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## REFORMING CUSTODY LAWS: A COMPARATIVE STUDY

HELEN RHOADES\* AND SUSAN B. BOYD\*\*

### ABSTRACT

This article looks at the outcomes of recent custody law reform inquiries in Canada and Australia, and examines the ways in which the reform processes in each country dealt with the claims of the various stakeholders and the emerging empirical research on post-separation parenting. Although the outcomes of the two processes were significantly different – one espousing a belief that ‘no one size fits all families’, the other promoting different approaches for differently situated families with a preference for shared parenting – it is argued that both reflect the moderating influence of the empirical evidence on the claims made by disaffected consumers of the family law system, a characteristic that distinguishes them from Australia’s 1995 custody reform process.

### I. INTRODUCTION

The past two decades have witnessed significant debates about child custody law reform in various jurisdictions including Australia, Canada, England, France, Denmark, Portugal, Hong Kong and the United States. In some jurisdictions legislative experiments have quite radically changed the legal framework for decision making in relation to post-separation parenting of children. In other jurisdictions such legislative experiments are being seriously considered. A number of common threads have underpinned these developments, including the central role played by fathers in triggering the legislative reviews, and the tendency for new policies to embrace a normative shift towards a shared parenting model.<sup>1</sup> It has also been observed that these legislative

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changes have largely proceeded with scant regard for the state of empirical knowledge of family life.<sup>2</sup>

This article examines the recent law reform processes and outcomes in two countries, Australia and Canada. Australia replaced its custody framework with a shared parenting regime in the mid-1990s,<sup>3</sup> and more recently examined the possibility of upgrading this approach by introducing a rebuttable presumption of 'equal time with each parent'.<sup>4</sup> The report of its 2003 inquiry ultimately rejected this proposal, but re-affirmed the commitment to a co-parenting model while allowing for alternative approaches for families affected by conflict or violence. Canada proposed a new legislative scheme in December 2002, having been able to take advantage of studies of the impact of earlier shared parenting reforms in other jurisdictions. Unlike Australia, Canada recommended against preferring any particular form of parenting arrangement, disavowing the idea that 'one size fits all' families.<sup>5</sup>

It has been suggested that family law is especially sensitive to its social environment by comparison with other areas of the law.<sup>6</sup> Yet academic commentators have complained that far from reflecting an awareness of the lived reality of families' lives, new custody policies – such as Australia's 1995 reforms – have tended to embody political communications based on assumptions,<sup>7</sup> myths<sup>8</sup> and the unrepresentative anecdotes of disaffected consumers.<sup>9</sup> Since that time, a growing body of sociological research of post-separation life has emerged, much of which suggests that 'adherence to a single principle or rule' is at odds with the lives of children and families.<sup>10</sup> In light of this research activity, we want to explore the factors that shaped the more recent reform proposals in Australia and Canada, and the extent to which each country's process was empirically informed.

Parts 2 and 3 of the article outline the background to the inquiries that led Australia and Canada to adopt their different legislative approaches, and the reform proposals that resulted from them. In Part 4 we examine the submissions of the various stakeholders to the Canadian reform process, and argue that Canada's rejection of a shared parenting scheme may represent as much an attempt to 'walk the line' between the interests of these consumer groups as a concern to reflect the empirical evidence of family practices. Part 5 then looks at Australia's 2003 inquiry, and examines its committee's response to these different information sources. In this part we suggest that an attempt to balance the claims of the different interest groups can also be discerned in the Australian recommendations. However, the analysis also indicates that the empirical research in this area is beginning to influence policy formation by revealing the complexity of family life and moderating the demands of the fathers' lobby for 'bright line' rules.<sup>11</sup> Part 6 concludes with a cautionary note about 'law in action' versus legislation 'on the books', suggesting the need to be wary of predicting significantly

different outcomes for families based on the language in different statutory schemes.

## 2. AUSTRALIA'S CUSTODY REFORM JOURNEY

### A. *The 1995 Shared Parenting Changes*

Australia's 1995 shared parenting reforms are contained in Part VII of the Family Law Act 1975 (Cth).<sup>12</sup> Their key feature was the replacement of the former custody and access division of roles with a scheme designed to encourage parents who live apart to raise their children collaboratively.<sup>13</sup> In similar fashion to the earlier UK Children Act,<sup>14</sup> these amendments effected a number of linguistic changes, removing what was considered to be the proprietary language of custody and access, and introducing the concept of 'parental responsibility'<sup>15</sup> and orders for residence and contact. The new scheme established an equality-based model of post-separation parenting, in which each parent retains their pre-separation 'powers, responsibilities and authority' in relation to their children's care,<sup>16</sup> absent a court order to the contrary. Reinforcing this concept is a set of underpinning principles that vest children with a right to be cared for by both of their parents and to have regular contact with each parent, subject to their best interests.<sup>17</sup> The reforms also added provisions that require judges to be conscious of the safety needs of children and other family members when making parenting orders,<sup>18</sup> although these amendments resulted from lobbying by women's groups at a late stage in the reform process and were poorly integrated into the overall scheme.<sup>19</sup>

Australia's decision to move away from the custody and access model was not the product of any empirical evidence that parenting patterns had changed, nor a response to research of the law's impact on children.<sup>20</sup> No such research had been conducted, and contemporary time-use studies clearly showed that most families continued to structure their parenting responsibilities around a single primary caregiver.<sup>21</sup> The trigger for change was a political concern for the position of non-custodial fathers. In submissions to a parliamentary inquiry in 1992, fathers' rights groups and those sympathetic to their concerns had claimed the court system was biased in favour of mothers when making custody awards, and asked for a legal presumption that would give them 'a more equal share' of their children's care following relationship breakdown.<sup>22</sup> Although that parliamentary committee recommended against shared parenting legislation,<sup>23</sup> and while studies of the English reforms had yet to be completed, the Australian government proceeded to amend the Family Law Act in the hope that this would alleviate fathers' distress.<sup>24</sup>

*B. The 2003 'Equal Time' Inquiry*

Empirical research was undertaken in Australia after the 1995 amendments were introduced.<sup>25</sup> Their findings showed that, three years on, the community at large remained unaware of the new concepts and language, and shared parenting had not become the new norm for separated families. There had also been a steady rise in applications for court orders in the years following the reforms,<sup>26</sup> and a new contact culture had developed involving increased reluctance on the part of judges to refuse orders for contact, even when allegations of domestic violence had been made.<sup>27</sup> In turn, this had led to changes in lawyers' behaviour and created pressures on women to provide contact that compromised their safety.<sup>28</sup> However, many fathers remained angry with the court system, as their expectations of equal shared residence had not been realized. Men's criticisms of the system continued to escalate, and ultimately won the support of the Australian Prime Minister. In June 2003, John Howard announced a new parliamentary inquiry into the law governing 'custody' arrangements, citing concern that 'far too many boys are growing up without proper role models'.<sup>29</sup> The House of Representatives Standing Committee on Family and Community Affairs ('the committee') was given six months to investigate whether the law should contain a presumption that children 'spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted'.<sup>30</sup>

The committee's report, *Every Picture Tells a Story*, was published in December 2003. Despite indications of strong support for equal time arrangements during the hearing process, the committee ultimately rejected the idea of a joint custody presumption,<sup>31</sup> concluding that the amount of time a child spends with each parent should depend on 'the best interests of the child concerned and on the basis of what arrangement works for that family'.<sup>32</sup> On the other hand, the committee expressed a hope that dual residence arrangements would become the new post separation norm 'wherever practicable', and suggested that '50/50 shared residence (or "physical custody") should be considered as a starting point for discussion and negotiation'.<sup>33</sup> It also recommended enactment of a rebuttable presumption of 'equal shared parental responsibility', defined as 'involving a requirement that parents consult one another before making decisions' about major issues, but not day-to-day decisions, for children.<sup>34</sup> This provision, however, will not come into play for families affected by 'entrenched conflict, family violence, substance abuse or established child abuse'.<sup>35</sup> Instead, a presumption *against* shared responsibility applies in these circumstances.<sup>36</sup> This bifurcated approach extends to judicial decision-making about residence orders, with a recommendation that courts

‘consider substantially shared parenting time’ where each parent wishes to be the primary caregiver, but only for families to whom the presumption of shared responsibility applies.<sup>37</sup>

The Report therefore re-affirms the current policy preference for shared parenting, but acknowledges that the 1995 reforms did not turn this idea into a lived reality.<sup>38</sup> The Committee has suggested that in order to overcome this failure the government should develop a wide ranging community education campaign to promote its benefits, and recommends the terms ‘residence’ and ‘contact’ in the Family Law Act be replaced with the ‘family friendly’ language of ‘parenting time’.<sup>39</sup> Overall, however, there are very few proposals for legislative change, and the few there are will likely make little substantive difference to the law if implemented. The duty to consult about major decisions will simply codify existing case law principles,<sup>40</sup> providing legislative clarity that was missing from the 1995 reforms.<sup>41</sup> And while other provisions seek to structure judges’ discretion in making residence orders, children’s best interests remain the ultimate determinant – as the committee acknowledged, ‘Parliament cannot dictate what orders courts will make’.<sup>42</sup> What the report has attempted to do is to reinforce the shared parenting direction of the 1995 reforms, while also recognizing that this approach will not work for all families and can be dangerous for some.<sup>43</sup>

### 3. CANADA’S ROAD TO REFORM: LEARNING THE LESSONS

Bill C–22, An Act to Amend the Divorce Act,<sup>44</sup> was introduced to Parliament by Canada’s former Minister of Justice on 10 December 2002. Although it has now been at least temporarily shelved following a change in government,<sup>45</sup> it was the product of a long process that is worthy of analysis, as it will likely inform any subsequent bills. Bill C–22 embodied several reform objectives similar to those central to the 1995 Australian amendments, including promotion of parental co-operation and reduction of conflict, enhancement of parental responsibilities, and elimination of the ‘proprietary’ terms custody and access from the Divorce Act.<sup>46</sup> Unlike the English and Australian schemes, however, these terms were not replaced with the language of residence and contact. Instead, ‘parenting orders’ would allocate ‘parental responsibilities’, which included ‘parenting time’ and ‘decision-making responsibilities’ (s16). The latter covered both responsibilities for making major decisions (such as health or religion) and more specific decisions (s16(5)). By contrast with the lack of clarity on this point in the 1995 Australian model, Bill C–22 stipulated that where no court order states to the contrary, exclusive responsibility for making day-to-day decisions rests with the person exercising parenting time (s 16(8)).<sup>47</sup>

