around one in four fathers and one in ten mothers with shared care arrangements indicated that they had safety concerns for themselves or the children as a result of ongoing contact with the other parent.\textsuperscript{150} Not all these concerns related to family violence or child abuse perpetrated by the other parent. The safety concerns could also be about harm inflicted or that might be inflicted by someone apart from the other parent, such as a new partner or a relative, or because the parent engages in activities with the children that the other parent does not consider to be safe.\textsuperscript{151} Nonetheless, forty-four per cent of fathers with safety concerns, and forty-two per cent of mothers with such concerns indicated that they had been physically hurt by their partner. Most of the remainder reported some emotional abuse.\textsuperscript{152}

How did these shared care arrangements come into being, and what might be assumed about the effects of the legislation in this respect? Of all the mothers and fathers who had safety concerns, about forty-two per cent had resolved the parenting arrangements mainly by discussion with the other parent.\textsuperscript{153} Others had used counselling, mediation or family dispute resolution services. Lawyers were seen as the main means of sorting out arrangements by fifteen to eighteen per cent of fathers and mothers. Courts

\textsuperscript{147} \textit{Ibid,} s 60CG.
\textsuperscript{148} Kaspiew et al, \textit{supra} note 90 at 233.
\textsuperscript{149} Qu & Weston, \textit{supra} note 105 at 101.
\textsuperscript{150} Kaspiew et al, \textit{supra} note 90 at 233.
\textsuperscript{151} \textit{Ibid} at 166.
\textsuperscript{152} \textit{Ibid} at 32.
\textsuperscript{153} \textit{Ibid} at 232.
were the main pathway to resolution of the dispute for only fifteen per cent of fathers and eight per cent of mothers.154

As was noted above, the AIFS evaluation found that overall, amongst people who had separated since 2006, sixteen per cent had a shared care arrangement of thirty-five per cent of nights or more and seven per cent had an equal time arrangement.155 If, as the AIFS found, those with safety concerns had shared care arrangements at about the same rate as those who did not have safety concerns,156 then extrapolating from the AIFS data, it would seem that the numbers of fathers and mothers with safety concerns who had shared care arrangements resulting from court involvement was vanishingly small.

Indeed, it is unlikely that courts would make orders for shared care where there are significant safety concerns. The Australian family law judiciary is largely a specialist bench. The great majority of judges who hear children’s cases were appointed to the Family Court or to the Federal Circuit Court after years of legal practice in family law. Many of them have backgrounds in legal aid work or as lawyers for children. There is much in the legislation that directs them to take account of a history of family violence and to give great weight to the protection of children from harm. The law does not require the judges even to consider a shared care arrangement unless they intend to make an order for equal shared parental responsibility. The presumption of equal shared parental responsibility does not apply when there is reason to believe there has been any history of violence or abuse.

It is nonetheless a problem that many shared care arrangements in the community involved situations where one or both parents had concerns about the safety of their children in the other parent’s care, even if almost none of these seem to have been ordered by courts following a trial. It is also a problem if the parents are in entrenched conflict whether or not there are current safety concerns.157 Shared care represents a compromise between competing claims for primary care, and so it is unsurprising that many of these problematic arrangements are made between parents in conflict, often through mediated agreements which are not child-focused.

154. Ibid.
155. Ibid at 119.
156. Ibid at 233.
4. Lessons from Australia: the payoffs and pitfalls
If reform is contemplated, what lessons then can be learned from the Australian experience, and what are the pitfalls to avoid?

a. The importance of alignment with community values
It is important that, as far as possible, the law of the land commands confidence and general acceptance. The disaffected and disgruntled may be repeatedly assured that the law is fine as it is, but they can only be told for so long to “eat cake.” Even if legislation is only amended to state principles and values that align with the case law, that may in itself improve public confidence in the family justice system.

One positive aspect of the Australian legislation is that the emphasis given to the involvement of both parents in their children’s lives is strongly in accord with community values. The AIFS evaluation reported:

The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals.158

In Canada, it may be that both provincial and federal legislatures need to consider afresh whether the law should be made clearer in affirming that while the parent-parent relationship may be dissoluble, they remain tied together by the indissolubility of parenthood. That message is not enhanced in Canada by continuing usage of the language of custody and access, since that language remains associated with making a binary choice between the parents after separation, notwithstanding the option of “joint custody.”

b. Legislation as community education
Another important concept that emerges from the Australian law reform experience is the value of legislation speaking beyond judges to the community at large, and providing norms to help parents and their advisers settle disputes, rather than just listing factors for judges to consider in the small number of cases that require a judicial resolution. That is the way of the future, even if the Family Law Act 1975 in Australia159 is not a good example of coherent messaging due to the complexity of its provisions.

