Family Law Reform in Australia: A Fractured Continuum

Frank Bates*

A. Introduction

In an earlier article on the subject of family law reform in Australia,[1] I commented that "… family law is an unrewarding area for the reformer, for it is rarely (if ever) possible to provide solutions which are acceptable to all parties or bodies of opinion." To that may properly be added the difficulties of prediction both on a personal and institutional basis which seem inherent in the very process of family law reform. This is the situation to which Nygh referred when commenting on the *Family Law Reform Act* 1995, "[n]o doubt what will happen is that which follows reform. The danger we feared will not eventuate and the provisions which we thought would create no problems will become nightmares!" [2]

Perhaps because of the inevitable imperfection of family law reform,[3] the *Family Law Act 1975* has been amended no less than 61 times,[4] with some recent significant amendments.[5] In fact, the *Family Law Act* is the most amended piece of Australian Federal legislation apart from the *Income Tax Assessment* and the *Social Security* Acts. It also represents a continuum, at least in the sense that the process of change and amendment has been perceptively continual over a 30 year period. The next and immediate question is how conceptually correct that process of reform has been. In an attempt to answer that question, it is necessary to return to the expressed aims of the original legislation in 1975.

In that year, the then Commonwealth Attorney-General K.E. Enderby wrote that the legislation was,

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[1] F. Bates, *Ten Years of Australian Family Law Reform: 1982-1992*, 2 Asia Pacific L.R. 43, at 44 (1993).

[2] P.E. Nygh, *The New Part VII – An Overview*, 10 Aust J. Fam L. 17 (1996).

[3] *See* below text at note 5.

[4] As of the time of writing, March 2004.

[5] For general comment on these latter amendments, see F. Bates, *Family Law Reform in Australia, 1992 and Beyond*, 3 European J. Law Reform 331-337, at 331 (2001).

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> … unquestionably a change of great magnitude in the law of Australia. I believe … that the Act will prove to be possibly the most humane and enlightened social reform to be enacted in Australia since the Second World War."[6]

More specifically, regarding the Family Court of Australia, Enderby commented that,

> … the Act makes it clear that the Family Court is to be a helping court which will take positive action to help parties as well as determine the legal issues between them. The creation of such a court can therefore be seen as a big step forward in helping and encouraging people with family problems to involve them in an informal, simple and effective way. [7]

Given these transparently laudable aims, what, one may legitimately ask, went wrong? For go wrong these matters surely did and, since this is a paper concerned with the processes of law reform, one must ask whether anything went significantly wrong with these very processes.

Before leaving this introductory discussion, it is both necessary and important to draw attention to one particular area of activity to which insufficient attention has been given: the contribution of the Family Law Council.[8] It will later be seen that its influence in particular issues has been profound. Created by §115 of the *Family Law Act* 1975, the Family Law Council's responsibilities are the following:

> It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General concerning –
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> the working of this Act and other legislation relating to family law;
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> the working of legal aid in relation to family law; and
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> any other matters relating to family law.

Perhaps the most notable aspect of the work of the Family Law Council[9] has been its rate of acceptance by government. In the *ipsissima verba* of the Council's historian,

> [O]f the 445 recommendations to government made by the Council in letters of advice and reports between 1976 and 1996, almost 81 percent have been substantially implemented. Only 11 percent have not been implemented. In summary, about 89 percent of recommendations which have been considered by government have been either implemented either substantially or in part.[10]

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[6] K.E. Enderby, *The Family Law Act 1975*, 49 Aust L.J. 477 (1975).
[7] *Id*., at 479.
[8] *See* below text, at note 12.
[9] For the sake of appropriate objectivity, it should be noted that the writer was a member of the Family Law Council from August 1990 to July 1993. The usual disclaimer, of course, applies.
[10] B. Hughes, The Family Law Council: 1976-1996: A Record of Achievement 60 (1996). In the foreword to that book, a past Chair of the Council, Ms J. Boland (now Boland J), wrote, at v, that,

> The success of the Family Law Council can be measured by its outcomes, with approximately 80 percent of its recommendations made in letters of advice and

This record graphically compares with other law reform bodies throughout the common law world.[11]

However, this does not mean that the Family Law Council's work has been uniformly recognised or that other law reform bodies have not actively been involved. In regard to the former, Chisholm J., writing extra-judicially of a reform in which Family Law Council recommendations played a significant part – that is, the *Family Law Reform Act* 1995 – commented on the absence of a significant law reform base, as such.[12] With respect, especially given the Council's documented record, that is not an easy argument to sustain.

B. The Effect of the 1995 Reforms

Having thus made mention of the *Family Law Reform Act* 1995, it is apposite to make more detailed comments regarding its nature and effect. First of all, there can be no doubt that it was very much the creature of the Australian Family Law Council as manifested in one major report. The Act, which introduced an entirely new Part VII dealing with children into the 1975 Act, expressed its aims and the principles underlying those aims in §60B of the Act.

Thus, §60B(1) states that, "[t]he object of this part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children." Section 60B(2) then continues by reciting that:

> The principles underlying these objects are that, except when it is or would be contrary to the child's best interest:
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> children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
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> children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
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> parents share duties and responsibilities concerning the care, welfare and development of their children; and
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> parents should agree about the future parenting of their children.

> reports to the Attorney-General and which have been considered by government to date, being implemented. The quality of the recommendations reflect the dedication and hard work of the talented people who have served on the Council or have been coopted to its committees. They have provided an unique blend of professional skills and experiences from backgrounds in the law, academia, government, the social sciences and other areas.

[11] *See generally*, J.H. Farrar, Law Reform and the Law Commission (1974), especially at 123.

[12] R. Chisholm, *Assessing the Impact of the Family Law Reform Act 1995*, 10 Aust.J .Fam. L. 48, at 52 (1996).

The influence of the Family Law Council is readily apparent in these objects and principles when they are referred back to its report, *Patterns of Parenting After Separation*,[13] which appeared in 1992. In that Report, one major conclusion which was drawn was that "[m]ost children want and need contact with both parents. Their long term development, education and capacity to adjust and self-esteem can be detrimentally affected by the long term or permanent absence of a parent ...."[14] What is the policy direction and legislative manifestation of this conclusion? An inevitable starting point is the decision of the Full Court of the Family Court of Australia in *B and B: Family Law Reform Act 1995*.[15]

In that case, the Full Court[16] had emphasised[17] that §60B was subject to §65E which provides that the best interests of the child were the paramount consideration.[18] In particular, §60B, whilst it represented a deliberate legislative statement, did not purport to define or limit the full scope of what was "... ordinarily encompassed by the concept of best interests."[19] As regards the two parts of §60B, the Court said that §60B(1) could be regarded as an optimum outcome, but was unlikely to be of great value in the adjudication of individual cases. Section 60B(2), the Court went on, provided principles which were more specific, but not exhaustive, and their importance would vary from case to case.