The key difference between Australia's Family Law Act and Canada's Bill C-22 was the latter's lack of any preference for sharing parental responsibilities, a point emphasized by Canada's former Minister of Justice, Martin Cauchon, when he introduced the Bill:

'Our approach, however, does not presume that any one parenting arrangement is better than others. We believe that such presumptions tend to focus on parental rights rather than on what is in the best interests of a particular child...'<sup>48</sup>

Bill C-22 would have introduced for the first time a 'best interests' checklist into the Divorce Act,<sup>49</sup> requiring judges to take into account twelve 'needs and circumstances of the child'. Many of the checklist factors had their equivalent in the Australian legislation, such as the child's 'views and preferences', and the 'nature, strength and stability of the relationship between the child and each spouse'. But there were also several important points of departure. Of note was the absence of any right of contact principle – or right to 'parenting time' – in Bill C-22. Another divergence was the greater significance accorded to evidence of 'any family violence' in the decision making process. The effect of violence was to be considered in terms of (i) the safety of the child and other family members, (ii) the child's general well-being, (iii) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and (iv) the appropriateness of making an order that would require the spouses to co-operate on issues affecting the child.<sup>50</sup>

Although no right to contact was inscribed in Bill C-22, one factor that judges were required to consider was 'the benefit to the child of developing and maintaining meaningful relationships with both spouses, and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse' (s 16.2(2)(b)). This factor was a watered down version of the maximum contact and friendly parent principle currently in s 16(10) of the Divorce Act, which has been much criticized for its prioritizing of contact over other factors such as safety, and for its unintended effect of discouraging parents from disclosing the existence of family violence.<sup>51</sup> In moving the maximum contact/friendly parent principle to become one of several factors that must be considered under the best interests checklist, the Government intended that the importance of the relationship between a parent and a child be weighed along with other factors.<sup>52</sup> On its face, then, Bill C-22 did not establish any particular model of post-separation parenting as normative.

The reform process that led to Canada's proposed legislation began after countries such as Australia and England had radically changed their laws on post-separation parenting<sup>53</sup> and empirical studies on the

impact of these changes were emerging. As had occurred in those jurisdictions, however, the immediate catalyst for the Canadian investigation of its custody laws was a political move by the fathers' rights movement. Fathers' rights advocates gained support in the Canadian Senate and blocked passage of the 1997 child support amendments (which they perceived to be biased in favour of mothers) until the federal government agreed to initiate a review of custody and access law.<sup>54</sup>

Unlike Australia's two inquiries, the Canadian process spanned several years. The first review was conducted by the controversial Special Joint Committee on Child Custody and Access (SJC), which held hearings across Canada in 1998.<sup>55</sup> The Committee did not conduct a comprehensive search of studies on new post-separation parenting regimes in other jurisdictions, some of which were not yet complete. However, it heard from experts who were conducting these studies in Australia and Washington State,<sup>56</sup> who signalled problems such as those experienced under the Australian regime: shared parental responsibilities for childcare had not increased, the population who used the law tended to be in high conflict, and the notion of shared parental responsibility was increasing the possibility of harassment rather than meaningful sharing of responsibility. The SJC observed that the Washington State Parenting Act had not achieved its objectives,<sup>57</sup> but seemed less clear about the impact of reforms in England and Australia.

The SJC Report<sup>58</sup> did not recommend a presumption in favour of shared parenting, but it did recommend replacement of the terms 'custody' and 'access' by 'shared parenting', which would encompass both previous terms. It also recommended that a Preamble be added to the Divorce Act alluding to the right of the child to contact with both parents. Overall, the SJC Report evinced sympathy for the arguments of fathers' rights advocates, but did not adopt all of their positions. It frequently referred to research supporting fathers' rights arguments that divorce is harmful to children, that loss of contact with fathers compromises children's well-being, and that in general, children benefit from the involvement of both parents.<sup>59</sup> However, it also referred to research that tempered suggestions that family law is biased against fathers.<sup>60</sup> In some instances, the Committee suggested that given contradictions in the research, the law must be flexible enough to accommodate individual circumstances. For example, it recommended against employing presumptions in the legislation, whether in favour of the primary caregiver or joint custody. This element of caution set the stage for the 'one size does not fit all' approach that ultimately dominated.

The Government of Canada responses after the SJC Report reflected an even more cautious approach, emphasizing that there should be no presumptions in relation to post-separation parenting law.<sup>61</sup> The idea of



removing the language of custody and access with its win-lose connotations was still mentioned frequently, as was contact as a key concern. But the Government took the time to conduct further consultations<sup>62</sup> and to commission research and statistical reports,<sup>63</sup> generating the wrath of fathers' groups, who sought more immediate action. The commissioned research, as well as reports on family law in Australia, New Zealand, England, France, and the United States, clearly informed the *Final Federal-Provincial-Territorial Report on Custody and Access and Child Support* (Final Report) published in November 2002, shortly before Bill C-22 was introduced.<sup>64</sup> This Report was much more 'academic' in tone than the 1998 SJC Report, with many sections discussing the social scientific and legal background to the issues in a balanced manner.

The Final Report looked carefully at the social science research from Washington State, England, and Australia, and noted key findings: that studies show that the new legal regimes have not reduced conflict or litigation in family matters, nor changed caregiving patterns.<sup>65</sup> It observed that 'changing legal terminology cannot alter attitudes or force parties to abandon confrontation'<sup>66</sup> and that the Australian studies found that the child's right to contact appears to be given more weight than any other principle, including provisions concerning family violence.<sup>67</sup> It further pointed out that imposing shared decision-making on parents who are not able to deal with one another without conflict can engender more conflict, to the detriment of children.<sup>68</sup>

The 2002 Final Report thus gained from the foreign studies a sensitivity to the conditions under which shared parenting does and does not work. It emphasized that parental arrangements should be based on the best interests of the child in the context of that child's circumstances, and that there should be no legal presumptions that one parenting arrangement is better than another.<sup>69</sup> Other significant recommendations included that there be no legislative presumptions regarding the degree of contact, and that legislative criteria defining best interests include 'any history of family violence and the potential for family violence' and 'facilitating contact with both parents *when it is safe and positive to do so*'.<sup>70</sup> Overall, the Family Law Committee emphasized the diversity of family arrangements and the need to offer a legal framework that was flexible in dealing with this diversity. Bill C-22 ostensibly reflected this philosophy.

#### 4. WALKING THE LINE

Although the law reform process leading to Canada's Bill C-22 was informed by research, it was also influenced by a political need to negotiate the demands of groups representing the 'consumers' of the system. Despite the extent to which the Canadian law reform process has been characterized as 'the gender wars',<sup>71</sup> law reform documents have

become surprisingly gender neutral over the same period.<sup>72</sup> Arguably, governmental bodies have walked a careful line in order to present an appearance of not bowing to any lobby group.<sup>73</sup> Ironically, in so doing, law reform may have been influenced by the demands of lobby groups, particularly fathers' rights advocates, representing quite extreme positions in some instances. Characterizing fathers' rights and women's groups as adversaries falsely implies that all advocacy groups offer equally valid analysis and recommendations grounded in research. In this part, we identify what types of research were invoked by different groups and how this research was dealt with in government documents. We suggest that the way research was invoked by government bodies was influenced by the diplomatic process involved in walking the line between women's groups and fathers' rights groups. As a result, research that was presented by representatives of women's groups or feminists may not have been taken as seriously as it ought, even if it ultimately tempered the extent to which fathers' rights recommendations were followed.

As outlined in Part 3, the Canadian law reform process was initiated as a result of pressure from a particular consumer group of family law. Many fathers' rights advocates appeared before the 1998 Special Joint Committee, portraying a grim picture of parenting by single mothers, the ills of father-absence, and blaming mothers, feminists and the legal system for bias against fathers.<sup>74</sup> However, many others who identified flaws in the operation of custody laws also appeared – advocates for abused women and grandparents, academics, social workers, and mediators – and many referred to research to support their arguments.<sup>75</sup> Despite these diverse perspectives, the SJC was influenced heavily by the arguments of fathers' rights advocates who presented – often using personal anecdotes – evidence of discrimination against fathers, and suggested a joint custody or shared parenting presumption as the key remedy.

