

**CSJ Response to:
Consultation on Co-operative Parenting Following Family
Separation: Proposed Legislation on the Involvement of Both
Parents in a Child's Life**



Introduction

We wholly support the Government's objectives as stated in their consultation paper **Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life**. Any of the four Options for amending the Children Act 1989 would go some way to build greater public confidence that the legal system supports co-operative parenting. However, our concern with them, as they are currently drafted, is that they all simply reaffirm the existing consensus, within the legal profession, that it is generally good to retain the involvement of both parents after separation.

There is therefore likely to be very little change in judicial practice flowing from any of these proposed amendments. An important opportunity for effective reform would be missed if this were the case.

The present Options add very little to current guidance for judges and others yet the need for such legislative guidance is even more pressing given the reduced availability of free legal advice. So we suggest instead a form of words that would a) draw on many of the elements and concepts in the four options, particularly those in Options 1 and 4 but b) go further in offering important guiding principles and c) avoid the dangers of introducing another presumption in addition to the paramountcy principle.

The consultation paper asks many questions about shared parenting and enforcement which we feel are important, but we have chosen to focus our response on questions it poses on the proposed Options for legal reform, the Australian evidence and non-legislative action to support both parents remaining involved after separation.

Considering the four Options for reform

The Government's consultation document, **Co-operative Parenting Following Family Separation**, lays out four options for amending the Children Act 1989 in order to meet its objectives:

Option 1 requires the court to work on the presumption that a child's welfare is likely to be furthered through safe involvement with both parents – unless the evidence shows this not to be safe or in the child's best interests

Option 2 would require the courts to have regard to a principle that a child's welfare is likely to be furthered through involvement with both parents

Option 3 has the effect of a presumption by providing that the court's starting point in making decisions about children's care is that a child's welfare is likely to be furthered through involvement with both parents

Option 4 inserts a new subsection immediately after the welfare checklist, setting out an additional factor which the court would need to consider.

The Government's stated objectives are

- for children to benefit from the continued involvement of both their parents, where this is safe and in their best interests
- to send a clear and consistent signal to separated parents that courts will take account of the principle that both should continue to be actively involved in their children's lives
- to help to dispel the perception that there is an in-built legal bias towards fathers or mothers
- to encourage more separated parents to resolve their disputes out of court and agree care arrangements that fully involve both parents; and
- to avoid any prescribed notion of an 'appropriate' division of time (while also recognising that for a child to have a good quality relationship with a parent requires something more than a token involvement by that parent).

We wholly support these objectives as these guided our own recommendations concerning Children and the Law in Chapter 5 of *Every Family Matters*, the final report from the CSJ's Family Law Review.¹ However, our concern with each of the Options as currently drafted is that they simply reaffirm the existing consensus that it is generally good to retain the involvement of both parents after separation.

McFarlane LJ, a member of the Norgrove Committee, said in *Re H (A Child)* [2012] EWCA Civ 281 at para 18: 'It is of course a given, and a starting point for these courts, that children will normally benefit from having a full and meaningful relationship with both of their parents as they grow up.'

We do however think there should be legislative change not only to ensure there is greater public confidence that this is indeed the starting point for the courts but also to provide clearer guidance on factors to consider in making court-ordered parenting arrangements.

We understand and concur with the Government's aversion to including any reference to children spending equal or near equal time with both parents. However we are concerned that the proposed options are not sufficiently substantive to guide judges in applying the welfare checklist in a way that would change current practice for the benefit of children. In our final report, *Every Family Matters*, we recommended laying out clear principles (albeit in modest detail) in legislation to guide judges and others.² These are outlined below.

To deal quickly with **Options 2** and **3**, we concluded that as neither made any mention of safety, unlike **Option 1**, the Government's first preference, these were problematic. Indeed the same can be said of **Option 4** but we were attracted to the inclusion of a sub-section that laid out an additional factor in the 'welfare checklist' contained within s.1(3).

Our own Review made a slightly different recommendation as to the placing of the additional factor within an amended Children Act (see highlighted text in proposed text

¹ Centre for Social Justice *Breakthrough Britain: Every Family Matters* London: Centre for Social Justice, 2009

² Ibid pp155-156

below). We concluded that, as Section 11 of the Act, currently headed 'General principles and supplementary provisions' does not offer any particular principles concerning how to decide the case, a new subsection (1) should be introduced along the following lines (and the remaining subsections renumbered).