Although *B and B* would probably[20] be regarded as being the major authority on the philosophy expounded by the new Part VII of the *Family Law Act*, other comments have been made. Thus, in *Cook v Stebhens*,[21] the Full Court of the Family Court of Australia[22] had said that the requirements of §60B(2), especially the children's right of contact found in §60B(2)(a), were expressed in positive terms and had to be approached accordingly. In *H v E*,[23] a differently constituted Full Court[24] adopted the view to be found in *B and B*.[25] More positively, in *Re G: Children's Schooling*,[26] the Full Court,[27] whilst noting that §60B was subject to the paramountcy of the child's best interests, stated that the

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[13] Hereinafter referred to as POPAS.
[14] Chisholm*, supra* note 12, at para 2.39.
[15] (1997) FLC 92-755.
[16] Nicholson CJ, Fogarty, and Lindenmayer JJ.
[17] (1997) FLC 92-755, at 84,219.
[18] In that regard at least, the 1995 amendments did not represent any major change in legislative policy or thrust.
[19] (1997) FLC 92-755, at 84,220.
[20] *See* F. Bates, *Something Old, Something New – Australian Family Law in 1997*, in A. Bainham (Ed.), The International Survey of Family Law: 1999, at 23 (1999).
[21] (1999) FLC 92-839, at 85,821.
[22] Ellis, Lindenmayer and Mushin JJ.
[23] (1999) FLC 92-845, at 85,893.
[24] Ellis, Kay, and Steele JJ.
[25] *Supra* note 18.
[26] (2000) FLC 93-025, at 87,407.
[27] Nicholson CJ, Kay, and Brown JJ.

objects and principles there set out, must be taken into account and *might be decisive*.[28]

Yet, all of that notwithstanding, the issue of co-operative, joint, or shared parenting did not come to an end with the case law on the 1995 amendments.

On 26 June 2003, the then Federal Attorney-General[29] and the Minister for Children and Youth Affairs[30] referred an inquiry to the House of Representatives' Standing Committee on Family and Community Affairs (hereinafter the 'Standing Committee' or 'Committee') requesting that the Committee inquire into, report on, and make recommendations for action into several issues. First, given that the best interests of the child are the paramount consideration, what other factors should be taken into account in deciding the respective time each parent should spend with his or her children post separation? In particular, should there be a presumption that children will spend equal time with each parent and, if so, in what circumstances should the presumption be rebutted and in what circumstances should a court order that the children have contact with other persons including their grandparents? Second, does existing child support formula work fairly for both parents in relation to the care of, and contact with, their children?

In its timely response, the Committee reported on those matters and others relating to the administration of the law.[31, 32]

In making the inquiry, the Ministers directed the Committee to look at the Federal Government's response to a report from the Family Law Pathways Advisory Group entitled *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (hereinafter the *"Pathways Report"*), which was launched in August 2001, and which outlined six problems with the existing family law system.[33] The Advisory Group made 28 recommendations in that report, directed towards the government, courts, and private professionals and organisations working within the system. A detailed analysis of those recommendations is beyond the scope of this commentary, but, because the Government's response seemed to provide the genesis for the most recent report of the House of Representatives Standing Committee's own report entitled *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation*, some general comment on the earlier

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[28] Author's emphasis.

[29] The Hon. Daryl Williams MP.

[30] The Hon. Larry Anthony MP.

[31] *See* below text at note 96.

[32] 31 December 2003. In the event, the contents of the Report were made public on 28 December 2003.

[33] These were that: first, that there was not enough focus on the best interests of the child or child inclusive practices in family law services; second, that the right sort of help and information was not always available to families at the time and place they needed it most; third, that some people managed their separation with little interaction with the system at all whereas others felt frustrated by it, believing in some cases that the system was biased against them; fourth, that some parts of the system worked well, but overall it was not as effective as it could be, or should be; and, last, that it is clear that a more coordinated and integrated approach to helping families in distress was needed.

report would seem apposite. In announcing the referral, the Australian Prime Minister, in a moment some would consider of rare prescience, commented that no one legislative change or pronouncement could alter immediate concern about the system, that the matter was of national importance and seemed to imply that it was important, to the greatest extent possible, that children had the benefit of regular and meaningful contact with both parents.[34]

The Government responded positively to the *Pathways Report* and commented[35] that the report provided,

> ... government and non-government service providers with a map that will guide future changes to the family law system. The goal is to develop an integrated family law system that builds individual and community capacity to achieve the best possible outcomes for families ....[36]

However, the House of Representatives Committee noted in its own report that the *Pathways Report* (and for that matter, the Government's response), good and helpful as it was, did not seek to address the basic philosophical underpinnings of family law.[37] That is not wholly surprising as attempts to do so are few and far between.[38] The House of Representatives Committee, however, commented that such was not within its terms of reference,[39] but, more tellingly perhaps, that it was conservative in the solutions which it proposed and had not consulted with the community as widely as was needed.[40]

Early in its report, the Standing Committee rejected what had been a key recommendation regarding a change in terminology leading up to the 1995 amendments.[41] As a precursor to the reforms, the Family Law Council had stated in its *Patterns of Parenting* report that the term 'custody' could be,

> ... synonymous with incarceration and is also used to describe conversion of property or goods. [42] When used to describe the status of children of divorce, the term invariably carries overtones of ownership. Moreover, we speak of a custody battle as if 'it' were a prize only one party can win.