The flaws in the fathers' rights arguments and the problematic impact of their influence on the SJC have been identified.<sup>76</sup> Indeed, the SJC itself was given a good deal of evidence – often by women's groups or feminists – about the perils of accepting the fathers' rights arguments at face value. For instance, the assumption that children should necessarily maintain a certain amount of contact with their parents after separation was directly challenged and research cited to qualify this assumption.<sup>77</sup> Direct questions were raised about the Australian and English reforms, and whether increased parental authority for access parents really benefited children.<sup>78</sup> However, Senator Anne Cools, a SJC member known for her support for fathers' rights advocates, persistently and aggressively questioned witnesses appearing for women's groups, suggesting there was widespread denial of access and citing letters written to Senators or Members of Parliament rather than

research.<sup>79</sup> Interestingly, another member of the SJC was surprised to learn later about the high rate of voluntary drop-off of the use of access rights by fathers in various jurisdictions.<sup>80</sup> Her surprise suggests that Committee members were swayed to some degree by the rhetoric rather than the research presented to them. Not all the empirical research presented to the recent Australian inquiry, notably the research on children's views of divorce and separation, was available during the SJC process. However, the SJC did not draw seriously even on the studies on post-separation parenting that *were* available. For example, its Report did not once refer to two reviews of the existing social science and legal literature on custody and access in the context of relocation or abuse that were commissioned and published by Status of Women Canada.<sup>81</sup>

The way that the Committee dealt with evidence about violence against women, in particular its frequency and impact on children, suggests that the SJC assessed the validity of research in relation to the perceived credibility of the witnesses who presented it. Considerable evidence, often backed up by statistics and studies, was offered by witnesses not affiliated with consumer groups per se, including university professors, who might ordinarily be viewed as 'objective'.<sup>82</sup> However, witnesses from battered women's shelters, helplines, and counselling services, as well as from organized women's groups, also presented research and statistics on the incidence of violence against women, as well as the impact on children of witnessing violence between their parents.<sup>83</sup> Fathers' rights advocates, in contrast, emphasized research purporting to show that domestic violence is gender neutral.<sup>84</sup> The SJC transcripts reveal that throughout many presentations by witnesses on the gendered patterns of violence against women, Senator Anne Cools pressed witnesses for statistics on how many women they served, how many of those went on to file for divorce, how many were killed by spouses each year, and so on.<sup>85</sup> Senator Cools often countered this testimony by citing work that showed that women too are violent and that domestic violence is reciprocal between women and men.<sup>86</sup> The 'sexual symmetry of violence thesis' was rebutted firmly by Professor Walter De Keseredy (among others), who was himself challenged by Senator Cools.<sup>87</sup>

This highly gendered process of interrogation of certain types of knowledge influenced the SJC Report, which did not neutrally present research on violence. When statistics were cited showing that violence against women is a serious problem in Canadian society, the impact of these studies was tempered by the Committee's characterization of the groups who raised these issues as 'representing the interests of the *adult* members of divorcing families', as opposed to children's interests.<sup>88</sup> The SJC recommended against a definition of family violence that would emphasize violence against women, because violence against men also exists.<sup>89</sup> This gender neutral approach to violence, which may in turn

downplay its implications for children as well as its gendered nature, influenced subsequent government documents, as well as the definition of 'family violence' in Bill C-22. Overall, the SJC dismissed the insights of women's groups and feminists who testified, even when their evidence was grounded in research about the relevance of spousal abuse to custody disputes. In turn, this research was not taken as seriously as it might have been. A process that had taken these concerns to heart might, for instance, have centred questions of abuse and safety in any legislative proposal, emphasizing that maximum contact was desirable only when it was safe and positive for the child and caregiver.

That said, despite the problematically gender neutral approach, the insights of research on violence and abuse may have contributed to the 'one size does not fit all' concept that dominated the 2002 Final Report and Bill C-22. Support for avoiding presumptions, whether in favour of shared parenting or otherwise, can also be found in the testimony of witnesses before the SJC who offered a social work or mediation perspective.<sup>90</sup> These witnesses may have been perceived as taking a more 'objective' stance than representatives of women's groups, who often argued for the use of presumptions, for instance against unsupervised contact with abusers. Two male university researchers also pointed in their presentations to the need to avoid being formulaic (especially in terms of gender issues)<sup>91</sup> and to the notion that 'one size does not fit all'.<sup>92</sup> Moreover, the Report summarizing nation-wide consultations held in spring 2001 supported this compromise position. It concluded that while many men's organizations supported implementing the SJC recommendations, and many women's organizations argued that a gender analysis should take place before proceeding, many professionals (for example, lawyers and service providers) said that the term *parental responsibility* had merit as a flexible option that could address many of the concerns raised by other respondents, with or without changing existing terminology in the area of custody and access.<sup>93</sup> Thus, the 'one size does not fit all' approach, attached to the language of parental responsibility, emerged as a middle ground endorsed by professionals with their cloak of objectivity.

Research played a much greater role as the Canadian law reform process entered the twenty-first century. Indeed, the government-initiated investigations occurred partly in response to the SJC's own call for more research. However, the SJC's 'narrow research concerns' reflected its preoccupations,<sup>94</sup> these being issues most commonly raised by fathers' rights advocates such as false allegations and the impact of losing contact with a parent.<sup>95</sup> Fathers' rights witnesses had suggested frequently before the SJC, mostly without citing research, that there was 'a systemic bias against fathers as caregivers'.<sup>96</sup> The research commissioned after the SJC Report by the Department of Justice can be construed as reacting mainly to these concerns, rather than the

concerns of women's groups. This research included studies on allegations of child abuse; access enforcement; options for law reform; grandparent–grandchild access; legal approaches and programme support for child access; the risks and protectors for children of separation and divorce; the participation of children in proceedings; mediators' experience with custody and access issues as well as their opinions on change needed; the experiences of lawyers and judges; identifying and streamlining high conflict cases; an assessment of the father/child relationship following parental separation from the male perspective; differential interventions into post-separation visitation disputes; and Québec's civil law notion of joint exercise of parental authority.<sup>97</sup>

Many of the commissioned studies offered valuable insights – for instance that other factors related to parental involvement (such as payment of child support) are more important for a child's well-being than the frequency of contact with the non-resident parent.<sup>98</sup> However, none dealt specifically with violence against women, the impact on children of witnessing violence, gender bias in family law, or the relationship between law and changes to actual caregiving responsibility. Nor did the federal government comply with its obligation to conduct a specifically gender-based analysis of the impact of a proposed legal change.<sup>99</sup> Arguably, the commissioned research mainly reflected the preoccupations of the SJC in relation to research needed on issues of particular relevance to fathers. That said, the 'one size does not fit all' theme emanated from some of these studies as well.<sup>100</sup>

The 2002 Final Report, as mentioned in Part 3, was far more balanced than the report of the SJC. It incorporated some suggestions made by women's groups before the SJC, especially concerning violence, and used few recommendations of men's groups for punitive measures against custodial mothers, or for joint custody presumptions. The Final Report also noted that while considerable attention had been paid to wrongful denial of access, there were also problems of failure to *exercise* access and difficulties respecting enforcement of a right of custody.<sup>101</sup> It pointed out that 'Research shows that serious problems with access are much more likely to occur when there is a history of abuse or high conflict between the parents',<sup>102</sup> and added that its review of the current legislation had not revealed any gender bias in favour of mothers.<sup>103</sup> Without denying these many positive, balanced aspects of the Final Report, its language was on the whole problematically gender neutral, including when it discussed highly gendered social phenomena such as family violence and caregiving. The aversion to using presumptions of any sort that had evolved during the Canadian process also dictated against any presumption against custody or unsupervised access for an abusive spouse, which was a key recommendation of women's groups.<sup>104</sup> Thus, the Federal–Provincial–Territorial Family Law Committee trod a

somewhat cautious path. Moreover, some of its better recommendations (for example, that contact with both parents should be facilitated *only when it is safe and positive to do so*) were, perhaps predictably, watered down significantly in Bill C-22.

## 5. FINALLY RECOGNIZING COMPLEXITY?

Much of the research that informed Australia's 2003 custody review did not exist when its 1995 legislation was enacted, and indeed, as noted above, the results of many of the key studies were not available during the Canadian reform process. In the decade since Australia first proposed a shared parenting law, a plethora of empirical studies of family life has been carried out.<sup>105</sup> As expedient as the later inquiry was, its committee could hardly avoid being conscious of this material.

### *A. Stakeholder Claims and the Empirical Research*

In the six months it was given to conduct its investigation, the committee responsible for Australia's 2003 joint custody reference received over 1700 submissions,<sup>106</sup> took evidence from 166 witnesses in public hearings across the country,<sup>107</sup> and met with a group of children and young people who had experienced family separation.<sup>108</sup> As in Canada, the inquiry generated an intense public debate. Such was the level of heat in this that many submissions were made confidentially, organizations that opposed the presumption reported receiving hate mail and threats of violence,<sup>109</sup> and concerns about the proposal expressed by the Chief Justice of the Family Court were met with calls for his resignation.<sup>110</sup> Men's groups and individual fathers and their supporters (including grandparent groups) presented arguments in favour of an equal time rule, but the preponderance of submissions to the inquiry opposed its introduction. Opposition came from a broad spectrum of organizations and professionals representing a variety of perspectives: infant health services, youth welfare organizations, child protection agencies, community welfare organizations, social researchers (including Australia's key family and child welfare research body, the Australian Institute of Family Studies), government departments (including the Child Support Agency and the Attorney-General's Department), child psychologists, sociologists, lawyers, academics, community legal centres, mediation services, domestic violence services and the Family Court.

The primary argument relied on by all groups concerned the wishes and well-being of children. In similar fashion to the SJC hearings in Canada, many stakeholders – including fathers, mothers, children and grandparents – spoke of their personal experiences. Some fathers illustrated their anecdotes with photographs and supported their

demands for equal time with comments made by their children (such as ‘Dad, we want to see you and mum fairly’<sup>111</sup>). Those who opposed the joint residence presumption also spoke of the need to see this issue from the perspective of children, but many more of these relied on research findings to support their position.<sup>112</sup> To some extent these studies bear out the claims made by fathers’ groups. For example, they demonstrate that children value a continuing relationship with both of their parents, and that many would like – or would have liked – to spend substantially equal amounts of time with each of them.<sup>113</sup> However, the research presented to the committee actually reveals a more complicated picture of children’s perspectives than this description implies, suggesting there is no clear link between a child’s well-being and the *form* of their residence arrangement, and that maximum contact with each parent is not necessarily a good thing.<sup>114</sup>

The various studies relied on indicate there is no universally workable arrangement for all children – that the factors that produce positive outcomes for some can be ‘a source of great unhappiness to others’<sup>115</sup> – and that children’s understanding of shared parenting is linked to the *quality* of the care they receive, not the amount of time spent with each parent.<sup>116</sup> Much of this empirical evidence also suggests that flexibility of arrangements and the ability to participate in decision-making are the key signifiers of fairness for children.<sup>117</sup> As Carol Smart’s recent work has shown, children can find living across two homes difficult to manage, particularly as they grow older.<sup>118</sup> Other researchers, such as Australian child psychologist Jenn McIntosh, provided the committee with evidence that rotational arrangements are ‘developmentally risky’ for very young children,<sup>119</sup> evidence that was reinforced by the testimony of individual mothers who spoke about the complications of overnight contact arrangements while their children were young.<sup>120</sup>