It uses language already contained in s.11(1) and also a legislative statement about what is and is not likely to be best for children similar to that contained in s.1(2) of the Act, where the tabled Options are proposing to make changes. (We maintained the gender-specific language of the Children Act (using 'he' and 'his') but of course the principles apply also where mothers are non-resident parents.)

(1) In proceedings in which any question of making a section 8 or section 13 order, or any other question with respect to such an order, arises:

(a) the court shall, in addition to the considerations contained in s.1(3) of this Act, also have regard to the principles:

(i) all those with parental responsibility shall be considered to have an equal status in their children's lives following separation unless the contrary was shown;

(ii) that children are most likely to benefit from the substantial involvement of both parents in their lives subject to the need to protect them from abuse, violence or continuing high conflict.

(b) in determining if, when and how to make an order providing for a parent to have a substantial involvement in the life of the child, the court shall in particular consider the benefit to the child, and the reasonable practicality, of contact of sufficient frequency and duration that the parent is able to have a substantial involvement in the child's day to day routine and activities; this may be in the form of a joint (or shared) residence arrangement.

(c) in assessing the benefit to the child of making an order that allows for a parent to have a substantial involvement in the life of the child, the court shall have regard to the extent to which that parent has in the past had such an involvement and/or has fulfilled his parental responsibilities, including where appropriate, the regular payment of child support and other financial provision and support.

(2) the court shall (in the light of any rules made by virtue of subsection (3) –

(a) draw up a timetable with a view to determining the question of making a section 8 or section 13 order without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

A revised subsection of this kind does not introduce a new presumption that would bind judges in interim cases and thus avoids the major drawback of **Option 1**. However it does incorporate this Option's indispensable consideration of safety and, importantly, other reasons (in addition to safety) why a child's best interests might not be served through involvement with both parents.

We offer further explanatory notes on the paragraphs in this subsection below:

Paragraph (a) indicates that those who had parental responsibility prior to separation should be treated as having an equal status afterwards, and that children are likely to benefit from the substantial involvement of both parents in their lives, subject in both cases to the need to protect children from abuse, family violence or continuing high conflict. It applies to those who subsequently obtain parental responsibility. However, it leaves open the possibility,

even in the absence of abuse, violence or continuing high conflict, that a child will not in fact benefit from the substantial involvement of both parents. A court may conclude this, for example, where the mature child is implacably opposed to seeing a parent, or where the parent has such a history of mental illness or other behavioural difficulties that he or she is unable to parent or care effectively.

The court will still have regard to the 'welfare checklist' in s.1(3) of the Act, and factors that would indicate that substantial involvement is contraindicated will no doubt emerge from a consideration of those factors.

The proposed paragraph refers to equal status, but not equal time. The former is an appropriate recognition of the equality of the parents; the latter is merely one way in which parenting can be organised – in appropriate cases.

Paragraph (b) requires the court in particular to consider the benefit to the child of a contact order or shared residence order that allows for frequent contact. It gives content to the term 'substantial involvement' by focusing on involvement in the child's day to day routine and activities. Of course, this is subject to reasonable practicality. That level of involvement (taking the children to sports activities or music lessons during the week, for example) is dependent upon the parents living close enough to make it possible. Substantial involvement may be found in other ways and aspects within a parent-child relationship and does not necessarily require geographical closeness.

Paragraph (c) draws the court's attention to whether the parent has had much involvement in the past. The law needs to support those parents who have been actively involved in their children's lives to continue in that role. This is most likely to be the case where they have lived together and one parent has taken a significant parenting load prior to the separation. The paragraph allows the court to give short shrift to the claims of parents who have had little or no previous involvement in the life of their child, or who have neglected their responsibilities (for example by constantly failing to show up for contact or being several hours late).

The reference to child support and financial provision is very deliberate. A good indication of whether a non-resident parent really is committed to his child and willing to share parental responsibility and substantial involvement is whether he has provided financial support during the relationship, if able to do so, and whether he has paid child support, post separation if able to do so.

Closer Consideration of Option 1, the Government's first preference

To recap, Option 1 requires the court to work on the presumption that a child's welfare is likely to be furthered through safe involvement with both parents – unless the evidence shows this not to be safe or in the child's best interests.

When conducting the Family Law Review we were strongly encouraged by several stakeholders to recommend the introduction of a new presumption. We declined to do so, not because it was logically or procedurally impossible to have a second presumption (in

addition to the paramountcy of the welfare of the child) but because an additional presumption can bind judges when deciding interim cases, before all the facts have been established. There might be important safety or other contrary welfare issues for which there is not immediately admissible evidence that would not be considered by a judge if he is bound to deliver a default outcome.

