



## Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law

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There is a constant and persistent view pursued by people who are often discontented litigants, sometimes obviously dysfunctional, that the court is in some sense designed by anti-family groups to destroy the institution of the family in society. . . An unfortunate concomitant of this approach is that some people and some politicians with limited knowledge of the issues involved, tend to latch on to such dysfunctional persons for apparent political gain. This has the further unfortunate effect of empowering such persons to feel that their behaviour is not only acceptable but is the subject of sympathy and approval by politicians and government. It is all too often the experience of this court that its most persistent critics have behaved in a way which cannot stand up to public scrutiny, particularly in relation to issues of violence against women and children. Such persons, who often espouse the rights of fathers, do very little for their cause. There are legitimate matters that can be advanced on their behalf and it is equally as important that the court and those within it do not adopt stereotyped attitudes towards men as well as women. However, the behaviour and attitude of those who espouse so-called fathers' rights leaves little opportunity for rational discourse.<sup>1</sup>

### Introduction

The movement to promote fathers' rights in the context of family law is newly emerging in Australia. While some fathers' rights groups have been in existence for a number of years the movement appears to have gathered momentum, credibility and popular support as a political and media force in more recent years. Evidence of this can be found in the media attention it has received,<sup>2</sup> the apparent proliferation of groups and branches,<sup>3</sup> the organisation

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1 Honorable Chief Justice Alastair Nicholson, from "Welcome" in "Enhancing Access to Justice", *Family Court of Australia Second National Conference Papers*, 20-23 September 1995, Family Court of Australia, Sydney, 1996, p 1.

2 For example: *The Sydney Morning Herald*, 6 July 1984, p 1; 19 February 1988; 5 August 1992, p 4; 22 September 1993, p 9; 2 September 1994, p 13; 25 February 1995, p 2; 22 June 1995; 2 September 1995, pp 1, 6; 4 May 1996, p 8; 12 October 1996, pp 1, 4; 14 October 1996, p 11; 15 October 1996, p 11; 22 October 1996 (Series by Bettina Arndt); 28 November 1996, p 1; 12 February 1997, p 13; *The Age*, 14 November 1995, p 11; 28 January 1996, p 12; 8 May 1996, p 20; 30 July 1996, p 15; *The Australian*, 2-3 September 1995, p 29; 13 March 1997, p 11; *The Sun Herald*, 9 March 1997, p 39.

3 M Abernethy, "Paternity Wars: In Australia, Divorce is a Battle Men can't Win", *Australian Penthouse*, April 1993.

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of conferences<sup>4</sup> and infrastructure,<sup>5</sup> the expressions of support from politicians,<sup>6</sup> the setting up of political parties,<sup>7</sup> and the increasing sophistication and quantity of the submissions such groups are making in respect of law reform references. Implicit evidence can be found in the strong reaction of the Chief Justice of the Family Court (cited above) and in the popular perception that fathers' rights groups have played an influential role in respect of a number of the recent Australian family law reforms.<sup>8</sup>

In spite of the media debate fathers' rights groups have generated in recent times there is still surprisingly little written about them in the Australian context.<sup>9</sup> Accordingly, in commencing this research we were interested in investigating and describing the groups as a phenomenon. In other words we wanted to find out who they are, how influential they have been in setting the agenda for family law reform and what their main concerns are. We have relied on primary sources in our research: submissions such groups have made to law reform bodies on various family law references; telephone interviews conducted by our research assistant with representatives from various groups;<sup>10</sup> self-generated literature; and media searches.

This article has two parts. In the first part we briefly discuss the apparent success fathers' rights groups have had in setting the agenda for family law reform in Australia. In the second part we outline the major concerns raised by Australian fathers' rights groups over the years. In our opinion such a project necessarily exposes the highly politicised nature of the fathers' rights agenda. Our intention in providing this overview is to provide a basis for future critical

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4 Lone Fathers Association, Australia (LFAA) organised the first National Family Law Conference in 1990 and the second National Family Law Conference in 1997.

5 Participants at the LFAA Conference (1997) raised the possibility that more political gain may result from strategic alliances and the creation of an umbrella organisation. Cheryl Gregory from DADs is engaged in the task of developing a mailing list and appropriate structure.

6 At the LFAA Conference (1997) Barry Williams recounted his communications with Tim Fischer. Member of Parliament and former Chair of the Joint Select Committee into the Family Law Act. Roger Price attended the conference as did Liberal backbencher Paul Marrick (federal member for Capricornia), and ACT Attorney-General Garry Humphries.