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[34] The Hon. J.W. Howard MP, House of Representatives Debates, 24 June 2003, at 17277-17278.
[35] Government Response to the Family Law Pathways Advisory Group Report, at 7-8.
[36] *Id*., at 15, and this is important in view of what the house of Representatives committee was to recommend, noted that, "[t]he family last system is much broader than the courts. It also embraces the many service providers and individuals who help families to resolve legal, financial and emotional problems, and is centred around the family members themselves. ...As well as the Family Courts of Australia and Western Australia, the Federal Magistrates Service and State Magistrates courts, they include Centrelink, the Child Support Agency and other government agencies at national and State and local levels, community-based organisations, private practitioners, advocacy groups and volunteers ..."
[37] House of Representatives Committee, Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation 3 (2003) (hereinafter, referred to as 'Picture').
[38] For a general commentary, *see* F. Bates, *Some Theoretical Aspects of Modern Family Law*, 100 South African L.J. 664 (1983).
[39] *Supra* note 33.
[40] Picture, *supra* note 37, at para 1.11.
[41] *Id*., at para 1.33.
[42] POPAS, *supra* note 13, at para 4.11.

Likewise, the Council regarded the word 'access' as having connotations of ownership such as, for example, the right to enter and pass adjoining land without hindrance. Therefore, the report concluded that co-operative parenting after separation could well be enhanced by the use of terminology which suggested ownership of children.[43] The Standing Committee accepted that there had been a change of terminology in the 1995 legislation but also hated that the earlier terminology had been used in the reference.[44] The Committee postulated that such use "... perhaps is indicative of the lack of success of the 1995 reforms, which has led the Committee to seek further new and still more appropriate terminology through this inquiry's work."[45] In the event, the Standing Committee recommended that Part VII of the Act be further amended to remove the language of 'residence' and 'contacts', "... in making orders between the parents and replace it with family friendly terms such as 'parenting time'". [46]

In addition to the issue of terminology, the Standing Committee was critical of the reforms introduced by the 1995 Act as having resulted in expectations which were ultimately unmet. First, the *Family Law Reform Act* 1995 was said to have been intended to create a rebuttable presumption of shared parenting, but evidence given to the Committee indicated that shared parenting was not happening in the courts or the community.[47] Second, despite the purported aims of §60B,[48] the predominant outcome in post separation parenting did not support them.[49] Finally the Council's suggested change in terminology – 'custody' and 'access' to be replaced by 'residence' and 'contact' – had not thereby been changed and there was still a common winner/loser scenario, which had been perpetuated by legal advice.[50] Indeed, such perceptions have influenced out of court negotiated outcomes – the perception being of the mother (usually) having sole residence and the father with alternate weekends and half school holidays. The Committee, while acknowledging that no such general rule existed, admitted that the perception that it did could well influence decisions to settle.[51] The Committee also acknowledged that sole residence was the norm and that, since 1995, orders for substantially shared parenting had declined.[52]

In addition, the Committee noted that §61C of the *Family Law Act* specifies that parental responsibility lies with each parent, but stated that in practice it

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[43] *Id*., at para 4.51.
[44] Picture*, supra* note 37, at para 1.33.
[45] They did, though, go on to say that until such new terminology was introduced, the 1995 terminology would continue to be used.
[46] Picture*, supra* note 37, at para 2.85.
[47] *Id*., at para 1.20.
[48] *Supra* note 13.
[49] Picture, *supra* note 37, at para 2.11.
[50] *Id*., at para 2.12.
[51] *Id*., at para 2.13.
[52] *Id*., at para 2.15. According to Family Court of Australia statistics in 1994-95, 5.1% of all orders were for joint custody whereas, in 2000-1, only 2.5% of residence orders were for joint residence.

was, "... often ignored. The parent with residence usually assumes the power because this is the practical outcome of living arrangements rather than as the result of legal exclusion."[53] In fact, in relying on a submission from the Family Court of Australia, the Committee went on to say that courts did not pay particular attention to shared responsibility because this was the "ordinary position." On one level, the structure of the paragraph is tautologous, on another paradoxical and, on yet another, difficult to understand. Nonetheless, the Committee stated it was committed to an approach based on a principle that both parents should remain involved in their children's lives and that children's time spent with each parent should be maximised.[54]

That gives rise to a matter which had troubled the Family Law Council in past times and which led to the *Patterns of Parenting* report, namely the question of whether a joint custody presumption referred to equal sharing of time. In the end, the Council rejected[55] the idea of a joint custody presumption which seemed to exist in the *Family Law Act* prior to the 1995 amendments.[56] The major reason why that approach was taken was that any presumption of equal time was seen as unworkable. The Committee seemed generally to take a similar view, although from a different standpoint, when it wrote that, "... the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care."[57] Despite that apparently uncompromising statement, the Committee continued by stating that it did not support, "... forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent." The Committee's stance was, instead, that, "... all things considered, each parent should have an equal say on where the child/children reside." At the same time, the Committee still urged that, wherever possible, an equal amount of parenting time should be the desired objective, taking individual circumstances into account.

Taking all of that into consideration, the Committee expressed the view that normal practices around information sharing after separation would need to change.[58] For instance, if parents were to share responsibilities about children's health, they would both need access to medical records and Medicare information and similar considerations would be applicable to educational matters. Even taking such issues into proper account, the Committee was still forced to conclude that there were no 'black and white answers' as to when equal time would work and when it would not.[59] The Committee thought there was danger in seeking to adopt a uniform approach in all situations.[60] Second, the

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[53] *Id.*, at para 2.33.
[54] *Id.*, at para 2.34.
[55] POPAS, *supra* note 13, para 4.51.
[56] *See Family Law Act* 1975 §63F(1), as it then stood.
[57] Picture, *supra* note 37, at para 2.35.
[58] *Id.*, at para 2.37.
[59] *Id.*, at para 2.41.
[60] *Id.*, at para 2.39.

Committee also pointed out the practical hurdles which a majority of families would have to overcome if the shared residence of children were to come about. Thus, the Committee referred to submissions which pointed to children's increased risk of exposure to ongoing parental conflict and the instability which inevitably results from changes in environment. The Committee also noted that "family friendly" workplaces were rare, as are the financial resources necessary to support two comparable households. Distance between households can also create problems with respect of transport and schooling.[61] Rather platitudinously, the report tells us that "... second families can also bring complications."

The conclusion to that part of the report is disappointing in that it is far from emphatic and probably tells us little more than the existing Part VII and the report. The Committee, thus, concludes that 50/50 shared residence (or "physical custody") should be considered as a starting point for discussion and reflection.[62] At the same time, the Committee acknowledged that, "... there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of their child/children and that each parent should have an equal say as to where their children reside." If that statement were not, by itself, sufficiently uncertain, the report continues to vouchsafe that, "In the end, how much time a child should spend with each parent after separation, should be a decision made, either by parents or others on their behalf, in the best interests of the child concerned and on the basis of what arrangement works for that family."[63] Once again, it is hard to say that that statement is likely to take the argument a great deal further, though, in light of the Committee's view about the role of the Family Court of Australia,[64] the reference to "others on their behalf" is not without interest.