Rebutting the second presumption would require additional and (likely) protracted legal proceedings, the pursuit of which would be beyond the financial means of most people. We note the Government's interest in how changes to legislation might impact the numbers of separated parents applying for a court order to determine contact arrangements (question 5 in the consultation). We are concerned that more parents might apply for an interim order if the presumption in Option 1 is adopted and further, that some parents concerned with the default outcomes of interim orders might be forced to fight those outcomes (rebut the presumption) at a later date.

One way of improving Option 1, if the Government resolved to legislate accordingly after the consultation process, would be to change the wording of the proposed subsection 4A to say that it should only apply to final (and not to interim) orders.

Evidence from Australia and other jurisdictions

This consultation asked respondents to consider evidence from Australia where a principle of 'children maintaining a meaningful relationship with both parents where possible' guides judges in the way we proposed above. It was this form of words that was proposed by the Norgrove Review in its interim report and then rejected by that same body in its final report, due to concerns that its implementation in Australia had led to a rise in 'shared care' outcomes for children in contexts where this was potentially detrimental to their welfare.

A paper submitted to the Government earlier this year by Professor Patrick Parkinson from the University of Sydney, makes it clear that the Norgrove Review was misguided by certain submissions from Australia which contained assertions about the negative impact of Australian law reform for which he could find no evidential basis.³

He also points out the very different starting point for those reforms: the Family and Community Affairs Committee of the House of Representatives had been asked by the then Prime Minister, John Howard, to investigate (among other issues) whether or not there should be a presumption that children will spend equal time with each parent and under what circumstances such a presumption could be rebutted.

The messaging from the outset was therefore completely different to that pertaining in the context of England and Wales where the Government has always made it abundantly clear that equal time is *not* a policy goal they are interested in pursuing.

Moreover, Parkinson makes an important point in his assessment of the possible harm to children involved in shared care decisions that would not have been made without the

³ Parkinson P. 2012, *Reforming the Children Act 1989: Learning from the Australian Experience*. A revised version of this paper, *Meaningful Reform of the Children Act 1989: Learning from the Australian Experience* now available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083974 (accessed 5th September 2012)

legislative changes seen in Australia. We quote him at length below: first he cites evidence that changes to the law such as we recommend, can indeed affect judicial decision-making:⁴

There is certainly evidence, from statements of the judges themselves, that the legislation has had an effect on outcomes by changing the process of their decision-making.⁵ There is also the evidence of outcomes of contested cases. In its evaluation of the 2006 reforms, the AIFS found that there had been a substantial increase in shared care in judicially determined cases, compared to cases decided prior to 2006.⁶ These were cases where the trial judge reached a decision concerning what was in the best interests of the children concerned, but the conclusion that a shared care arrangement was in the best interests of the child in so many cases was not one which, it seems, many judges had seriously considered before 2006.

What is happening then in this small number of cases where shared care is being ordered? Prior to 2006, essentially there were just two choices: a residence order in favour of the mother or a residence order in favour of the father. Joint residence orders were rare. After 2006, there were three choices: primary care to the mother, primary care to the father, or shared care. It appears that given the requirement actively to consider that third option, judges who hitherto would have opted for either maternal or paternal care, are now more inclined to the view that it is in the best interests of the child to have a shared care arrangement.

However, earlier in the paper he cautions against assuming that shared care puts children at greater risk where there are safety concerns:⁷

The possibility also needs to be considered that if a judge does make orders for shared care against a background of safety concerns, this is done as a way of protecting children. In the general population survey, fathers in equal time arrangements were more concerned about the safety of their children in the mother's care than the other way around.⁸ It may well be that shared care could be seen as an option where there are serious issues about the mother's parenting capacity and about the safety of the children in her care, but where removal entirely from the mother would not be the best option. An order for shared care may be a way of moderating the risk to the children and providing them with some stability, while still giving the mother a prominent role in her children's lives. It may, therefore

⁴ Parkinson P. 2012 *Meaningful Reform of the Children Act 1989: Learning from the Australian Experience*, Sydney Law School Legal Studies Research Paper No. 12/41, p19 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083974 (accessed 5th September 2012)

⁵ See eg *Bryans and Franks-Bryans* [2007] FamCA 377 (a relocation case) per Strickland J at para 70: "In my view the changes brought about by the *Family Law (Shared Parental Responsibility) Act* do not alter the approach to be taken to these cases. The assessment of the competing proposals of the parties must still be carried out by reference to Part VII of the Family Law Act. However, the objects, the principles, and the factors to be taken into account in determining what is in the child's best interests have changed, and there is a presumption that needs to be addressed, and these changes may very well affect the outcome in individual cases". See also *Eddington and Eddington* [2007] FamCA 1299 at para 52; *M and S* (2007) FLC 93-313 at 81,385.