7 The Family Law Reform Party (FLRP) is a registered political party which has run candidates at state level and intends to run candidates at the next federal election.

8 See L Young, "Parenting Disputes under the Family Law Act 1975: The New Regime" (1996) 1 *Sister in Law* 93 at 101.

9 For one of the few treatments of these groups see R Graycar, "Equal Rights Versus Fathers' Rights: the Child Custody Debate in Australia" in *Child Custody and the Politics of Gender*, C Smart and S Sevenhuijsen (eds), Routledge, London, 1989. Canadian research in this area includes the work of I Bertoia and J Drakich, "The Fathers' Rights Movement: Contradictions in Rhetoric and Practice" (1993) 14 *Journal of Family Issues* 592. Work in the US includes S Coltrane and N Hickman "The Rhetoric of Rights and Needs: Moral Discourse in the Reform of Child Custody and Child Support Laws" (1992) 39 *Social Problems* 400. Work in the UK includes Richard Collier, "'Coming Together?': Post-Heterosexuality, Masculine Crisis and the New Men's Movement" (1996) IV *Feminist Legal Studies* 3.

10 These interviews were not a primary research resource. This was because we were unable to systematically locate groups and/or their representatives. However, the interviews did provide useful background information such as the size of membership and the types of activities undertaken by the groups interviewed.

engagement<sup>11</sup> with such groups around the various issues raised. Because our intention is to describe, but certainly not to espouse, the views of the fathers' rights movement we have provided some (very limited) critical comment.

### Who are the fathers' rights groups?

For the purposes of our research we have defined fathers' rights groups as being either groups which explicitly represent fathers' concerns (whether custodial or non-custodial) or groups with an agenda which reflects the concerns of non-custodial parents (who are statistically more likely to be fathers). This definition is very loose. It includes groups whose sole focus is fathers' rights, groups that raise parenting concerns as an aspect of their more general focus on men's rights, and groups which don't claim to represent either parent and yet present in their law reform submissions and literature a strong agenda for non-custodial parents. An example of the former are groups like Lone Fathers Association, Equality for Fathers and Dads Against Discrimination, which are very obviously set up to perform the role of representing fathers. An example of the latter is the Family Law Reform Association NSW Inc which actually claims not to be a fathers' rights group. It says that it is after equality for both parents, it is just that fathers are usually the ones disadvantaged. It falls within our definition because it was started by men and has an agenda that primarily reflects the concerns of non-custodial parents.

There are a number of borderline groups which we have also taken note of in undertaking this research. Some of these groups are borderline because they sometimes fall within our definition and at other times outside it. Parents Without Partners is the best example. One representative we interviewed said that it was a social group only with no interest in representing any particular constituency, while another representative we spoke to presented a strong fathers' rights agenda. One law reform submission produced by this organisation presented an agenda strongly supporting the concerns of the non-custodial parent, while other law reform submissions contained agendas sympathetic to the interests of custodial parents, either male or female. Other borderline groups include those such as Women Who Want to be Women or Women and Grandparents Treated Unfairly by the Family Law, who clearly claim to represent neither fathers' interests nor the interests of non-custodial parents and yet present an agenda that is strongly sympathetic to these constituents.

Many of these groups claim to represent a very large (and growing) constituency, although sometimes their figures are used in a loose sense. For example, a representative from Dads Against Discrimination claimed that it represented 350,000 men, that "being the number of men caught up in the family law system."<sup>12</sup> Some of these groups also claim to field large numbers of inquiries from members of the public. Typical activities undertaken range

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11 See M Kaye and J Tolmie, "Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups" (forthcoming in MULR).

12 Communication with research assistant. The Family Law Reform Association NSW Inc, in speaking of those involved in its inception (in one of its' self-generated pamphlets), says that, "at times there were only four people at a meeting, but they were determined to press

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over a broad spectrum, including such things as organising regular self-help meetings for members to share their experiences in the family law system, organising public information meetings with guest speakers, making submissions to government bodies on law reform references, speaking to the media, producing newsletters and pamphlets, lobbying and encouraging members to lobby politicians and the referral of members to information and professional services.