A second argument raised by fathers and their supporters concerned the role of the legal profession and the courts in failing to implement the shared parenting directive of the 1995 reforms. Despite the removal of the custody and access regime from the law, children with a shared residence arrangement remain relatively rare in Australia, with the primary caregiver model continuing to be the typical post-divorce arrangement.<sup>121</sup> Fathers acknowledged this reality but argued that it was a consequence of gender bias within the legal system, which could be remedied by enactment of a presumption that would force judges to make shared residence orders.<sup>122</sup> It is somewhat ironic that despite their contempt for lawyers, fathers placed such great faith in the power of the law. By contrast, opponents of the 50/50 approach suggested that mothers tend to be given custody ‘because they have shaped their lives around their children more’,<sup>123</sup> and argued that such caregiving patterns would not be altered by amending the Family Law Act.<sup>124</sup>

Again the empirical research that was made available to the committee favoured the latter interpretations. Australian time-use survey data demonstrates that women continue to 'do three times as much of the caring as fathers do',<sup>125</sup> while a recent UK report suggests that couples' pre-separation division of labour affects the arrangements they make when they part.<sup>126</sup> Perhaps the most cogent evidence presented to the inquiry came from a study conducted by the Australian Institute of Family Studies (AIFS) of separated couples who share substantially equal care of their children. This research demonstrates that shared residence is the most logistically complex of parenting arrangements, requiring a number of favourable material conditions – including geographical proximity, financial capacity, and workplace flexibility – to make it work.<sup>127</sup> The committee was also provided with evidence of the resource-intensive nature of such arrangements, which entail duplication of major infrastructure costs across the two households.<sup>128</sup> In addition to the material hurdles, the AIFS research also shows that shared care requires a high degree of mutual emotional support,<sup>129</sup> which by definition is not a feature of families in conflict.

A third significant aspect of the empirical evidence provided to the Australian inquiry concerned parental conflict and post-separation violence. Researchers furnished the committee with the results of longitudinal studies showing that enduring parental conflict negatively affects children's post-divorce adjustment,<sup>130</sup> and spoke about the dangers to children's well-being of imposing an obligation of co-operative parenting in such situations.<sup>131</sup> Women's support services also provided the committee with both empirical and anecdotal material about the effects of domestic violence.<sup>132</sup> This included evidence that intimate partner violence is a common feature of litigated post-separation disputes in Australia,<sup>133</sup> that its presence is a strong indicator that child abuse may also be occurring,<sup>134</sup> and that contact arrangements provide the primary site of vulnerability for continuing abuse of former partners.<sup>135</sup> Witnesses from women's legal services suggested that disputes involving these concerns need a different approach to those where violence is not an issue, so that the child's safety, rather than the maintenance of contact with their non-resident parent, guides the outcome.<sup>136</sup> Children's welfare agencies also opposed the introduction of a 50/50 presumption on this basis, even with an exemption for such cases, arguing that the requirement to prove abuse would deter women from leaving violent relationships and 'make it even harder for those children to be protected'.<sup>137</sup>

Finally, although it was not part of the inquiry's terms of reference, there were numerous consumer complaints<sup>138</sup> and arguments from academics and social science professionals<sup>139</sup> suggesting that lawyers exacerbate conflict and that the court system is an inappropriate way to respond to post-separation disputes about children. In fact, quite early



in the hearing process the committee made it clear that it was interested in reforming not just the law, but the entire family law system.<sup>140</sup> Several committee members took the opportunity to make criticisms of their own of the Family Court and the legal profession, describing them collectively as a ‘monolith’ that consumes enormous government resources and ‘bankrupts’ families while ‘perpetuating division and divisiveness in our community’.<sup>141</sup> In light of this, a number of submissions from academic and social science researchers suggested that the focus on legal rules was somewhat beside the point, and that the more pressing need was for increased ‘non-adversarial’ conflict resolution services.<sup>142</sup> This included quite widespread support for enlarged funding of mediation programmes,<sup>143</sup> as well as a more radical proposal from one witness to replace lawyers and judges with professionals who have ‘an in-depth understanding of child development’.<sup>144</sup>

### *B. Playing to the Gallery*

The committee was therefore somewhat overwhelmed with submissions that failed to endorse the benefits claimed by the fathers’ lobby for a joint custody presumption. Its response to some of these witnesses, and particularly those who relied on empirical evidence, was openly aggressive. Interactions between committee members and researchers were often strained and occasionally acrimonious, and the obvious antipathy towards the empirical work that was exhibited at times suggested that its capacity to affect the inquiry’s outcome was limited. This was highlighted at one point when the Chair of the committee made the following confession:

‘I am a bit of an anti-research person myself. I do apologise if I offend you. I figure it is time we get out of the research and get into delivering exactly what our families need.’<sup>145</sup>

Some committee members seemed particularly reluctant to accept findings that suggested no major social change had occurred in relation to the care of children, and at times relied on their personal experience to counter the empirical data. For example, one researcher who provided survey data about the continuing gendered nature of children’s care was met with the following rejoinder from the committee’s Chair:

‘I have said this before, but, as a parent and grandmother, I know that my sons have a far different role in their children’s lives than my husband had in our children’s lives. They go out to work through the day as the primary breadwinners, but I would not consider their mothers to be the primary care givers at all. I would consider that my sons are the primary care givers, even though they are the primary breadwinners as well. ... My concern is that all your

studies show and all the indications seem to be that women are still the primary caregivers, but I am not sure that that is the case.<sup>146</sup>

Committee members also queried witnesses who presented evidence about domestic violence. While there was not the same level of suspicion of these witnesses as exhibited by some SJC members in Canada, the Australian committee requested further particulars about the prevalence data, and sought statistics on the rate of intervention orders provided to mothers and the incidence of women who make false allegations of abuse.<sup>147</sup> Moreover, although the committee made it clear from the outset that it did not support the idea of shared parenting for families affected by violence or abuse,<sup>148</sup> it was evident that it did not have a particularly nuanced understanding of the dynamics of family violence. For example, the following response of one committee member suggests a failure to appreciate the issues of secrecy and underreporting associated with intimate partner abuse:

‘[T]oday, by the time a family gets to the divorce courts, if there is violence within the family that case has already been substantiated by lots of police visits to the home if the violence has been perpetrated against the mother. Most of the street would probably know there is a domestic violence issue in that household, generally speaking.’<sup>149</sup>

By contrast with the treatment of researchers, there was a great deal of sympathy for ‘consumers’ of the family law system and their grievances, especially those of fathers, with several committee members noting that they had ‘been through it personally as well’.<sup>150</sup> Men who told their stories were rewarded with accolades about their parenting,<sup>151</sup> and praised for being ‘the prime movers and shakers’ behind the inquiry.<sup>152</sup> There was an obvious concern among the committee members to find an immediate solution to the problems fathers suggested they faced in maintaining a relationship with their children after separation, rather than commission further research.<sup>153</sup>

In light of such comments, the resulting report was something of a surprise. It not only acknowledges the empirical work, but its influence on the committee’s recommendations is clear. In many ways it is a masterpiece of diplomacy, which addresses both men’s desire for equality and women’s concerns about violence, as well as incorporating the various research data about children’s views, the structural barriers to dual residence arrangements, and the effects of enduring parental conflict. Most significantly, the empirical findings are cited in support of the rejection of an equal time presumption, suggesting that this evidence had persuaded the committee that the focus on time and a single rule for all families was misguided.<sup>154</sup> In concluding there are ‘dangers in a one size fits all approach’ to post-separation arrangements,

the report refers to the longitudinal studies of children's adjustment, the data about the rarity of family friendly workplaces, and the resource implications of parenting across two households.<sup>155</sup> The committee also recommended that children be included in decision-making processes, a further response to the research.<sup>156</sup>

However, like Canada's Final Report, the recommendations also appear to be designed to strike a balance between the demands and interests of the various constituencies. The way the committee went about this was to create a bifurcated system which aims at enabling 'the majority' of children to 'grow up with meaningful and positive relationships' with their parents, while ensuring that 'families and children subject to abuse are not exposed to further risk'.<sup>157</sup> There are a number of overtures to fathers, such as the presumption of shared decision-making responsibility described in Part 2. The committee also responded to the consumer complaints about the legal profession, devising (in its words) 'a system where involvement of lawyers is the exception rather than the rule'.<sup>158</sup> This includes a recommendation for a multi-disciplinary Families Tribunal comprising a combination of social science and legal professionals,<sup>159</sup> and amendments that would require parents to undertake mediation or other forms of non-legal dispute resolution before being able to make an application for a Tribunal or court decision.<sup>160</sup> The recommendations also acknowledge the submissions of women's groups about family violence and parental conflict, and unlike the SJC's report in Canada, these do not suggest that this is an adult-only or gender-neutral problem. The proposals expressly recognize the risks to children of collaborative parenting in these situations, and exempt these families from the requirement to attempt mediation, providing them with direct access to legal representation and the courts to ensure their safety.<sup>161</sup>

Much of the detail for this bifurcated system remains to be worked out. For example, the protective capacity of the 'alternate' pathway will depend to a large extent on how the requirement for access to it is defined. The report suggests that cases involving abuse or violence requiring immediate access to a court process will be 'quickly identified' by 'appropriately trained' staff at the system's entry points.<sup>162</sup> Yet intake procedures for mediation and counselling services in the family law system have not always proved to be sensitive to the issue of post-separation violence, and studies have shown that the practices of both legal and non-legal service providers sometimes thwart women's tentative attempts to disclose it, and that counsellors and mediators have often attempted to conciliate disputes even when they are aware that violence exists.<sup>163</sup> There are also serious concerns about the impact that the Tribunal will have, if implemented, particularly as the committee has suggested that legal representation of clients will be

prohibited, and that funding for its creation may be taken from the legal aid budget.<sup>164</sup>

Despite this, the outcome of the inquiry indicates that the research on families had a significant role to play in defeating the proposal for a joint custody presumption. As occurred with the 1995 reform process, the concerns of fathers who had lobbied for legislative change were acknowledged and the language of equality liberally applied. Yet men's demands for an equal time rule were rejected, and the proposed amendments recognize that shared parenting will not be possible or appropriate for all families, and that it can pose real risks for children if conflict exists. Most importantly perhaps, the research appears to have persuaded the policy-makers that there is a variety of different arrangements that can work well for children and families, and that there are various 'innocent' reasons – logistical, emotional, economic – for the failure of shared residence arrangements, rather than inevitably (or at least solely) blaming obstructive mothers and malevolent judges for its rarity.