Having set out the Committee's own policy and objectives (if such they can properly be called), it was then necessary to provide mechanisms to bring them about. In that regard, the Committee commented that, in essence, the concept of shared parenting which it had in mind is structured on four levels.[65] Once again, I fear that these levels suggest little, if anything, which could be described as advancing what presently exists. The first level is where fully shared decision making is appropriate and, hence, would comprise joint decisions regarding all aspects of post separation parenting. That would include jointly deciding where children will live and how much time they would spend with each parent. Despite what has earlier been said regarding the practicality and vagueness of all too much of the document, that first level was regarded as, "... the vision for

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[61] This does appear to have been a special problem in Australia, see the cases mentioned in *supra* note 19. On the issue of less radical relocation (from Cairns to Bendigo, as in *B and B*), see the more recent case of *D and SV* (2003) FLC 93-137. *See also* Picture, *supra* note 37, at paras 2.45-2.47.

[62] *Id.*, at para 2.43.

[63] *Id.*, at para 2.44.

[64] Below text at note 82.

[65] Picture, *supra* note 37, at para 2.49.

post separation parenting in the future." The second level comprised joint decision making as to the agreement's substance, but certain aspects – such as time spent with each parent which is separated from joint responsibility and assigned to one parent, as either agreed between them or imposed by an external decision maker – are incorporated into a parenting plan.[66] The third would apply to families where issues such as entrenched conflict, family violence, substance abuse, or child abuse indicate that joint parenting is not possible at the time of separation. The final level (of last resort) would be where a child would not be safe in the care of a parent as a consequence of past family violence or serious child abuse, including sexual abuse. In such a case, a *court*[67] may need to determine contact between child and parent should not occur at all in the foreseeable future. In view of what has been earlier said, the Committee suggested that such a four level structure would enable a variety of post separation outcomes which reflect the unique circumstances of each party and, at the same time, maximise the opportunity for ongoing involvement of parents in their children's lives. Nonetheless, such options were open to courts under the existing Part VII, if not, indeed, before the 1995 amendments to the Act.

The Committee then went on to suggest the creation of a rebuttable presumption as a way to increase shared parenting. In that regard, the Committee noted that, on the one hand, the introduction of such a presumption might lead to an increase in litigation because the majority of separated families would not have equal time arrangements in place and, thus, would not fit the presumption.[68] On the other hand, the existence of such a presumption would eliminate the need for litigation at least for those who presently feel that they have to argue against sole residence in order to get the level of contact sought. However, the matter which seemed to have precipitated[69] the recommendation[70] that, "... Part VII of the *Family Law Act* 1975 be amended to create a clear presumption that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making" was that Parliamentary intention might be significantly enforced if courts were required to consider the presumption of shared responsibility in each case. In making that point, the Committee noted that courts could play an educative role in informing courts of legislative intent. This was of particular importance because of anecdotal evidence that the implicit presumption contained in §60B of the Act was being judicially ignored.[71]

Perhaps a little more surprising in the context of the report at large was the reliance which the Committee placed on the utility of Parenting Plans.[72] In its 1992 report, the Family Law Council had stated that, "... the use of a well-structured and clear parenting plan guide will assist parents in focussing on how

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[66] *See b*elow text at note 71.
[67] Author's emphasis.
[68] Picture, *supra* note 37, at para 2.54.
[69] *Id.*, at para 2.56.
[70] Recommendation 1, below text at note 71.
[71] Picture, *supra* note 37, at para 2.55. *See also* text *supra* note 13.
[72] *Id.*, at paras 2.58-2.62.

to meet the needs of their children after separation. In time of emotional upheaval, the plans offer a structure on which the parents can rely, while, ideally, avoiding the formality of proceeding to litigation."[73] The Council continued by claiming that, "... parents will have an identified and clear structure to work with from the outset of their negotiations over children. Thus it is hoped that by adopting a forward-looking and constructive approach to the question of ongoing child care, parents will be able to reach an amicable agreement for the children relatively quickly and thereby avoid causing undue distress."[74] At the same time, three other matters should be noted: first the report admitted that it was not every family situation which would be amenable to parenting plans.[75] In such a case, it would be necessary for a plan to be prepared by the Court, which would, almost inevitably, be quite different from such plans created by co-operating parents. Conversely, the report acknowledged that there were some separating parents for whom such plans would be inappropriate because they would be able to co-operate without formalising their relationships.[76] Third, and, for the purposes of this paper, this is perhaps the most important: the parenting plan suggestion made in the *Patterns of Parenting* report was subject to the most trenchant criticism. For example, Ingleby has trenchantly inquired as to "When is a child agreement not a child agreement? When it is a parenting plan. The area of parenting plans is another example of law reform which does not effect any significant change to the law."[77] Ingleby, too, refers to "stained glass platitudes" and "sophistry" which he believed characterise the 1995 amendments.

As regards parenting plans in the more recent report, the Committee was of the view[78] that such plans assumed a joint decision making capacity and a responsibility to sort out and agree, at least on basic matters.[79] The Committee acknowledged[80] that the registration of parenting plans was cumbersome, inflexible and, consequently unpopular with practising family lawyers.[81] At the same time, though, the Committee regarded parenting plans as being preferable to Consent Orders which can frequently lead to disputes over matters of detail which could otherwise be avoided if the detail were in a plan which could be amended or renegotiated over time.[82] In that context, the Committee recommended that Part VII of the Act be amended to as, "to define 'shared'

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[73] POPAS, *supra* note 13, at para 5.07.
[74] *Id.*, at para 5.15.
[75] *Id.*, at para 5.19.
[76] *Id.*, at para 5.21.
[77] R. Ingleby, *The Family Law Act – A Practitoner's Perspective*, 10 Aust J.Fam. L. 48, at 52 (1996).
[78] Picture, *supra* note 37, at para 2.59.
[79] *Id.* "[S]uch things as the physical care of the child, including where they should live and how much time they should spend with each parent, as well as how parents will allocate their decision making. A parenting plan can be as detailed or as general as the parties to it require depending on their capacity to communicate and be flexible."
[80] *Id.*, at para 2.60.
[81] *Family Law Act* 1975 §63DB.
[82] Picture, *supra* note 37, at para 2.61.