One of our general impressions of the fathers' rights movement is the high turnover of groups. Many of the groups we attempted to make contact with for the purpose of telephone interviews seem to have gone out of existence since making the law reform submissions that alerted us to their existence. In spite of this turnover there are a number of groups which claim to have been around for many years.<sup>13</sup> Our impressions are that these have tended to survive because of the tireless efforts of one or more key individuals in the organisation. Examples are Barry Williams who was the founding member and has been the National President of the Lone Fathers Association since 1973, has a high profile role in Parents Without Partners, with which he has been associated for more than two decades, and Nevil Abolish Child Support and the Family Court<sup>14</sup> who has "run" Parent Without Rights for the last eight years. A common problem for the groups seems to be continuity in membership, with people tending to move on "once they have been helped".<sup>15</sup>

An interesting feature of these groups is the increasing involvement of women. Many of these groups are concerned to point out that they have members who are women and sometimes women as key players in the organisation.<sup>16</sup> The women who are involved tend to be involved in their capacity as "second wives" or other family members of men who have had some engagement with the family law.

### **A. How influential has the fathers' rights agenda been?**

One of our intentions in carrying out this research was to assess the impact the groups have had in Australia. This has proved more difficult than we imagined.

#### **1. Media coverage**

Our impression is that the groups and/or their views have a strong presence in the media. We certainly found that when media sources were commenting

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on for reforms to the Family Law Act, no matter how much support they received. They knew they were speaking for thousands of people and that it was imperative that they continue."

13 For example, Parent Without Rights was apparently formed in 1977. The LFAA claims to have started in 1973.

14 Mr Abolish Child Support and the Family Court changed his name by official deed poll. See "Nevil With A Cause", *The Age*, 3 October 1997.

15 Dads Against Discrimination (communication with research assistant). The UK group, Families Need Fathers, in its advice to members thinking about starting a local group says, "Only a few people will stay longer in a group than it takes to settle — or abandon — their own problems. Don't be depressed. . ." See J Baker, *Starting a local group: An FNF guide*, Version 2, Families Need Fathers, London, 1996, at p 2.

16 See for example, Men's Rights Agency which was co-founded by Sue Price.

about non-custodial parents or family law issues generally, it was very common to include interviews or comments from at least one fathers' rights group spokesperson.<sup>17</sup> Other media commentators might not actually use interviews with the groups, but will espouse views sympathetic to theirs,<sup>18</sup> and might even detail interviews with "family law practitioners" or "individuals" who have strong contacts with at least one of the groups.<sup>19</sup> Not surprisingly, perhaps, the existence of the groups is powerfully felt on talk back radio programs. However, other more news oriented programs are also devoting attention to the groups. For example, the ABC radio station, Radio National, played a track from the recently released compact disc "Displaced Dads" produced by Dads Against Discrimination.<sup>20</sup>

Dads Against Discrimination outlines its opinion on the reason for the media interest as follows:

DADs Queensland is one of the first organisations that the media call when they want an unbiased, non-sexist, balanced and concerned view on the rights of non-custodial parents and the welfare of their children.<sup>21</sup>

Indeed this view seems to be shared by the media, for many of the programs and articles that we have listened to, watched, and read for this piece do not present a counter perspective on these issues. The fact that the views of fathers' rights groups are considered unbiased is reminiscent of "the subliminal message" in law which has been critiqued by Naffine and other feminists, "that reasonable people are men, not women".<sup>22</sup>

## 2. Political influence

We would argue that the rhetoric and views of the groups, and the significant media attention they have received, have affected the atmosphere in which legal and political changes are being debated in Australia. This is particularly so given that many of their views are in alliance with those of the "pro-family" New Right.<sup>23</sup> However, the intention of this paper is not to overstate the political influence of the groups, which we have found very difficult to assess. Indeed, the groups vary in their own opinions on this. At times, they suggest that they wield enormous political influence. For example, fathers' rights campaigner Ian Monk entitled his compilation of newspaper clippings on his campaign efforts, *How I initiated three Parliamentary Inquiries into Family*

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17 Some notable examples are: A Horin, "Fathers Angry at Move to Cut Child Access", *Sydney Morning Herald*, 22 June 1995; C Allisson, "Inquiry told of 'Grossly Unfair' Child Support Laws", *Sydney Morning Herald*, 22 September 1993; M Brown, "There are a Lot of Angry Men out There", *Sydney Morning Herald*, 6 July 1984; L Lamont and N Jamal, "Getting Their Orders", *Sydney Morning Herald*, 12 February 1997; D Bagnall, "Divorced from Reality", *The Bulletin*, 12 November 1996, 16 at p 18.

18 Sex/life, *Fathers and Family Law Courts*, Programs 19 and 20.

19 B Arndt, "I want my Daddy", *Sydney Morning Herald*, 12 October 1996.

20 *Life Matters*, 19 December 1996.