## 5. CONCLUSION

As the previous sections indicate, the impetus for the recent reform inquiries in Canada and Australia was agitation by fathers' groups for a legislative commitment to equal custody following divorce. In neither case did this claim wholly succeed. On its face, Canada's proposed scheme in Bill C-22 would have provided separated parents with greater scope to be creative in making arrangements for their children. Although fathers were relatively more successful in Australia, with its 2003 inquiry recommending shared residence be considered as 'a starting point for discussion and negotiation', its report ultimately rejected the idea of 'forcing this outcome' on families.<sup>165</sup> As yet neither country's reform suggestions have been enacted, and it remains to be seen what the effect of these schemes would be if implemented. Juliet Behrens has argued that the impact of legislative regulation in this area depends on a number of factors, including the 'regulatory conversations which take place within communities of interpreters'.<sup>166</sup> As the evaluations of Australia's earlier reforms demonstrated, the practical consequences of changes to the law are largely a function of how they are understood and used by the system's various service providers.<sup>167</sup>

Like the 1995 Australian scheme, the more recent proposals in Canada and Australia embody a number of normative tensions that would need to be 'stabilized' by the interpretative practices of lawyers, counsellors, mediators, judges and the other professionals working in the system.<sup>168</sup> For example, as Bill C-22 did not distinguish between

caregiving and contact, it could be argued that it instituted an implicit equalisation of parental status, regardless of responsibilities. Thus, despite the lack of any explicit preference for shared parental responsibility in Bill C-22, its framework, if implemented, might have given rise to patterns similar to those found operating in Australia. In fact, even without the enactment of the proposed amendments, the reform agenda and its media coverage have generated expectations about increased contact and decision-making responsibilities,<sup>169</sup> and the language of shared parenting and parenting plans is already used by some Canadian lawyers, mediators and judges.<sup>170</sup> Similarly, witnesses who appeared before the Australian Committee suggested that clients had already begun framing their claims in line with their expectations of a 50/50 presumption.<sup>171</sup> Thus, a real danger exists that without strong language to the contrary, any new legislation offering a 'one size does not fit all' approach may nevertheless give rise to 'standard arrangements'.<sup>172</sup>

Indeed, the substance of the 'law on the books' remains a key source of the normative messages that are 'radiated' through professional practices to clients.<sup>173</sup> Thus, in light of the tendency demonstrated by the Australian evaluations for its pro-contact principles to become the default positions in practice, even where there are concerns about safety or parental capacity, there is an argument for setting legislative guidelines that shape the meaning of 'one size does not fit all' in relation to families affected by violence or conflict.<sup>174</sup> Guidelines might, for instance, usefully caution against joint decision-making in situations involving domestic abuse, as has been recommended by the Australian parliamentary committee,<sup>175</sup> so as to provide some protection against inappropriate negotiated settlements.<sup>176</sup> This will be especially important if Australia's proposals are implemented, when mediators and social science professionals may replace lawyers as the primary 'interpreters' of the law.

The outcomes of the recent Canadian and Australian custody reform processes suggest that the role of empirical research is no longer confined to evaluating the impact of reforms after they have been enacted, but is beginning to play a positive role in averting policy changes that are based solely on the claims of disaffected consumers.<sup>177</sup> At the same time, we have found that some law reform measures that would have better reflected the reality of families' lives have been avoided, in part in order to placate disaffected consumers. Given the influence of the interpretative practices of lawyers and other professional dispute resolvers on post-separation arrangements, we suggest that this research evidence must reach beyond the policy-makers, and that the findings be made available to those who work in the system in order to inform their practice.<sup>178</sup>

## NOTES

<sup>1</sup> Kurki-Suonio, K (2000) 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective', 14 *International Journal of Law, Policy and the Family* 183–205; Collier, R. (2001) 'In search of the "good father": law, family practices and the normative reconstruction of parenthood', 22 *Studies in Law, Politics and Society* 133–69; Ryrstedt, E. (2003) 'Joint decisions – A prerequisite or a drawback in joint parental responsibility?' 17 *Australian Journal of Family Law* 155.

<sup>2</sup> Dewar, J. (2003) 'Families' in Cane, P. and Tushnet, M. (eds), *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, Ch 20; Graycar, R. (2000) 'Law reform by frozen chook: family law reform for the new millennium?', 24 *Melbourne University Law Review* 737–55.

<sup>3</sup> Family Law Reform Act 1995 (Cth).

<sup>4</sup> Australia, Commonwealth, House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry Into Child Custody Arrangements in the Event of Family Separation*, Canberra: Australian Government and Publishing Service, December 2003, (visited 23 February 2004) <http://www.aph.gov.au/house/committee/fca/childcustody/report/fullreport.pdf> at Terms of Reference, xvii [hereinafter 'Standing Committee'].

<sup>5</sup> *House of Commons Debates*, 052 (4 February 2003) at 3102–29 (Hon. Martin Cauchon) <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/052-2003-02-04/han052-1010-e.htm>.

<sup>6</sup> Dewar, J. (1998) 'The normal chaos of family law', 61 *Modern Law Review* 467–85 at 468.

<sup>7</sup> Piper, C. (2000) 'Assumptions about children's best interests', 22 *Journal of Social Welfare and Family Law*. 261–76 at 271.

<sup>8</sup> Melville, A. and Hunter, R. (2001) "As everybody knows": countering myths of gender bias in family law', 10 *Griffith Law Review* 124–36.

<sup>9</sup> Graycar, above n 2.

<sup>10</sup> Neale, B., Flowerdew, J. and Smart, C. (2003) 'Drifting towards shared residence?' *Family Law* 904–908 at 905.

<sup>11</sup> John Dewar has argued that 'modern family law legislation is characterised by a deliberate attempt to shift the normative content of family law towards the rule end of the spectrum', Dewar, J. (1997) 'Reducing discretion in family law', 11 *Australian Journal of Family Law*. 309–326 at 313.

<sup>12</sup> The Family Law Reform Act 1995 came into effect in June 1996. Note that applications for parenting orders in Australia need not be connected to divorce proceedings, and can be brought in relation to both nuptial and ex-nuptial children by any person 'concerned with the care, welfare or development of the child': Family Law Act 1975 (Cth), s 65C(c).

<sup>13</sup> Australia., Commonwealth, House of Representatives, *Parliamentary Debates* (21 November 1995) at 3303 (Hon. P. Duncan).

<sup>14</sup> The Children Act 1989 (UK), 1989, c. 41 came into effect in October 1991. For a comparison of the Family Law Reform Act 1995 (Cth) and the private law provisions of the UK Children Act, see Dewar, J. (1996) 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) compared – twins or distant cousins?', 10 *Australian Journal of Family Law* 18–34.

<sup>15</sup> Defined in Family Law Act 1975 (Cth), s 61B as 'all the duties, powers and responsibilities and authority which, by law, parents have in relation to their children'.

<sup>16</sup> Family Law Act 1975 (Cth), s 61B.

<sup>17</sup> Family Law Act 1975 (Cth), ss 60B(2)(a) and (b).

<sup>18</sup> Family Law Act 1975 (Cth), ss 68F(2)(i) and 68K. Family violence is defined for these purposes as 'conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety': Family Law Act 1975 (Cth), s 60D.

<sup>19</sup> Behrens, J. (1996) 'Ending the silence, but ... Family violence under the Family Law Reform Act', 10 *Australian Journal of Family Law* 35; Armstrong, S. M. (2001) "We told you so. . ." Women's legal groups and the Family Law Reform Act 1995', 15 *Australian Journal of Family Law* 129.

<sup>20</sup> Chisholm, R. (1996) 'Assessing the impact of the Family Law Reform Act 1995', 10 *Australian Journal of Family Law* 177–97 at 185. See for discussion of the reforms, Rhoades, H. (2000) 'Posing as reform: The case of the Family Law Reform Act' 14 *Australian Journal of Family Law* 142–159.

<sup>21</sup> Bittman, M. (1992) *Juggling Time: How Australian Families Use Time*, Canberra: Australian Government Publishing Service.

<sup>22</sup> Australia, Commonwealth, Joint Parliamentary Select Committee (1992) *The Family Law Act 1975: Aspects of its Operation and Interpretation*, Canberra: Australian Government Publishing. Service at 105 ('Joint Select Committee report'). See for these arguments in the current UK context,

Geldof, B. (2003) 'The real love that dare not speak its name: A sometimes coherent rant', in Bainham, A., Lindley, B., Richards, M. and Trinder, L. (eds), *Children and Their Families: Contact, Rights and Welfare*, Oxford: Hart Publishing, 171.

<sup>23</sup> Joint Select Committee report, above n 22 at 106 and 111.

<sup>24</sup> Australia, Commonwealth, House of Representatives, *Parliamentary Debates* (8 November 1994) at 2841 (Mr D.R. Williams).

<sup>25</sup> See Dewar, J. and Parker, S. (1999) 'The impact of the new Part VII Family Law Act 1975' 13 *Australian Journal of Family Law* 96–116; Rhoades, H., Graycar, R. and Harrison, M. (2000) *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and Family Court of Australia.

<sup>26</sup> See for discussion of the findings, Rhoades, H. 'The rise and rise of shared parenting laws – a critical reflection' (2002) 19 *Canadian Journal of Family Law* 75–114; Dewar and Parker, above n 25. A similar pattern was observed in the UK after the enactment of the Children Act: see Davis, G. and Pearce, J. (1998) 'Privatising the family', *Family Law* 614–17.