parental responsibility as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including – but not confined to Education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence."[83] This, they state, should be in the form of a parenting plan. I find this recommendation more than just a little disturbing: the specific issues which are raised in it are precisely those which are likely to cause serious friction between separated parents and have certainly done so in the past. To put the matter in terms of the report itself, these are matters which would fall within the second level of shared parenting as described by the Committee where an external decision maker could very well be necessary and too much might be expected of a parenting plan.[84]

Given all of that, it is important to consider, at this juncture, the machinery which the Committee would put in place to deal with the kinds of situations envisaged in the second, third and fourth of their four levels which represent their espoused notion of shared parenting.[85]

First, on the immediate issue of shared parenting, the Committee was of the view that changing the Act itself was insufficient. The Committee took the view[86] that, "… community perception of legislation is as critical to its success as its actual content. Any legislative change which the government decides to implement may therefore need to be accompanied by community and professional education."[87] It may very well be that any perceived failure of the fundamental framework of the 1995 amendments can be attributed to such lack of awareness.

C. The Problems of Public Perception

In the context of public perception and awareness, the comments of Enderby referring to the Family Court of Australia will be remembered.[88] Yet at the same time, either the vision itself or its practical application was, or had become, flawed. For instance, Ms. Moira Rayner, who at the relevant time was Victorian Commissioner for Equal Opportunity, had commented that the Family Court, "… has become as adversarial a court as one would wish and the intention that children's interests should be taken at least as seriously as adults has been largely frustrated."[89] Further, in 1985, Finlay noted that, "quite apart from violence directed towards court personnel, there was a general malaise about the

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[83] *Id.* Recommendation 3.2.
[84] *Supra* note 64.
[85] *Supra* note 63.
[86] Picture, *supra* note 37, at para 2.77.
[87] The Committee noted, id., that such had been a common practice in other areas of law reform such as taxation and health.
[88] *Supra* note 6.
[89] Quoted in *Bates*, *supra* note 1, at 53.

Family Court in the community that will not go away."[90] That commentator went on to say that, "Once doubts have been raised – they may or may not be justified at all – general confidence begins to ebb away. Once confidence is lost, it is very hard to recover. This is something of very great concern to the whole community." In its report, the Standing Committee found widespread community dissatisfaction with the family law process.[91] The Committee believed that it was impossible to address adequately its original terms of reference without also examining the process itself. After having considered the impact of the adversarial process[92] as well as the form in which proceedings involving family law were heard, the Standing Committee expressed the view [93] that:

> To be confident of a sufficient impact, the Committee believes that change may need to be more radical than diverting people to alternative dispute resolution and making less adversarial changes to court processes alone. Only a small percentage of people get to trial before a judge, but since dispute resolution processes often occur within a framework of adversarially based litigation and because the judge is the final arbiter, the courts significantly influence how the rest of the process works.

In making that point, the Committee then went on to consider the role of the legal profession at a fundamental level and stated that its avowed objective was to devise a system where the involvement of lawyers was the exception rather than the rule.[94] They continued by considering the possibility of agreements between parties excluding lawyers and expert witnesses from the process of litigation.[95] However, the Committee itself noted that any such process was predicated on the agreement between the parties and a common commitment to the collaborative process.[96] "It does not", it states obviously, "provide any way of preventing a vindictive party from dragging the process out and still proceeding to litigation at more cost to themselves and, more importantly, to the other party."

The Committee then noted the large number of unrepresented litigants in family law matters, a subject on which much has recently been written.[97] Nevertheless, the Committee admitted that courts must have some role, albeit a limited one, and suggested that the primary rule of the court should be the enforcement of tribunal orders when required. From that, it was readily apparent which direction the Committee was taking, and its conclusion to that part of the report cannot be unexpected. The Committee concluded that, "a comprehensive and radical solution is required to effectively ensure the majority of families are able to reach solutions for their future parenting responsibilities first through

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[90] H.A. Finlay, *Fault and Violence in the Family Court of Australia,* 59 Aust .L. J. 559 (1985).
[91] Picture, *supra* note 37, at para 4.1.
[92] *Id.*, at paras 4.1-4.41.
[93] *Id.*, at para 4.42.
[94] *Id.*, at para 4.47.
[95] *Id.*, at para 4.52.
[96] *Id.*, at para 4.53.
[97] *Id.*, at paras 4.56-4.59.

mediation and then through a non-adversarial tribunal process."[98] In other words, a parenting plan should be devised prior to any application to the Family Court or the Federal Magistrates Service.

After examining various tribunals which operate in Australia and elsewhere, as well as dealing with constitutional issues, the Committee then urged an eight step process aimed at achieving the goals set out throughout the report.[99] The Committee concluded that,

> … a completely new infrastructure with a new child inclusive, non adversarial decision making body at its centre would provide a sufficiently radical reform to have a real impact on changing behaviour and expectations to post separation outcomes.[100]

The first step urged[101] by the Committee was the establishment of a single new entry point for parents to access help that would provide a full range of dispute resolution options available under the family law system. [102]

The second step as envisaged by the Committee was that parents should receive appropriate help to establish workable and relevant plans in establishing shared parenting arrangements since the immediate aftermath of separation could be a very confusing and stressful time for both parents and children.[103] The Committee considered[104] it important that the informational process be activated before parents had approached the Tribunal or the courts.[105] It followed that any such entry point should be appropriately staffed with the capacity to meet with the parties and make an assessment, both of the parties themselves and the dispute. However, the Committee pointed out that such an agency could not compel attendance.[106] One of the Committee's incentives for cooperation was that in any subsequent adjudicative hearing an adverse inference could be taken for failing to participate. But such a punitive attitude might cast doubt on the legitimacy of the entire process, and furthermore, coercive provisions do not seem to have met with success in Australian law.[107] Regardless, it is surely still even less satisfactory to conceal coercive measures in another part of the new