Former Family Court Judge, Richard Chisholm, has posited that the population of parents who separate can be divided into three groups when it comes to thinking about how legislation concerning post-separation

158. Kaspiew et al, supra note 90 at 365.
159. Supra note 66.
parenting should be written.\textsuperscript{160} There are those who litigate, those who sort out their parenting issues without reference to the law at all, and a group in the middle, who at some level or another, engage with the family law system in resolving their disputes, at least through lawyers and mediators.

The assumption which underlies the approach of drafting legislation for judges to decide cases is that others can thereby "bargain in the shadow of the law."\textsuperscript{161} However, the cases decided by judges are utterly atypical. In Australia, only about six per cent of all parenting cases that are commenced in the courts end up in a judgment following a trial.\textsuperscript{162} Decision-making in children's cases is also highly discretionary and fact-driven. Litigants cannot bargain in the shadow of the law if the law casts no shadow.

It may well be that the parents who litigate to trial are the least likely candidates to make shared parenting work; but the law cannot just be written for this small minority. While some parents will make their own arrangements without reference to legal norms, others can be assisted in developing a well-functioning shared parenting relationship if there is enough guidance in the legislation supported by opportunities for education and dispute resolution. Through its FRCs, Australia has developed a community-centric approach to family dispute resolution. In these centres, education is provided about developing child-focused parenting arrangements and mediation is offered either free of charge or at a very low cost.

A community-centric approach needs to be supported by carefully drafted legislation that provides norms and guidelines that can help shape the way people view what it means for parents to live apart.\textsuperscript{163} Children's cases cannot be dealt with by rules, but there are general principles that can be articulated in legislation to provide a framework for mediation and negotiations between lawyers. Examples of general statements of principle that might usefully be included in legislation and that can also be referred to by the courts in deciding contested cases are that children have a right to maintain relationships with parents and other family members who are important to them, unless this is detrimental to their well-being; that children have a right to protection from harm; that children who have formed a close relationship with both parents prior to the parents'
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separation will ordinarily benefit from having the substantial involvement of both parents in their lives, except when restrictions on contact are needed to protect them from abuse, violence or continuing high conflict; that parenting arrangements for children ought to be appropriate to their age and stage of development; and that parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.

Legislation can be a means of providing greater encouragement of shared parenting if it is directed to the community, not to the judges. Requiring family dispute resolution practitioners to raise with parents the option of a substantially shared care arrangement is much more appropriate than requiring judges to consider it in litigated cases. The place to shift the sole custody paradigm is in the lower conflict cases, not the most high conflict cases.

c. **Guidance on when shared care is, and is not, appropriate**

What can be done to make it less likely that parents will agree on shared care as a compromise when the relationship between them is highly conflicted and levels of cooperation are poor?

The Australian legislation sought to address the issue of deterring inappropriate shared care arrangements by requiring that a shared care arrangement must be ‘reasonably practicable’ and providing guidance on when that might be so. Judges are required to consider the proximity of the parents’ homes, the capacity of the parents to implement a shared care arrangement, their ability to communicate with one another, and the likely impact of the shared care arrangement on the child.\(^\text{164}\) This can be used by mediators and lawyers to “reality test” the practicability of a proposed shared parenting arrangement.

This may be contrasted with the position in other jurisdictions that provide no such guidance. In England and Wales, for example, the Family Justice Review reported that there was a considerable body of opinion in favour of retaining the very limited guidance contained in the *Children Act 1989* through the child welfare “checklist.”\(^\text{165}\) The “welfare” checklist is a useful but somewhat generic list of factors that applies in both public law and private law cases. Such a checklist may well be sufficient in a world in which most conflicts about parenting after separation are determined by judges, or settlements are reached in the shadow of the law.

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164. *Family Law Act 1975* (Cth), supra note 66, s 65DAA.
After the global financial crisis, many countries are facing serious financial difficulties which have resulted in a reduction in all kinds of government-funded services. Demands for more money for lawyers and courts are not likely to be well-received by governments pressed with many competing demands, and for which family law is a low priority. Britain, for example, has made very substantial cuts to legal aid and the provision of free legal advice in family law matters.\footnote{166} In this context of cuts to legal aid, parents who once would have received significant publicly-funded legal assistance will be left to resolve issues for themselves with limited guidance. Hence, laws need to be drafted differently. Clearer guidance on factors to consider in making parenting arrangements may assist in resolving private law matters, not least in assessing when shared care is, and is not, an appropriate option.