⁶ Kaspiew et al, at 133. Shared care orders (35%-65% with each parent), rose from 4% to 33.9% of cases in the cases where contact arrangements were specified, but this appears to be a relatively small subset of the total – see infra.

⁷ Parkinson P. 2012 *Meaningful Reform of the Children Act 1989: Learning from the Australian Experience*, Sydney Law School Legal Studies Research Paper No. 12/41, p17 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083974 (accessed 5th September 2012)

⁸ Kaspiew et al, at 166.

be wrong to jump to the conclusion that shared care is a risk to children where there are safety concerns. It might be the best option in a bad situation.

It is also essential that we consider other international evidence alongside that of Australia. For over a quarter of a century, Canada's Divorce Act has contained a provision that in making orders for custody and access, 'the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.'⁹ We have not found evidence that this has produced detrimental outcomes. Moreover, in several US jurisdictions such as California¹⁰ the law states it is public policy to ensure that children have frequent and continuing contact with the non-resident parent unless it is contrary to the children's best interests.¹¹

Non-legislative action to support both parents remaining involved after separation (question 8)

Arguably the most important lesson we should draw from Australia in the current discussions on Family Law reforms, is their investment in a network of Family Relationship Centres all over the country. These are the front-line services which help parents to work out difficulties in post-separation parenting arrangements.¹²

This policy represents a community-centric, rather than court-centric, approach to family relationships. As courts decide very few cases (and those they do decide tend to be atypical) they should no longer be seen as the hub of family justice.

The Norgrove Review recommended a similar direction for reform, in terms of mandating attendance at a mediation information and assessment meeting and at a separating parent information programme, prior to being able to file an application in court concerning parenting arrangements for the children. These proposals are very similar in their likely impact to the Australian system, which provides these services mainly through Family Relationship Centres.¹³

We urgently need to go further in improving access to community-based mediation and counselling for parents who live apart. In several of our policy publications, including the *Every Family Matters* report mentioned earlier, we have recommended the setting up of family relationship 'hubs'.¹⁴ Existing infrastructure such as children's centres and other community facilities could be used to meet the significant need many parents have for assistance to make arrangements which are age-appropriate and suitable for the family's circumstances. Parents also need help to adjust those arrangements as time goes on.

⁹ Divorce Act 1985 s.16(10).

¹⁰ California Family Code §3020.

¹¹ See also Iowa Code § 598.41(1)(a); Colo. Rev. Stat. § 14-10-124(1)).

¹² See further Patrick Parkinson, 'Keeping in Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

¹³ Parkinson, n.124 above. People may alternatively go to private mediators or other community-based mediation services.

¹⁴ Centre for Social Justice *Breakthrough Britain: Every Family Matters*, London: Centre for Social Justice, 2009, pp104-107

That work could be done by third sector and other organisations¹⁵ possibly funded to some extent with a proportion of the very large amount of legal aid money currently directed towards legal advice and assistance on parenting arrangements after separation. Redirecting some of this money to fund educators, mediators and counsellors to assist people with their relationships may be both more effective and much better value for money. Certainly there is an emerging and encouraging evidence base from Australia to draw from in assessing the likely impact of such a policy.

Conclusion

Given the respect and affection many have for the Children Act and the strong resistance to any amendments perceived to affect the welfare principle, any change at all will be difficult to achieve. It is therefore essential that this opportunity to improve it and make it more relevant to the vastly different post-separation 'parenting landscape' is not wasted. As a society we are now much more alive to the reality that a child does not stop having two parents after they decide to part. We are also belatedly becoming aware of the detrimental effects of father absence and the need to do all that is possible to support fathers' ongoing involvement in the lives of their children in ways that are practical and safe. The law has an important part to play in ensuring children do not miss out.

We are therefore wholly supportive of the Government's objectives in this policy area but would urge them to consider the changes to the Options we outline above so that changes to the law will translate into practical benefit to the families forced to reach for its help.

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¹⁵ Australia's Family Relationship Centres have a common brand and identity, but are run by a range of third sector organisations which tender to run the Centre in each location.