21 DADs newsletter (communication from DADs, Qld).

22 N Naffine, *Law and the Sexes*, Allen & Unwin, Sydney, 1990.

23 See Smart and Sevenhuijsen, above n 9, L Harne and J Radford, "Reinstating Patriarchy: the Politics of the Family and the New Legislation" in A Mullender and R Morley (eds), *Children Living With Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda*, Whiting & Birch, London, 1994; see further, P Abbott & C Wallace, *The Family and the New Right*, Pluto Press, London, 1992.

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*Law and Reformed the Family Court.* Barry Williams, the National President of the Lone Fathers Association, has stated that:

The previous government was advised that, if the extreme inequities in the present formula were not fixed, there would be a very large defection of male NCP voters from the Labor party at the next election. The (then) government ignored that warning.<sup>24</sup>

In a similar vein, Barry Williams writes:

I had a very positive and sympathetic hearing in Parliament House with Tim Fischer [the Deputy Prime Minister of Australia] on 5 February. He is going to back us all the way for quick and positive changes. He stated the system and especially the Child Support Scheme is stacked against the man. A special sub-committee has been set up to look into the Child Support Scheme.<sup>25</sup>

There are other suggestions or evidence of influence. For example, Barry Williams asserts that the Joint Select Committee into the Operation of the Family Law Act 1975 (Cth) was established after a petition signed at the 1990 conference of the Lone Fathers Association called for a parliamentary inquiry into the Family Law Act.<sup>26</sup> Additionally, together with other fathers' rights groups the "LFAA is now called to sit on family law advisory panels and discussion groups".<sup>27</sup> One obvious example of influence occurred when the Australian Family Court was bombed. The then Commonwealth Attorney-General, Gareth Evans, wrote to groups, such as the Lone Fathers Association, stating that he was "very concerned about the Family Court and in particular the recent violent incidents" and would welcome any suggestions for change which they might make.<sup>28</sup>

A new strategy to increase their political influence and gain credibility is the establishment of political parties to represent the groups' concerns. Peter Brown, of the Family Law Reform Party stated, "We have to fix the [family law] system. And the only way to do this is through a political solution".<sup>29</sup> He discusses the advantages of registration as a political party as follows:

I rang Canberra. . . and asked for a meeting with the Attorney-General to discuss [the Liberal Party's position on family law issues]. I was asked what group we were from, I told them FLR, and what sort of group is that, when I replied that we were a registered political party we had an appointment within two hours. . . All this for 135 votes.

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24 LFAA Conference, 1997.

25 *Lone Fathers' Noos*, the newsletter of the LFAA (undated, 1997).

26 *Ibid.*

27 M Abernethy, above, n 3 p 38. B Arndt, "When School's Out for Fathers", *Sydney Morning Herald*, 4 May 1996, suggests that "family law reform groups" complaints about the treatment of non-custodial parents by school authorities have resulted in new policies in NSW and Queensland which attempt to offer non-custodial parents more involvement in their children's schooling.

28 T Taylor, "Australian Terrorism: Traditions of Violence and the Family Court Bombings" (1992) 8 *Australian Journal of Law and Society* 1, argues that the Attorney-General's consultation with fathers' rights groups and his apparent desire to appease them had the effect of legitimising the bombings and delegitimising their target (the court).

29 LFAA Conference, 1997.

### 3. Law reform

It is difficult to assess the extent to which the groups' political clout has translated into law reform. In a *Penthouse* article, written prior to the changes made by the Family Law Reform Act 1995, it was said that:

People like Mike Ward [Men's Confraternity], Barry Williams [LFAA] in Canberra and Ken Pierce [LFAA NSW] in Sydney all know they have a long way to go. They have the numbers but no financial support; their actions can lead to Joint Committees, Family Court reports and Ombudsman inquiries but they can't turn recommendations into law; they have the sympathy of politicians but many of those politicians are afraid to upset the woman vote.<sup>30</sup>

On the other hand, in a letter to our research assistant, Barry Williams said of Lone Fathers Association, "This organisation has been credited with success in many changes to the Family Law Act...". It is uncertain which changes Mr Williams is alluding to, but the most wide-ranging amendments to the Family Law Act in relation to disputes over parenting were made by the Family Law Reform Act 1995. It has been claimed by sources outside the groups that "a driving force in effecting these reforms has been the recent and persistent voice of fathers' rights groups".<sup>31</sup> Certainly aspects of the reforms would appear to satisfy some of the groups' concerns.<sup>32</sup> However, lobbying by women's groups had a significant impact on the final version of the bill, and these changes would not have been to the liking of the fathers' rights groups.<sup>33</sup> Hence, even if the "driving force" behind the changes was fathers' rights groups, the actual Act passed by parliament could not be said to be one which purely panders to those groups. A similar comment could be made about the recent proposals for law reform in relation to the Child Support Scheme.