Another option to deter inappropriate shared care arrangements is to go back to a strong sole custody or sole residence norm in which fathers can only expect to get primary residence or shared care when the mother is demonstrably unfit. There are no doubt some who would like to turn back the clock in this way to another age when divorce meant the end of the family unit, with only vestigial ties remaining between parents, and when the family formed by unmarried parenthood was a mother-child dyad\footnote{167}; but that old order has irretrievably disappeared. The idea that while marriage may be dissoluble, parenthood is not has become widely accepted, and seems irreversible.

If there were a strong sole custody norm, that would certainly allocate most of the bargaining chips in negotiation to mothers and make it less likely that they would feel a need to compromise by agreeing on some form of shared care. However, it would need to be combined with sufficient legal aid provision to assist impecunious mothers to assert their claim for sole custody in the face of a competing application by the father. The rapid rise in litigation on parenting after separation has overwhelmed family justice systems in many countries.\footnote{168} This, combined with the long-term financial issues facing governments as a consequence of high debt levels and ageing populations, make it unlikely that generous legal aid for litigation can be expected in the future; and it is doubtful that many parents feel comfortable navigating the legal system on their own.

168. Parkinson, supra note 19, ch 1.}
d. *Emphasise the importance of maintaining children's relationships with both parents and with others who are important to them*

The Australian legislation properly emphasises the rights of children to maintain a relationship with both their parents and others who are important to them, unless this is contrary to their best interests. It is important, however, that this principle is not overstated or too widely applied. The emphasis must be on maintaining children’s relationships with parents, not creating them. There are particularly difficult issues when parents have never lived together. Can the parents develop a cooperative joint parenting relationship when they have never known what it is to live together and raise the child as a couple? Is it to be presumed that children will benefit from a relationship with a parent whom they do not know through the intimacy of the daily child-care tasks that occur naturally in most intact families?

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

e. *Avoid presumptions about time*

The Australian Parliamentary Committee in 2003 was clear in its recommendation that there should be no legal presumption in favour of equal time, or indeed any other pattern of post-separation parenting. However, the legislation came to be understood by some parents as giving rise to a de facto presumption of equal time, and this had various negative effects with some shared care arrangements being made in circumstances where such an arrangement was not appropriate. The distinction between considering the option of equal time and considering it as a preferred option was too subtle.

Shared parenting might be an optimal arrangement for some families if it could be managed, but the logistics and expense of doing so may mean

169. *Family Law Act 1975* (Cth), *supra* note 66, s 60B.
170. *Ibid*, s 60B.
it is out of the reach of many separated parents. For these reasons, there can be no one-size-fits-all policy for post-separation parenting.

The Australian legislation was helpful in emphasizing the need to consider time with each parent and to require lawyers and mediators to explore these options with clients. The notion of “substantial and significant time” has been useful in encouraging more creative and child-centred arrangements than the standard formula. The requirement to consider equal time, however, was too easily misunderstood as a presumption, and in mediation this is unlikely to be helpful. Guidelines or presumptions that feed into an agenda of parental rights or adult notions of equality are antithetical to the development of child-focused arrangements. In this respect, the new law in British Columbia has got it right in stipulating that there should be no presumption of equal parenting time.  

f. Avoid bifurcation in the law of parenting after separation

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

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

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

He observed that it may well be appropriate to state these two themes as part of the general principles or objects of the Act, but not as primary

172. Chisholm, supra note 107 at 128.
considerations in determining what is in the best interests of a child. To do so may obscure too many other issues that compromise good parenting.

**Conclusion**

No doubt in Canada, the debates will continue about promoting shared parenting through legislative reform. There is benefit in drawing upon the experience of other jurisdictions to inform such debates. There is much turbulence in family law around the world as legislatures struggle with the very rapid and significant changes occurring in family life and in ideas about appropriate family structures. There can be little doubt that the age of sole custody as a norm is over and that to be acceptable across the population, laws need to emphasize the importance of both parents in children’s lives after separation in the absence of safety concerns, high conflict, or other countervailing factors. That is different from promoting shared care as an option. The practicalities of shared care mean that it is probably limited to the few; but shared parenting, more widely understood, ought to be a norm, as it has become through much of the Western world. Canada’s *Divorce Act*, in this respect, looks dated.

The Australian experience of family law reform was undoubtedly a mixed one, but that is probably true of reforms in most jurisdictions around the Western world in this very difficult and complex area of social policy. There are lessons that can be learned from the Australian experience, which can assist in drafting better laws that will promote positive reform, including, where appropriate, the shared care of children.