<sup>27</sup> Dewar and Parker, above n 25 at 103. A similar pattern has been revealed in the UK system: Smart, C., May, V., Wade, A. and Furniss, C. (2003) *Residence and Contact Disputes in Court*, Volume 1, Centre for Research on Family, Kinship and Childhood, University of Leeds, for the Department of Constitutional Affairs; Humphries, C. and Harrison, C. (2003) 'Squaring the circle – Contact and domestic violence', *Family Law* 419–23.

<sup>28</sup> Again, similar effects were observed in the UK following the Children Act changes: see Smart, C. and Neale, B. (1997) 'Arguments against virtue – Must contact be enforced?' *Family Law* 332–6.

<sup>29</sup> Hudson, P. 'PM orders inquiry on joint custody', *The Age*, 25 June 2003.

<sup>30</sup> Standing Committee, above n 4 at xvii.

<sup>31</sup> *Ibid* at para 2.35.

<sup>32</sup> *Ibid* at paras 2.41 and 2.44.

<sup>33</sup> *Ibid* at paras 2.38 and 2.43.

<sup>34</sup> *Ibid* at paras 2.82 and 2.84.

<sup>35</sup> *Ibid* at para 2.83.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 2.86.

<sup>38</sup> *Ibid* at paras 2.71, 2.75 and 2.56.

<sup>39</sup> *Ibid* at paras 2.87 and 2.85.

<sup>40</sup> *B and B* (Family Law Reform Act 1995) (1997) 21 *Family Law Review* 676, 730; *Cooke v Stehbens* (1998) 24 *Family Law Review* 5.

<sup>41</sup> Compare Children Act 1989 (UK), 1989, c 41, s. 2(7)

<sup>42</sup> Standing Committee, above n 4 at para 2.56.

<sup>43</sup> *Ibid* at paras 2.35 and 2.39.

<sup>44</sup> Second session., 37<sup>th</sup> Parliament, 2003. The federal Divorce Act, R.S.C. 1985 (second suppl.), c 3 regulates only child custody disputes related to divorce. Other disputes, for instance those between unmarried parents, are regulated by provincial legislation.

<sup>45</sup> Tibbetts, J. (2004) 'Changes to Divorce Act shelved by justice minister', *The Vancouver Sun*, 6 February 2004, A6. But see 'Cotler likes custody reform package', *The Lawyers' Weekly*, 20 February 2004, 7, which indicates that the new Minister of Justice is himself personally interested in reviving the Bill.

<sup>46</sup> *House of Commons Debates*, above n 5 at 1010 and 1030.

<sup>47</sup> This reflects a recommendation made by Rhoades *et al*, above n 25 at 10.

<sup>48</sup> *House of Commons Debates*, above n 5.

<sup>49</sup> The best interests of the child has, however, been the sole factor that judges are to consider in making custody and access orders in the divorce context since 1985: Divorce Act, above n 44 at s 16(8).

<sup>50</sup> But see Neilson, L. C. (2003) 'Putting revisions to the Divorce Act through a family violence filter: the good, the bad and the ugly', 20(1) *Canadian Journal of Family Law* 11–56 for a critical assessment of the failure of Bill C–22 to adequately consider the complex impact of family violence.

<sup>51</sup> See, for example, Cohen, J. and Gershbain, N. (2001) 'For the sake of the fathers? Child custody reform and the perils of maximum contact', 19 *Canadian Family Law Quarterly* 121–83; Boyd, S. B. (2003) *Child Custody, Law, and Women's Work*, Oxford: Oxford University Press, Ch 6.

<sup>52</sup> *House of Commons Debates*, above n 5.

<sup>53</sup> Canada's law reform story actually dates back to the mid-1980s. The merits of joint custody were very much at issue when the 1985 Divorce Act, above n 44, was debated: Boyd, S.B. and Young, C. (2002) 'Who influences family law reform? Discourses on motherhood and fatherhood in legislative reform debates in Canada', 26 *Studies in Law, Politics, and Society* 43–75. This Divorce Act,

still in force, did not adopt a presumption in favour of joint custody, but it did adopt a controversial provision in s 16(10) that encouraged 'maximum contact' with both parents and favoured the 'friendly parent'. In 1993, the Department of Justice initiated a public consultation process on custody and access, but nothing really happened until the child support reforms in 1997. See Boyd, above n 51, at 187–96.

<sup>54</sup> An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, S.C. 1997, c 1 (in force 1 May 1997). These reforms included guidelines for quantum, enhanced enforcement, and changes to taxation. The detailed Guidelines are found in the Regulations, S.O.R./97–563. See Bala, N. (1999) 'A report from Canada's "gender war zone": reforming the child related provisions of the Divorce Act', 16(2) *Canadian Journal of Family Law* 163–227.

<sup>55</sup> For analysis see Bala, above n 54; Boyd, above n 51, at 200–7; Diamond, B. (1999) 'The Special Joint Committee on Custody and Access: a threat to women's equality rights', 19 *Canadian Journal of Women's Studies* 182–5; Laing, M. (1999) 'For the sake of the children: preventing reckless new law', 16 *Canadian Journal of Family Law* 2, 229–82.

<sup>56</sup> Professor Reg Graycar presented before the Special Joint Committee about preliminary results of the Australian study by Rhoades *et al*, above n 25: Special Joint Committee on Child Custody and Access (hereinafter SJC), 35 (4 June 1998). Dr J. Dunne presented research showing that the objectives of the drafters of the 1987 Parenting Act in Washington State had not been realized: Special Joint Committee on Child Custody and Access, 19 (27 April 1998). Dunne's research was later published: Dunne, J. E., Hudgins, E. W. and Babcock, J. (2000) 'Can changing the divorce law affect post-divorce adjustment?', 33 *Journal of Divorce and Remarriage* 35–54.

<sup>57</sup> Canada, Special Joint Committee on Child Custody and Access (1998) *For the Sake of the Children*, Ottawa: Parliament of Canada at 40 (hereinafter SJC Report).

<sup>58</sup> *Ibid* at 1.

<sup>59</sup> See, for example, SJC Report, above n 57 at 10–12, 14, 30. Studies showing that parental education programs produced positive benefits, for instance the facilitation of access, were also cited: SJC Report, at 29.

<sup>60</sup> For instance, it cited statistics showing that in the vast majority of post-divorce arrangements, children are placed in the custody of their mothers, and acknowledged that this primary caregiver arrangement usually occurs by agreement of the parties: SJC Report, above n 57 at 4. The Committee referred here to divorce statistics from Statistics Canada, *Divorces 1995*, at 20, but also to figures from the National Longitudinal Study on Children and Youth, Statistics Canada, *Daily*, 2 June 1998, which is the first effort in Canada to conduct longitudinal research of this nature.

<sup>61</sup> Canada, Department of Justice (1999) *Response to the Report of the Special Joint Committee on Child Custody and Access: Strategy for Reform*, Ottawa: Department of Justice Canada at 10, 12 (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/sjcarp02.html>.

<sup>62</sup> Another public consultation was held in 2001, this time organized by the Federal–Provincial–Territorial Family Law Committee, based on a consultation document, which raised questions and reform options for the public to consider: Canada, Department of Justice (2001) *Putting Children's Interests First: Custody, Access and Child Support in Canada* (visited 23 February 2004) <http://canada.justice.gc.ca/en/cons/ConsultationDocument.pdf>. The 2001 Report of the consultations reflected no clear consensus. It stated that a parental responsibility model best reflected the flexibility favoured by most respondents: Canada, Department of Justice (2001) *Custody, Access and Child Support in Canada: Report on Federal-Provincial-Territorial Consultations*, Ottawa: IER Planning, Research and Management Services at 83 (presented to the Federal–Provincial–Territorial Family Law Committee, prepared by IER Planning, Research and Management Services) (visited 23 February 2004) <http://canada.justice.gc.ca/en/cons/fpbt-cons/full-report.pdf>

<sup>63</sup> These reports are available from the Department of Justice, online (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/index.html>.

<sup>64</sup> Canada, Department of Justice (2002) *Final Federal-Provincial-Territorial Report on Custody and Access and Child Support: Putting Children First* (Custody and Access Project of the Federal–Provincial–Territorial Family Law Committee) (hereinafter Final Report), (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/flc2002e.pdf>.

<sup>65</sup> *Ibid* at 9 and Appendix B, 75–7.

<sup>66</sup> *Ibid* at 13.

<sup>67</sup> *Ibid* at 76–7.



<sup>68</sup> Ibid at 15.

<sup>69</sup> Final Report, above n 64 at 18, Recommendation 6.

<sup>70</sup> Ibid at 19, Recommendation 8 (emphasis added). Notably, the 'safe and positive' language did not appear in Bill C-22.

<sup>71</sup> Bala, above n 54.

<sup>72</sup> Boyd, above n 51 at Ch 8.

<sup>73</sup> For a fuller elaboration of this argument, see Boyd, S. B (2003) 'Walking the line: Canada's responses to child custody law reform discourses', 21 *Canadian Family Law Quarterly* 397.

<sup>74</sup> See Boyd, S. B. (2004) 'Demonizing mothers: fathers' rights discourses in child custody law reform processes', *Journal of the Association for Research on Mothering*, in press.

<sup>75</sup> Transcripts of their testimony are available at <http://www.parl.gc.ca/InfoCom/CommitteeMinute.asp?Language=E&Parliament=1&Joint=1&CommitteeID=147> (visited 23 February 2004)

<sup>76</sup> See, for example, Boyd, above n 51, Laing, above n 55.

<sup>77</sup> For example, Special Joint Committee on Child Custody and Access, 27 (19 May 1998) at 1705 (Ms S. Boyd, Ad Hoc Committee on Custody and Access Reform). See especially the Brief of the National Association of Women and the Law to the Special Joint Committee on Child Custody and Access (1998), at paras 43-53.

<sup>78</sup> SJC, 8 (16 March 1998) at 1635 (Ms C. Curtis, Member of Family Law Working Group, National Association of Women and the Law).

<sup>79</sup> Ibid at 1715 (Senator A. Cools).