It seems fair to comment that fathers' rights groups are increasingly effective in making, and in galvanising their members to make, submissions in respect of family law reform references. This is an ability which obviously has the potential to impact the law reform process. Concerns about the public submission process in relation to family law reform have been expressed by a number of writers. Regina Graycar has commented that "public submissions may not present an accurate picture of the current operation of the family law

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30 M Abernethy, above, n 3 at 107.

31 L Young, "Parenting Disputes under the Family Law Act 1975: the New Regime" (1996) 1 *Sister in Law* 93 at p 101.

32 For example s 60B(2) introducing the child's right of contact, on a regular basis, with both parents; the increase in "alternative dispute resolution" (now called primary dispute resolution) and private ordering generally; the fact that a residence parent will not automatically have the rights to make decisions concerning the children (cf "old" custody orders). See J Behrens, "Shared Parenting: Possibilities and Realities" (1996) 21 *Alternative Law Journal* 213.

33 Note in particular the work of the National Women's Justice Coalition who lobbied for changes to the Family Law Reform bills. Amendments were made so that s 60B(2) clarifies the child's "right" of contact so that it exists "except where it is or would be contrary to the best interests of the child". See also the ending of the "silence about violence" in the Act in ss 43, 68F, 68J, 68K, 68R, 68S and 68T, although many would argue that these changes did not go far enough. See J Behrens, "Ending the Silence, But... Family Violence under the Family Law Reform Act 1995" (1996) 10 *AJFL* 35.

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system”.<sup>34</sup> The public submission process favourably reflects “organised, self-interested and more vociferous groups”<sup>35</sup> such as fathers’ rights groups. Women may be disadvantaged in the ability to participate effectively in public inquiries. For example, Martha Fineman has written in relation to a legislative committee in Wisconsin that, “[t]he fact that the custodial mothers were not organized meant that their side of the story — their problems, perceptions and issues — were incompletely and, in a political sense, ineffectively articulated”.<sup>36</sup>

Echoing these concerns, Linda Hancock<sup>37</sup> argues that the report produced by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of Family Law on Child Support<sup>38</sup> narrowly focused on issues raised by fathers’ rights groups,<sup>39</sup> as opposed to equally addressing the concerns of resident parents and remaining cognisant of the broader aims and objectives involved in the introduction of the Child Support Scheme.<sup>40</sup> She suggests that this outcome was a natural result of relying on submissions as evidence rather than independent non-partisan research. She found that 53 per cent of the submissions made to the committee were made from non-resident parents (predominantly men), and 5 per cent were from their spouses. By comparison only 32 per cent of the submissions were from resident parents (predominantly women).<sup>41</sup>

It has been suggested that fathers’ rights groups would have more of an impact if not for the fact that they tend to be badly organised and dominated by “egos”.<sup>42</sup> As we have noted above,<sup>43</sup> at least one key individual in each group is often responsible for the survival of the group and is the key media spokesperson for the group.<sup>44</sup> These individuals are not necessarily

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34 R Graycar, *Submission to the Joint Select Committee on Certain Aspects of the Operation of the Family Law Act*, Part Two, National Committee on Violence Against Women, 1991 at p 71.

35 L Hancock, “Reforming the Child Support Formula: Who Wins?”, forthcoming in *Just Policy*.

36 M Fineman, “Illusive Equality: On Weitzman’s Divorce Revolution” [1986] *American Bar Foundation Research Journal* 781 at p 788.

37 Hancock, above, n 35.

38 *An Examination of the Operation and Effectiveness of the Scheme* (1994) Canberra.

39 For example she notes that in chs 16–19, which deal with issues concerning the child support formula, the submissions of non-resident parents are cited or quoted 81 per cent of the time by the committee, as opposed to submissions made by resident parents.