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[98] *Id.*, at para 4.69.
[99] *Id.*, at paras 4.70-4.86.
[100] *Id.*, at para 4.88.
[101] *Id.*, at para 4.96.
[102] In so doing, they considered the possibility of attaching the entry point to some existing mechanism (e.g. Medicare or Centrelink) on the grounds (*Id.*, at para 4.87) but that to do so would only have a limited impact on adversarial behaviour, especially at an early stage, as there would be a tendency to rely on courts as the primary decision making body.
[103] *Id.*, at para 4.104.
[104] *Id.*, at para 4.105.
[105] Traditionally, the Committee noted (*Id.*, at para 4.104) that Family Court counsellors, during their first contact with a client, provided parents with information about children's needs and possible appropriate parenting arrangements and options for resolving disputes.
[106] *Id.*, at para 4.107.
[107] *See* F. Bates, *Counseling and Reconciliation Provisions – an Exercise in Futility*, 8 Family Law 248 (1978).

proposed procedure, which should, of course, be regarded as voluntary.[108] To correct the faults of the Committee's coercive suggestion, the point of entry in resolving familial conflicts should be quickly to identify those cases where access to court process is necessary.[109] In addition, such cases (*i.e*. those involving matters referred to as stage four of the shared parenting process)[110] could also be directed towards the proposed Families Tribunal's investigative processes.[111]

The fourth step outlined by the Committee is that a case assessor could refer parents to mediation or counselling services where they are available in the community or courts.[112] If mediation is unsuccessful, parties could be returned to the initial entry point and referred to the Tribunal. All of these processes would be aimed at delivering a parenting plan, which represents the Committee's fifth step. The Committee commented that,

> The plan should then be registrable at the Tribunal and become binding in the same way a Tribunal orders will be binding but subject to a relatively simple procedure for variation. This would also facilitate the use of the parenting plan in any future dispute about things covered by it, in contrast to the current rigidity of interim and final orders.[113]

From what has gone before, it will be apparent that the most central part of the pattern projected by the Committee is step six – the Families Tribunal. Where mediation and other dispute resolution procedures have failed to assist the parties in reaching an agreement, the next step will be to commence an application in the newly constituted Families Tribunal. It is, thus, unfortunate that the weakest part of the Committee's strategy relates to the Tribunal. The three paragraphs which deal with the Tribunal itself leave so much unsaid.

First, when mediation and other dispute resolution procedures have failed to help the parties reach an agreement, then the next step would be to commence an application in the Families Tribunal for a decision.[114] Within the Tribunal, the processes are:

> ... envisaged to be as informal as possible, with very little documentation, but consistent with the rules of natural justice. It is anticipated that Tribunal members would be drawn from the ranks of professionals working in the family relationships field. First, the Tribunal would attempt to conciliate the dispute. This could be undertaken by a single member. If this does not resolve it, the hearing of the dispute and the decision making function of the Tribunal could be performed by a panel of members comprising a mediator, a child psychologist/other person able to address the child's needs and a third person with appropriate legal expertise.

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[108] *Supra* note 100.
[109] Picture, *supra* note 37, at para 4.109.
[110] *Supra* note 65.
[111] Picture, *supra* note 37, at para *4.110*.
[112] *Id.*, at para 4.111. If there are issues of imminent danger, *see supra* note 107, those could be referred directly to courts if they are of substance and not mere allegations.
[113] *Id.*, at para 4.112.
[114] *Id.*, at para 4.113.

Second, the outcome of any such hearing would be a binding order, confirmed by the relevant legislation.[115] Third, the Committee emphasised that any such statute should totally exclude legal representation for parties appearing in a Families Tribunal application.[116] The statute, the paragraph continues, should permit the Tribunal, at its sole discretion, to appoint legal counsel, interpreters, or other experts to assist the Tribunal. Nonetheless, the Committee anticipated that,

> ... the Tribunal will be able to deal with the overwhelming majority of its clients without the need for the services of these experts. In addition, as children's voices are to have a significant role, there may be a need to provide separate representation, especially for young children.

The *lacunae* and the inconsistencies which present themselves in these three paragraphs will readily be apparent. Although the role of lawyers is very strictly limited, drawing the members of the Tribunals from groups of other professionals is unlikely to prove any more popular than a more traditionally constituted tribunal. The problems which have attached to the personnel of the Family Court of Australia are, it is submitted, likely to be transferred to the Tribunal members, as the results of their adjudications will have the same potentially disruptive effects as those of the Family Court.[117] Additionally, criticisms which had been made of the secrecy in which Family Court proceedings were conducted are likely to reassert themselves.[118] In turn, these factors may very well act as a considerable disincentive for appropriately qualified and experienced individuals to become members of the Tribunal. This is the more so when one considers that the government protection available to judges in all courts is unlikely to be available to Tribunal members.

The attempt to eradicate legal involvement has inevitably failed to take procedural matters into proper account. The simple statement in the report is quite inadequate: thus, even in bodies such as the Administrative Appeals Tribunal where traditional rules of evidence are specifically excluded by statute, may not necessarily be utilised.[119] The exclusion of legal representation is, again, likely to produce problems which have already been noted;[120] there is no reason why the difficulties attaching to unrepresented litigants in the Family Court should not be transferred to the projected Tribunal.

There is some apparent uncertainty regarding the legislative basis of the Tribunal. References in the report to "the statute" are insufficient. It is unclear as to whether the body is to be set up by a new Act or by a new division of the

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[115] *Id.*, at para 4.114.
[116] *Id.*, at para 4.115.
[117] *Supra* note 88.
[118] For a journalistic, though not atypical comment, *see* P. Tennison, Family Court: The Legal Jungle (1983).
[119] *See* F. Bates, *Aspects of Evidence in Australian Social Security Proceedings*, 6 Civil Justice Quarterly 108 (1987).
[120] *Supra* note 105.

Family Law Act, although given the structure of the report at large, the former would seem to be more likely.

As regards the continuing role of the Tribunal, the report goes on to discuss the issue of enforcement. It should be said that procedures involving enforcement of orders involving children have not been especially successful. This is particularly true of the new Division 13A of the *Family Law Act* which was introduced in 2000.[121] The present writer has anecdotal evidence that those court personnel charged with its day to day application find it technical and difficult. The report's response is less than specific: first, the Committee, rather platitudinously noted that, despite the fact that orders would be binding, it was inevitable that there would be subsequent breaches, especially if relationship issues have not been resolved.[122] The Committee, thus, envisaged[123] that the first allegations of breach of an order could be appropriately dealt with by the Tribunal in the first instance.[124] Subsequent breaches would be dealt with by a court,[125] although, in some instances, the first breach might be referred by the Tribunal to the Court, if it is clear that a variation would not be effective to resolve the dispute.[126] One can only wonder how this projected machinery would be efficient to deal with breaches as represented by cases such as *Schwartzkopff*,[127] where a stronger and more formalised approach is clearly necessary.