<sup>80</sup> SJC, 33 (1 June 1998) at 1635; 34 (3 June 1998) at 1800 (Mrs S. Finestone).

<sup>81</sup> Bailey, M. and Giroux, M. (1998) *Relocation of Custodial Parents: Final Report*, Ottawa: Status of Women Canada; Bala, N. et al (1998) *Spousal Violence in Custody and Access Disputes: Recommendations for Reform*, Ottawa: Status of Women Canada. These two reports were referenced by witnesses before the Special Joint Committee, including Nicholas Bala himself: 6 (25 February 1998) at 1540; and 21 (30 April 1998) at 1515 (Ms V. M. Fisher, Coordinator, Provincial Association of Transition Houses Saskatchewan); and in the Nova Scotia Advisory Council on the Status of Women (May 1998) *Brief to the Special Joint Committee on Custody and Access Reform* (visited 23 February 2004) <http://www.gov.ns.ca/staw/Custodyb.htm>. Brenda Cossman and Roxanne Mykitiuk had also provided a useful overview of the issues and research for the Department of Justice, 'Child Custody and Access - Discussion Paper', subsequently published in (1998) 15 *Canadian Journal of Family Law* 13-78, which presumably was available to the Special Joint Committee.

<sup>82</sup> An example from the non-university community was Dr Gary Austin, Psychologist and Consultant, London Family Court Clinic, SJC, 18 (22 April 1998) at 1615-20. An example from the university community was Professor Walter DeKeseredy (Professor of Sociology, Carleton University), SJC, 33 (1 June 1998) at 1255-1335.

<sup>83</sup> See, for example, SJC, 13 (31 March 1998) at 1005-15 (Ms Beth Bennet, Program Director, Assaulted Women's Helpline, and Ms E. Morrow, Lobby Coordinator, Ontario Association of Interval and Transition Houses); SJC, 19 (27 April 1998) at 1955-2000 (Ms J. Lothien, Representative, Family Services of Greater Vancouver); SJC, 20 (29 April 1998) at 1630 (Ms J. Black, Coordinator, Calgary Status of Women Action Committee).

<sup>84</sup> SJC, 16 (3 April 1998) at 1430 (Mr C. Lachaine, Groupe d'entraide aux pères et de soutien à l'enfant). See also SJC, 19 (27 April 1998) at 1325-30 (Mr J. Maiello, Fathers' Rights Action Group).

<sup>85</sup> See, for example, Senator Cools' interaction with a counsellor from Vancouver Family Services: SJC, 19 (27 April 1998) at 2010-20 (Ms J. Lothien, Representative, Family Services of Greater Vancouver).

<sup>86</sup> For example, Senator A. Cools, questioning Carole Curtis, a witness appearing for the National Association of Women and the Law: SJC, 8 (16 March 1998) at 1735.

<sup>87</sup> SJC, 33 (1 June 1998) at 1300 (Professor W. DeKeseredy, Professor of Sociology, Carleton University). See also SJC, 38 (22 April 1998) at 1610 (Dr J. Service, Executive Director, Canadian Psychological Association).

<sup>88</sup> See, for example, SJC Report, above n 53 at 12 (emphasis added). Testimony about women's responsibility for caregiving of children was characterized in the same way.

<sup>89</sup> Ibid at 81.

<sup>90</sup> For instance, Ms C. Guilmaine noted that abuses could occur of automatic presumptions such as the former presumption in favour of shared custody in California: SJC, 16 (3 April 1998) at 955

(Ms C. Guilmaine, Social Worker and Family Mediator, Ordre professionnel des travailleurs sociaux du Québec).

<sup>91</sup> SJC, 27 (19 May 1998) at 1445 (Professor D. Dutton, Department of Psychology, University of British Columbia).

<sup>92</sup> Ibid at 2040 (Professor B. Beyerstein, Psychologist, Simon Fraser University).

<sup>93</sup> *Custody, Access and Child Support in Canada: Report on Federal-Provincial-Territorial Consultations*, above n 62 at 8.

<sup>94</sup> Bala, above n 54, at 198.

<sup>95</sup> SJC Report, above n 57, at 78.

<sup>96</sup> For example, SJC, 25 (11 March 1998) at 1830 (Mr D. Guspie).

<sup>97</sup> These reports are available from the Department of Justice (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/index.html>.

<sup>98</sup> Canada, Department of Justice (2002) *An Overview of the Risks and Protectors for Children of Separation and Divorce* by S. C. Bernardini and J. M. Jenkins (Prepared for Family, Children and Youth Section) at iii, (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/2002-fcy-2e.pdf>.

<sup>99</sup> The Canadian government has committed itself, domestically and internationally, to evaluating the impact of its laws and policies on women by doing a gender-based analysis. See Status of Women Canada (1995) *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa: Status of Women Canada, at para 35 (visited 23 February 2004) <http://www.swc-cfc.gc.ca/pubs/066261951X/199508-066261951X-e.pdf> which states “the federal government will, where appropriate, ensure that critical issues and policy options take gender into account”.

<sup>100</sup> For example, Canada, Department of Justice (2001) *Post-Separation Visitation Disputes: Differential Interventions* by R. Birnbaum and W. McTavish (Paper prepared for the Family, Children and Youth Section) at 18 (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/2001FCY6.pdf>.

<sup>101</sup> Ibid at 24. This Report also pointed out that the actual level of false allegations of child abuse (which had been a huge issue during the Special Joint Committee consultations) seemed relatively low: Ibid at 19, drawing on Bala’s research report, above n 81.

<sup>102</sup> Ibid at 41.

<sup>103</sup> Ibid at 16.

<sup>104</sup> This was so even though one of the commissioned research papers pointed out that there is a significant distinction in the reasoning behind presumptions regarding custody arrangements, such as joint custody or primary caregiver, and presumptions regarding violence: Canada, Department of Justice (2001) *An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access* by B. Cossman (Prepared for the Family, Children and Youth Section) at 65 (visited 23 February 2004) <http://canada.justice.gc.ca/en/ps/pad/reports/2001-FCY-2E.pdf>.

<sup>105</sup> As Carol Smart and Bren Neale have observed, sociologists have recently rediscovered ‘the family’ as a site for investigation: Smart, C. and Neale, B. (1999) *Family Fragments*, Cambridge: Polity Ch 1.

<sup>106</sup> Submissions can be viewed at <http://www.aph.gov.au/house/committee/fca/childcustody/subs.htm> (visited 23 February 2004).

<sup>107</sup> Transcripts of hearings can be viewed at <http://www.aph.gov.au/house/committee/fca/childcustody/hearings.htm> (visited 23 February 2004).

<sup>108</sup> Standing Committee, above n 4 at para 1.65.

<sup>109</sup> For example, the Council for Single Mothers and their Children provided the Committee with copies of threatening letters they had received after publicly opposing the enactment of a joint custody presumption: Australia, Commonwealth, House of Representatives Standing Committee on Family and Community Affairs, Child Custody Inquiry, *Official Committee Hansard* (24 September 2003) at 24 (hereinafter *Official Committee Hansard*).

<sup>110</sup> Wroe, D. ‘Judge claims intimidation in row over child custody’, *The Age*, 2 December 2003.

<sup>111</sup> *Official Committee Hansard* (29 August 2003) at 27 (private witness).

<sup>112</sup> For example, the Family Law Council, the Australian Institute of Family Studies, Griffith University Families, Law and Social Policy Research Unit, and academic researchers such as Ms M. Walter (University of Tasmania), Dr L. Laing (University of Sydney), Professor L. Moloney (La Trobe University), Professor P. Parkinson and Associate Professor J. Cashmore (University of Sydney), and Associate Professor W. Weeks (University of Melbourne).

<sup>113</sup> Fabricus, W. V. and Hall, J. A. (2000) ‘Young adults’ perspectives on divorce: Living arrangements’, 38 *Family and Conciliation Courts Review* 446–61; Gollop, M., Smith, A. and Taylor, N. (2000) ‘Children’s involvement in custody and access arrangements after parental separation’, 12

*Child and Family Law Quarterly*. 383–99; Parkinson, P., Cashmore, J. and Single, J. (2003) *Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation*, Australia: University of Sydney (visited 23 February 2004) <http://www.law.usyd.edu.au/staff/PatrickParkinson/AIFSFairness2003.pdf>.

<sup>114</sup> Pryor, J and Rodgers, B. (2001) *Children in Changing Families: Life after Parental Separation*, Oxford: Blackwell, 214; Hunt, J. (2003) *Researching Contact*, London: National Council for One Parent Families, 7. See also for an argument suggesting the need to question such child welfare orthodoxies, Eekelaar, J. (2002) 'Contact – Over the limit', *Family Law* 271–4.

<sup>115</sup> Neale *et al* above n 10, at 905.

<sup>116</sup> Amato, P. R. and Gilbreth, J. G. (1999) 'Nonresident fathers and children's well-being: a meta-analysis', 61 *Journal of Marriage and the Family*. 557–73; Smart, C. (2002) 'From children's shoes to children's voices', 40 *Family Court Review* 305–19 at 314; Kelly, J. B. (2003) 'Changing perspectives on children's adjustment following divorce', 10 *Childhood* 237–54 at 247.

<sup>117</sup> Buchanan, A. and Hunt, J. (2003) 'Disputed contact cases in the courts', in Bainham, A. *et al*, above n 22 at 373; Smith, A. B., Taylor, N. J. and Tapp, P. (2003) 'Rethinking children's involvement in decision-making after parental separation', 10 *Childhood* 201–16 at 207; Smart, C., Neale, B. and Wade, A. (2001) *The Changing Experience of Childhood – Families and Divorce*, Cambridge: Polity, 122.

<sup>118</sup> Smart, above n 116; Neale *et al*, above n 10.

<sup>119</sup> *Official Committee Hansard* (20 October 2003) at 4 (Dr McIntosh).

<sup>120</sup> *Official Committee Hansard* (28 August 2003) at 34 ('Tracy', private witness).