40 See also K Funder, “Changes in Child Support” (1997) 48 *Family Matters* 36.

41 The remainder of submissions were from organisations (which included a number of fathers’ rights groups), grandparents and divided custody parents. Graycar, above, n 9, found that of the oral submissions to the ALRC, *Reference into Contempt*, Report No 35, 1987 (hereafter ALRC, *Contempt*) 46 out of 71 were from identified “fathers’ rights” groups or from individuals sympathetic to their position. See also M Harrison and R Graycar, “The Australian Family Law Reform Act: Can Changing Legislation change Legal Culture, Legal Practice and Community Expectations?” (forthcoming).

42 B Arndt, *Getting the Message Across about Injustice to Men*, Conference Paper, LFAA Conference, 1997.

43 Text to n 14.

44 Many of these individuals perform key roles for one or more group. For example, the Child Support Action Group (CSAG) research paper entitled *Parents are Forever: A Reply by the Disposable Parent* was jointly written. One of the writers, Y Joakimidis, wrote the recent



particularly articulate or media savvy.<sup>45</sup> Our opinion, derived from studying internet websites and overseas materials, is that the groups in Australia are not as well organised or as sophisticated in the presentation of their views as those in the United States, Canada or the United Kingdom. However there are currently moves in Australia to organise into one national umbrella group:<sup>46</sup> "This single organisation would carry the weight and lobby power that the smaller groups individually lack. . .".<sup>47</sup> If well organised (perhaps by second wives who according to some within the groups<sup>48</sup> seem to have many of the organisational skills in the movement), this umbrella group could also provide a focus for the development of necessary skills, as well as greater cohesion and continuity in the Australian fathers' rights movement.

### **B. The agenda of the fathers' rights movement**

In this part we will set out the agenda of the fathers rights' movement. We will first look at the general concerns some fathers' rights groups have expressed about the erosion of the family unit. We will then go on to outline more specific substantive concerns raised by many of the groups, namely, child custody, enforcement of access,<sup>49</sup> child support, "false" allegations of family violence, matrimonial property division and the desirability of the reintroduction of fault into divorce proceedings. Finally we will look at concerns about process, such as secrecy, allegations of bias in family law decision making processes and the question of funding of men's as opposed to women's groups.

In commencing this research we expected to find a significant amount of diversity among the different groups.<sup>50</sup> For example, we expected to find some

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LFAA Submission to the ALRC reference on *Children and the Legal Process*, Issues Paper 18, AGPS, Canberra, 1996 (hereafter ALRC, Children).

45 Arndt, above, n 42.

46 Cheryl Gregory (DADs) speaking at LFAA conference, 1997.

47 See, D Ward, *Guidance for the Unification of Associations and Groups seeking Changes to Family Related Legislation in Each State*, information leaflet, 1996.

48 Cheryl Gregory (DADs) speaking at the LFAA conference, 1997.

49 Pt VII of the Family Law Act 1975 (as amended by the Family Law Reform Act 1995) has changed much of the terminology (and substance) of parenting orders. In this paper we have tended to use the language of "custody" and "access" because that still tends to be the common parlance and the language used by most of the groups. Additionally, many of the groups' submissions upon which we have relied were written prior to the recent amendment.

50 When commencing this research we also expected to find that each of the groups was a cohesive entity with uniform policies or approaches. This was true of some of the groups, but not the case in respect of others. As we have mentioned, some presented different perspectives at different points in time, or depending on which spokesperson and branch was talking. An example of a general difference in tone and approach emerges within DADs between the NSW branch and the Qld branch in their respective submissions to the Joint Select Committee on Certain Family Law Issues: Inquiry into the Operation and Effectiveness of the Child Support Scheme (hereafter, JSC CFLI: CSS). The NSW branch states that "when the Child Support Scheme was introduced into Australia the basic principle of the scheme was a courageous and just move by the Australian government. It was to acknowledge that some non-custodial parents were not accepting their share of the children's upbringing after separation from the mother." NSW DADs then goes on to say that nonetheless "the Child Support Scheme has many anomalies which are inflexible and do not meet the needs of children or their parents". This can be contrasted with the submission of the Qld branch of DADS to the effect that "there is a basic human element that the Act

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groups with agendas that were, if not consistent with, then at least respectful of, women's concerns at one end of the spectrum, some with agendas that were radically opposed to women's concerns at the other end of the spectrum, and any range of intermediate responses in between. Instead we found that although there was some diversity in the approaches of the various groups,<sup>51</sup> there was less diversity in this respect than we expected. In fact on most issues it is possible to spell out, at least on a general level, consensus across many of the groups.