In view of all of the foregoing, it will readily be apparent that a role (or roles) must remain for the courts. Hence, the Committee stated that there would be a protective role, an enforcement role and a limited review role which would remain with the courts, even though such curial processes as remain ought to be as non-adversarial as possible.[128] As regards the third of the roles envisaged for courts, the Committee was of the view that the potential for review should so far as possible be excluded and should be limited to issues of denial of natural justice and with respect to the Tribunal acting outside its statutory jurisdiction.[129] The report then sets out nine criteria on which court decisions should be based.[130] It should be said that many of these are far from dissimilar to the

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[121] For comment, *see Bates*, *supra* note 4, at 340 *et seq*.
[122] Picture, *supra* note 37, at para 4.116.
[123] *Id.*, at para 4.117.
[124] *Id.*, at para 4.118. The report continues by saying that, "If, as is often the case, the breach is in reality a symptom of a need to vary the original order to make it more workable, the Tribunal would have the power to vary its own order."
[125] That function, the Committee continued, *Id.*, at 4.118, could be performed by a Magistrate either in the Federal Magistrates' Court or attached to the Tribunal. It could, alternatively, be performed by delegation from a judge or magistrate within a court to a Registrar or Judicial Registrar attached to the Family Court of Australia.
[126] *Supra* note 121.
[127] (1992) FLC 92-303; *see* F. Bates, *Scandalising the Court: Some Peculiarly Australian Developments*, 3 Civil Justice Quarterly 241 (1994).
[128] Picture, *supra* note 37, at para 4.119.
[129] *Id.*, at 4.120.
[130] *Id.*, at 4.121. These are that:

original aims articulated for the original Family Court in 1975, though, as might be expected, the report urges that procedures should be easily understood without the need for lawyers. [131]

Rather optimistically, one is forced to say, the report states that costs to clients ought not to be prohibitive.[132] Paradoxically, that paragraph goes on to state that access to enforcement, if legal representation is necessary, should be supported by public funds, although it should be possible to proceed without representation. At the same time, the Committee also recognised that some fees might be necessary to avoid vexatious applications or to discourage over reliance on the system.[133] That statement seems to recognise that such behaviour is an inherent part of any system which seeks to regulate family breakdown.

D. Children's Voice and the Grandparents' Interests

Although it is clear that encouragement of joint parenting and restructuring the administration of the system are the lynchpins of the report, there is one other major conceptual issue to which the report gives rise. That is, the voice which children are to be given and, consequently, the role of people other than parents in the lives of children.

> Court decisions when required, should be based therefore on the following approach:
>
> a significantly simplified, speedy and low cost process for making decisions;
>
> specifically designed for appropriate non-adversarial deliberation on relevant matters;
>
> rules of evidence should be eliminated or at least significantly limited;
>
> forms and affidavits should be minimized;
>
> procedures should be easily understood and manageable without the need for lawyers;
>
> formalities for the admission of relevant documents should be simple and user-friendly;
>
> the court should be able to adopt an investigative approach and decide what information it needs and does not need to make a decision;
>
> a hearing process should avoid undue formality and be investigative in character rather than adversarial; and
>
> consideration should be given to the design of rooms used for making parenting decisions, especially where the decision-maker does not need to be a judicial officer.

[131] *Supra* note 6.
[132] Picture, *supra* note 37, at para 4.127.
[133] *Id.*, at para 4.127.

As regards the first, after having recited Article 12 of the *United Nations Convention on the Rights of the Child*,[134] the report states[135] that,

> The new Families Tribunal processes should be designed around maximising opportunities for children to participate. Hence, the simpler court procedures which have been proposed need to be child friendly as should the services which were brought into effect at each end of the process.

One is able to perceive the original aims of the Family Court appearing once again. There is, of course, as the report noted,[136] the possibility of a child being separately represented under §68L of the Act. An analogous provision was to be found in the original legislation.[137] All in all, a very much greater degree of specificity in the later report would have been desirable.

In that broad context, the report noted that there had been a great deal of evidence regarding a perceived imbalance between the enforceability of child support through the Child Support Agency and of contact through the courts.[138] If that should suggest that the payment of child support and contact should be *ipso facto* tied one to the other, then this writer would see that as a flagrant nonsense for the simple and obvious fact that the two issues have conceptually nothing to do with one another. Put another way, there are clearly some parents who are eligible and required to pay child support but who, at the same time, should have limited or no contact with the children for whom it is paid. Child support cannot be regarded as an entry ticket to contact.

Nevertheless, the Committee, more realistically, concluded[139] that there was scope for further strengthening the enforcement provisions to be found in the *Family Law Act*. First, the relevant bodies[140] should be able to make orders for compulsory parenting time and for referral to parenting programs. Given the thrust of the report as a whole, it is rather surprising that this is the first significant mention of these possible courses of action. Second, the report goes on usefully to point out that the consequences of a deliberate breach of an order should be as serious for the parent who fails to make him or herself available in accordance with an order, as it is for a parent who wilfully refuses to make the children available without reasonable excuse. The report properly noted that, although court orders were not obligatory, if parties did seek to utilise them,

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[134] This article states that, "1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[135] Picture, *supra* note 37, at para 4.139.

[136] *Id.*, at 4.134.

[137] *Family Law Act* 1975 §65.

[138] Picture, *supra* note 37, at para 4.140.

[139] *Id.*, at para 4.142.

[140] Designated as being the Families Tribunal, enforcement Registrars or a current judge or magistrate attached to the court.

then obligations were created thereby. Third, the Committee then expressed the view that consequences should be cumulative for subsequent breaches and all other sentencing options should be retained. Fourth, reasonable but minimum financial penalties should be imposed for first and subsequent breaches. However, a third breach should, if it demonstrates a pattern of deliberate defiance of court orders, require the court to give serious consideration to making a new parenting order in favour of the non-breaching party (unless it is contrary to the best interests of the child). Such a decision would, in effect, be overruling the decision of the Tribunal.

As regards the role of people other than parents in the development of children, the Committee discussed the role of grandparents in some detail. This was because, first, of their terms of reference[141] and because, "[w]ith the greater incidence of divorce in Australia and with greater longevity of the population, potentially more grandparents are faced with possible contact difficulties." [142] The report notes[143] that the issue of grandparents is significant, as research overseas has shown,[144] because they are an important resource in childcare and the continuing provision of education and support for children.