<sup>121</sup> Fewer than four per cent of parents registered with the Child Support Agency in 2002 were deemed to have a shared parenting arrangement: Smyth, B., Caruna, C. and Ferro, A. (2003), 'Some whens, hows and whys of shared care: what separated parents who spend equal time with their children say about shared parenting', Paper presented to the Australian Social Policy Conference, Sydney, 9–11 July 2003.

<sup>122</sup> For example, *Official Committee Hansard*, (20 October 2003), at 53 (Mr Joakimidis).

<sup>123</sup> *Official Committee Hansard*, (28 August 2003) at 4 (Ms Mitchell, Women's Information Referral Exchange).

<sup>124</sup> *Official Committee Hansard* (29 August 2003) at 14 (Ms Walter); (26 October 2003) at 39 (Ms Swinbourne, Sole Parents Union).

<sup>125</sup> *Official Committee Hansard* (13 October 2003) at 16 (Dr Sanson).

<sup>126</sup> Smart *et al*, above n 27.

<sup>127</sup> Smyth *et al*, above n 121. All of the fathers with workable shared care arrangements in this study had reduced their work hours or retained flexible work patterns to allow them to care for their children, all lived within 10 km of the child's mother, and all were in a position to make choices about their work–family balance.

<sup>128</sup> *Official Committee Hansard* (3 November 2003) at 5 (Ms McHugh, New South Wales Social Policy Research Centre).

<sup>129</sup> Smyth *et al*, above n 121.

<sup>130</sup> McIntosh, J. E. (2003) 'Enduring conflict in parental separation: Pathways of impact on child development', 9 *Journal of Family Studies* 63–80; Buchanan, C. M., Maccoby, E. E. and Dornbusch, S. M. (1991) 'Caught between parents: Adolescents' experience in divorced homes', 62 *Child Development* 1008–29; Lee, M-Y. (1997) 'Post-divorce interparental conflict, children's contact with both parents, children's emotional processes, and children's behavioural adjustment', 27 *Journal of Divorce and Remarriage* 61–82; Burns, A. and Dunlop, R. (2002) 'Parental marital quality and family conflict: Longitudinal effects on adolescents from divorcing and non-divorcing families', 37 *Journal of Divorce and Remarriage* 57–74.

<sup>131</sup> *Official Committee Hansard* (20 October 2003) at 9 (Dr McIntosh).

<sup>132</sup> For example, *Official Committee Hansard* (28 August 2003) at 20–6 (Ms Bailey, Domestic Violence and Incest Resource Centre).

<sup>133</sup> Brown, T., Frederico, M., Hewitt, L. and Sheehan, R. (1998) *Violence in Families: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, The Family Violence and Family Court Research Program Monash University Clayton and the Australian Catholic University Canberra; Sheehan, G. and Smyth, B. (2000) 'Spousal violence and post-separation financial outcomes', *Australian Journal of Family Law* 102–18.

<sup>134</sup> Cox, C. E., Kotch, J. B. and Everson, M. D. (2003) 'A longitudinal study of modifying influences in the relationship between domestic violence and child maltreatment', 18 *Journal of Family Violence* 5–17; Kaye, M., Stubbs, J. and Tolmie, J. (2003) 'Domestic violence and child contact arrangements', 17 *Australian Journal of Family Law* 93–133.

<sup>135</sup> Ibid; Humphries, C. and Thiara, R. K. (2003) 'Neither justice nor protection: women's experiences of post-separation violence', 25 *Journal of Social and Welfare Law* 195–214; Rendell, K., Rathus, Z. and Lynch, A. (2000) *An Unacceptable Risk: A Report on Child Contact Arrangements where there is Violence in the Family*, Queensland, Australia: Women's Legal Service Inc, at 37; Hester, M and Radford, L. (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark*, Bristol: Policy Press.

<sup>136</sup> See for this argument, Jaffe, P. G. N., Lemon, K. D. and Poisson, S. E. (2003) *Child Custody and Domestic Violence: A Call for Safety and Accountability*, Thousand Oaks: Sage 33, 52 and 59.

<sup>137</sup> *Official Committee Hansard* (28 August 2003) at 10 (Mr Tucci, Australians Against Child Abuse).

<sup>138</sup> For example, *Official Committee Hansard* (28 August 2003) at 18 (Mr Brayshaw, Australian Family Support Services Association) and 26–8 (private witness).

<sup>139</sup> *Official Committee Hansard* (20 October 2003) at 1–27 (Professor Moloney and Dr McIntosh); *Official Committee Hansard* (13 October 2003) at 30–47 (Professor Parkinson and Dr Cashmore).

<sup>140</sup> *Official Committee Hansard* (29 August 2003) at 16 (Mr Quick).

<sup>141</sup> Ibid; *Official Committee Hansard* (13 October 2003) at 43 (Mr Dutton).

<sup>142</sup> A recent Australian study suggests however that the assumption of an adversarial versus non-adversarial demarcation between lawyers and mediators in family law disputes may be more apparent than real: Hunter, R. (2003) 'Adversarial mythologies: policy assumptions and research evidence in family law', 30 *Journal of Law and Society* 156–76.

<sup>143</sup> For example, *Official Committee Hansard* (29 August 2003) at 16 (Ms Walter).

<sup>144</sup> *Official Committee Hansard* (20 October 2003) at 3 (Professor Moloney).

<sup>145</sup> *Official Committee Hansard* (29 August 2003) at 17 (Mrs Hull).

<sup>146</sup> *Official Committee Hansard* (13 October 2003) at 16 and 17 (Mrs Hull).

<sup>147</sup> *Official Committee Hansard* (28 August 2003) at 6 (Mr Price); *Official Committee Hansard* (10 October 2003) at 5 (Mrs Irwin); *Official Committee Hansard* (13 October 2003) at 42 (Mr Cadman).

<sup>148</sup> For example, *Official Committee Hansard* (29 August 2003) at 10 (Mr Dutton) and 12 (Ms George).

<sup>149</sup> *Official Committee Hansard* (24 September 2003) at 23 (Mrs Draper).

<sup>150</sup> *Official Committee Hansard* (29 August 2003) at 24 (Mr Pearce).

<sup>151</sup> For example, *Official Committee Hansard* (29 August 2003) at 27 (Mrs Irwin).

<sup>152</sup> *Official Committee Hansard* (13 October 2003) at 23–4 (Mr Quick).

<sup>153</sup> For example, *Official Committee Hansard* (29 August 2003) at 14 (Mrs Irwin).

<sup>154</sup> Standing Committee, above n 4 at para 2.4.

<sup>155</sup> Ibid at para 2.39

<sup>156</sup> Ibid at paras 2.66 and 4.158.

<sup>157</sup> Ibid at para 2.8.

<sup>158</sup> Ibid at para 4.47

<sup>159</sup> Ibid at para 4.157.

<sup>160</sup> Ibid at para 3.72.

<sup>161</sup> Ibid at paras 4.62, 4.86 and 4.89. Note however that the report suggests that 'mere allegations' of violence will not be sufficient to invoke the right to legal representation and a court hearing: see *ibid* at para 4.99.

<sup>162</sup> Ibid at para 4.107 and 4.109.

<sup>163</sup> Greatbatch, D. and Dingwall, R. (1999) 'The marginalization of domestic violence in divorce mediation', 13 *International Journal of Law, Policy and the Family* 174–90; Keys-Young, Legal Aid and Family Services (1996) *Research/Evaluation of Family Mediation Practice and the Issue of Violence*, Canberra: Commonwealth Attorney-General's Department; Kaye *et al*, above n 133 at 108–111.

<sup>164</sup> Standing Committee, above n 4 at Ch 4.

<sup>165</sup> Standing Committee, above n 4 at paras 2.43 and 2.35.

<sup>166</sup> Behrens, J. (2002) 'The form and substance of Australian legislation on parenting orders: a case for the principles of care and diversity and presumptions based on them', 24 *Journal of Social Welfare and Family Law* 401–22 at 402.

<sup>167</sup> Dewar and Parker, above n 25 at 100–1.

<sup>168</sup> Ibid; Chisholm, above n 20 at 194–5.

<sup>169</sup> See Bala, above n 54.

<sup>170</sup> In fact, Linda Neilson's research conducted mostly during the 1990s before the latest reform process began found that many Canadian judges operating under the current Divorce Act, above n 44, already take as their starting point that contact is in a child's best interests, including sometimes where abusive behaviour is an issue: Nielson, L. (2001) *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association Law for the Futures Fund*, Fredericton: Muriel McQueen

Fergusson Centre for Family Violence Research (visited 23 February 2004). <http://www.unb.ca/arts/CFVR/spousal-abuse.pdf>. See also Cohen and Gershbain, above n 51.

<sup>171</sup> See for example, *Official Committee Hansard* (26 September 2003) at 28 (Ms Anderson) and *Official Committee Hansard*, above n 109 at 24 (Mrs Irwin).

<sup>172</sup> See also Neilson, above n 50.

<sup>173</sup> Dewar and Parker, above n 25; Behrens, above n 166.

<sup>174</sup> For one such proposal, see Behrens, above n 166. See also Kelly, F. (2003), *Conceptualizing the Child through an Ethic of Care: Custody and Access Law Reform in Canada*, LL.M. Thesis, University of British Columbia, esp. Ch V.

<sup>175</sup> Standing Committee, above n 4 at para 2.83.

<sup>176</sup> See for examples of inappropriate post-separation arrangements that had been negotiated outside the courtroom, Rhoades, H. (2002) 'The "no-contact mother": Reconstructions of motherhood in the era of the "new father"', 16 *International Journal of Law, Policy and the Family* 71.

<sup>177</sup> Note, however, that past experience in the UK demonstrates that policy-makers can distort research findings to support political messages: see Smart *et al*, above n 117, at Ch 2.

<sup>178</sup> Note that the Australian government has recently begun to provide child-focused professional development programmes for family lawyers and mediators along these lines: see Webb, N. and Moloney, L. (2003) 'Child-focused development programs for family dispute professionals: Recent steps in the evolution of family dispute resolution strategies in Australia', 9 *Journal of Family Studies* 23.