### 1. The erosion of the family unit

Many fathers' rights groups are concerned that the family unit is being attacked and undermined. For example, Men's Confraternity is worried about the "continual attacks by feminists at [sic] the family unit, which have created a society of single parent families, made motherhood a dirty word, and also put the job of housewife as the lowest form of human endeavour".<sup>52</sup> It is clear that the family unit,<sup>53</sup> whose demise these groups are mourning, is the traditional nuclear family unit headed by the father:<sup>54</sup>

Some in society seem to be intent on destroying the time-honoured role of the family, with particular emphasis given to the removal of the father. Unfortunately they have been amply supported by government policies. . . government has now, by its policies taken over the role of men and is now acting as de facto husband in relation to providing support for women and as de facto father in supporting children of the relationship. Again providing a suspicion that men have become the disposable sex, unless it is to provide income support via property settlement and ongoing maintenance.<sup>55</sup>

During our research we were struck by the antipathy expressed by many fathers' rights groups not only towards single motherhood,<sup>56</sup> but also "alternative" family forms particularly lesbian motherhood.<sup>57</sup> If we were to

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ignores. With its Marxist philosophical underpinning the Act fails to take account of people's individual situations, hopes, aspirations, and abilities. It lumps all into one solution, which is a gross disrespect for human rights. Take away a persons hope, their future, and they will give in and die."

51 Men's Confraternity is an example of a group that presents a view of reality that is more extreme than most of the other groups, while the Family Law Injustice Group Helping Together (FLIGHT) is an example of a group taking a more moderate approach.

52 Family Law Reform Party, *Submission to Australian Law Reform Commission Reference on Matrimonial Property*, Report No 39, AGPS, Canberra, 1987 (hereafter, ALRC, Matrimonial Property). The Family Law Reform Party refers to the "destruction of the family by feminists and homosexuals" (LFAA Conference, 1997). See also the Men's Rights Agency, ALRC, Children.

53 On the vexed question of what is a "family" see D Herman, "Are we Family? Lesbian Rights and Women's Liberation" (1990) 28 *Osgoode Hall Law Journal* 789.

54 Indeed, Barry Weedon (FLRP), at the LFAA Conference (1997) above n 52, says, "[t]he traditional family unit consisting of father, mother and children is currently under threat from many quarters in Australia".

55 Men's Rights Agency, (ALRC, Children).

56 Many of the critiques of sole custody could also be seen as disapproval of sole motherhood. For example LFAA posits families involving sole custody as sites of abuse (ALRC, Children).

57 This irrational fear of "alternative" family forms is illustrated by Barry Weedon (FLRP) at the LFAA Conference 1997, who argued, "... demands by lesbian and homosexual to be

attempt to understand this antipathy as other than mere bigotry, perhaps the concern that men are seen as the disposable sex might partially explain a distrust of families "in which an appropriate paternal masculinity is... absent".<sup>58</sup>

A common claim in the fathers' rights literature is that separation or family breakdown leads to "tragic consequences".<sup>59</sup> For the Child Support Action Group, these include "domestic violence, suicides, alcohol, drug and sexual abuse and long-term unemployment".<sup>60</sup> Men's Rights Agency submits that:

Children of separated parents are more likely to not perform well at school, are more likely to be in trouble with the police, less likely to go on to tertiary education, more likely to have trouble with their own relationships resulting in separation and divorce and the girls are more likely to have early pregnancies.<sup>61</sup>

If the parents do separate, it is argued, then continuing and frequent contact with the father is essential because children need fathers as role models.<sup>62</sup> For example, Men's Rights Agency argues that the "standard" contact arrangements of "twenty six times a year, and if lucky half the school holidays" is "not enough time... for the children to be able to experience and learn from the role modelling their father has the opportunity to provide". Therefore, it is:

[n]o wonder children are growing up with a distorted view of their place in society, leading to the huge influx in juvenile crime, both boys and girls, youth suicide, homeless youth, and an increasing drug culture amongst the young.<sup>63</sup>

There is certainly ample support in the scholarly literature for the proposition that divorce has a negative short-term impact on the children of a

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regarded as families have encouraged women to leave their husbands...". For an excellent discussion of the hatred of lesbian mothers see J Millbank, *On Being Despised: Some Thoughts on the Issue of the Anti-Mother*, Conference Paper, Court Network Conference, Melbourne, March 12 1997.

58 R Collier, *Masculinity, Law and the Family*, Routledge, London, 1995, p 202; B Simpson, P McCarthy and J Walker, *Being There: Fathers After Divorce*, Relate Centre for Family Studies, Newcastle Upon Tyne, 1995, p 4.