In existing Australian law, the Committee noted[145] it had always been possible for grandparents to make application for residence or contact orders, a position which had been strengthened by the 1995 amendments.[146] At the same time, the Committee had recognised, from evidence given to the inquiry, that that was not well known or publicised. In consequence, the Committee noted that, in the majority of cases, the various relationships were worked out informally without recourse to the law, despite the legal framework.[147] In addition, grandparents were frequently deterred from accessing such legal avenues as might be available by both their own unwillingness to exacerbate already problematic situations as well as by cost. [148]

In consequence, the changes recommended by the Committee are not especially fundamental: first, they urge that subsections 68F (2)(b) and (c) of the *Family Law Act*, as amended in 1995, make explicit reference to grandparents;[149] second, that a range of strategies be developed which ensure grandparents' involvement at all relevant states.[150] These suggestions contain nothing

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[141] *Supra* note 29.
[142] Picture, *supra* note 37, at para 5.10.
[143] *Id.*, at para 5.11.
[144] *See, for example*, G. Douglas and N. Ferguson, *The Role of Grandparents in Divorced Families*, 17 Int. J. Law Policy and the Family 41 (2003); F. Kaganas and C. Piper, *Grandparents and the Limits of the Law*, 4 Int. J. Law and the Family 27 (1990); F. Kaganas and C. Piper, *Grandparents and Contact: Rights and Welfare Revisited,* 15 Int. J. Law Policy and the Family 270 (2001).
[145] Picture, *supra* note 37, at para 51.21.
[146] *Family Law Act* 1975 §65C.
[147] Picture, *supra* note 37, at para 5.28.
[148] *Id.*, at para 5.39 .
[149] *Id.* Recommendation 23.
[150] *Id.* Recommendation 24.

exceptionable, are capable of attainment, and are clearly articulated with some of the 1995 amendments.

The question of child support was also raised in the terms of reference, but does not, of itself, fit with the general thrust of this commentary and, hence, will only be mentioned briefly. The major substantive recommendation[151] is that the minimum child support liability payable be increased from $260 p.a. to $520 p.a.[152] It is also urged that any direct link between the amount of child support payments and the time children spend with each parent be eliminated. Although such measures might be unpopular with some sections of society, they would seem, to this writer, to be uncontrovertible. Finally, the Committee recommend[153] that a detailed re-evaluation of the Child Support Scheme by a Ministerial Taskforce be established for this purpose.

E. Conclusion

Where, then are we and, in that context, why the expression, "fractured continuum" in the title? Since the *Family Law Act* came into force, it has been continually subjected to the processes of change or reform.[154] An encapsulation of the whole process, which is far from easy, would be that Australian family law reform is represented by an increase in the structure of the level of discretion originally given to judges in the Act as first conceived and, second and related, the change in the Family Court itself. Implicit, of course, in the reform process is the notion that changes will improve the doctrines and procedures with which the process has been concerned. In relatively recent times, there can be some proper doubt as to whether that appropriate expectation has been fulfilled: with respect to the 1995 amendments, comment has also been made to their having given rise to expectations which had not been met.[155] Those amendments made in 2000, concerned mainly with the enforcement of orders involving children and financial agreements seem, to this writer at least, to have been unsatisfactory in every respect. [156]

In this context, the first appropriate question is, "What is going to happen to *Every Picture Tells a Story?*" It could vanish into the ether or it could be emasculated at a very early stage despite anecdotal evidence that its central provisions are supported, in what looks to be an election year, by both major political parties. However, some projections have been made. Thus, a two-year pilot project has been suggested[157] during which the Tribunal would complement the Family Court and, if found to be successful, could ease much

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[151] *Id.* Recommendation 24.
[152] That is, from $5 per week to $10 per week.
[153] Picture, *supra* note 37, Recommendations 26, 27.
[154] *Supra* note 3.
[155] *Supra* note 45; 456 Australian Family Law – Family Law News 10 (2004).
[156] *See* Bates, *supra* note 4, at 118.
[157] *See* Sydney Morning Herald, 27 April 2004.

of the Family Court's workload. The same news item also comments that any such pilot might face opposition from some back bench parliamentarians who do not believe that the proposals go far enough and want to remove lawyers from the process entirely.

On the other hand, as might be expected, the Family Law Section of the Law Council of Australia set its face firmly against the idea of the Families Tribunal.[158] Thus, the President of the Law Council expressed concern about the Committee's lack of consultation with relevant and interested parties.[159] He noted that about 2% of separating couples with children require court hearings to resolve parenting disputes. The remainder resolve such disputes through negotiation, mediation, or conciliation. He stated that evidence suggested that most of these solutions were achieved with the assistance of legal representation or, at the very least, with legal advice. His view was that lawyers assist people in moderating their emotional response at a most difficult point in their lives and help them remain focussed and objective. The Family Law Section was, additionally, of the view that the proposals would do nothing to redress power imbalances.

In addition, the Family Law Section was of the view that, just as the introduction of the Federal Magistrates Service into the area had led to an increase in inappropriate legislation, the establishment of yet another forum could be expected to have similar results. The proposals emanated, the Section believed, from anecdotal criticisms of the existing system by people who represented only a small proportion of those personally experiencing family breakdown over the last decade. Be that as it might, I have already suggested[160] that the weakest part of *Every Picture Tells a Story* is that which describes and seeks to justify the Families Tribunal.

In fine, why a "fractured continuum?" The "continuum" should readily be apparent: the Act has been subject to the reform process since its very inception.[161] I do believe that a continuum is indeed perceptible which is represented by the curification of the Family Court of Australia and a singularly more structured discretion given to its judges.[162] At the same time, aspects of the process have become tangential and have done little for the system and those people it was originally designed to serve: the 2000 reforms and *Every Picture* have provided evidence of a serious discontinuity from time to time. And those times are too close to the present to make us feel even remotely comfortable.

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[158] 456 Australian Family Law – Family Law News 10 (2004).
[159] Mr Bob Gotterson QC.
[160] *Supra* note 110 *et seq*.
[161] *Supra* note 3 *et seq.*
[162] *See* F. Bates, *Review of L. Star, Counsel of Perfection: The Family Court of Australia (1996),* 3 (1) Newcastle L R 113 (1998). *See also supra* note 4.