59 CSAG, NT, (JSC CFLI: CSS).

60 NT branch (JSC CFLI: CSS).

61 ALRC, Children.

62 See LFAA (ALRC, Children) which lists the consequences for children who do not have prominent masculine role models. Note the resonance of these arguments with the Family Court's reasoning in *A v J* (1995) 19 Fam LR 260; FLC 92-619, supporting Collier's assertion that, "[i]t has been primarily through reference to their presumed utility as appropriate male 'role models'... that the law has sought to attach fathers to families". See, R Collier, "A father's 'normal love'?: Masculinities, Criminology and the Family" in R Dobash et al (eds), *Gender & Crime*, University of Wales, Cardiff, 1995, p 216.

63 Men's Rights Agency (ALRC, Children). See also the comment of Parent Without Rights (JSC CFLI: CSS) that "if nobody acts now, very soon the numbers of homeless street kids, the numbers of young children in places like St Kilda in Melbourne and Kings Cross in Sydney, will soon quadruple". Men's Confraternity claims that "100 per cent of youths who consistently steal cars do not have a father at home. Ninety per cent of children brought before the Children's Court do not have a father": "Review of Restraining Orders", *Submission to the Task Force on Family and Domestic Violence and the Ministry of Justice*, Appendix C May 1995 at p 19 (hereafter Review of Restraining Orders). No sources are provided for this data.

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marriage.<sup>64</sup> However it is not at all clear from the studies that divorce necessarily has the harmful long-term effects the groups claim. Australian research by Paul Amato, for example, suggests that the competence of children in single parent families in the medium to long-term is the same as children from intact families.<sup>65</sup> This study, and others,<sup>66</sup> suggest that family structures per se matter less to children's well being than other factors, such as the high levels of poverty experienced by single parent families, how much inter-parental conflict the children must witness, and how positive their relationship with the resident parent is. In comparison with the clear evidence of the importance of their relationship with the resident parent, studies looking at whether contact with non-custodial fathers is significant in terms of the children's well-being are inconclusive,<sup>67</sup> contrary to the assertions made by these groups.

Various features of the family law system are portrayed by fathers' rights groups as attacking the traditional family. For example, no fault divorce is seen by the Lone Fathers Association as leading to a breakdown in the traditional family because under the "no fault" divorce system:

People know that they will not be considered to be guilty of any punishable moral or legal fault if or when they casually decide to get divorced and abandon their parental contract and just as casually try some other kind of lifestyle experiment, such as "welfare recipient", "single parenthood", "lesbian /homosexual marriage" and "sex worker".<sup>68</sup>

Spousal maintenance and child support are also frequently mentioned as

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64 For an overview of the research on this issue see J Pryor and F Seymour, "Making decisions about children after parental separation" (1996) 8 *Child and Family Law Quarterly* 229.

65 *Children in Australian Families: The Growth of Competence*, Prentice Hall, Sydney, 1987. In fact they fared slightly better in life skills. In this sense his research contradicts that of the US researchers. See J Wallerstein and J Kelly, *Surviving the Breakup*, Basic Books, New York, 1980; J Wallerstein and S Blakeslee, *Second Chances — Men, Women and Children a Decade after Divorce*, Ticknor & Fields, New York, 1989. There are numerous criticisms which have been levelled at "Wallerstein's" research: namely, the lack of control groups, the impact that the intervention may have had on the results, and the harm focus of the studies.

66 See also R Dunlop and A Burns, "*Don't Feel the World is Caving In*": *Adolescents in Divorcing Families*, Australian Institute of Family Studies, Monograph No 6, Melbourne, 1988; F Furstenberg and A Cherlin, *Divided Families: What Happens to Children When Parents Part*, Harvard UP, Cambridge, Massachusetts, 1991; C Hooper, "Do Families Need Fathers? The Impact of Divorce on Children", in Mullender and Morley (eds), above n 23, p 86.

67 Some studies demonstrate that relationships with the non-custodial parent remain central for many children. There are also suggestions that for a proportion of children there may be positive benefits associated with discontinuing contact with the non-custodial parent. Other studies fail to show an association between frequent contact with fathers and children's well being. See P Amato and B Keith "Parental divorce and the well-being of children: A meta-analysis" (1991) 110 *Psychological Bulletin* 26; C Hooper, "Do Families Need Fathers? The Impact of Divorce on Children" above, n 66.

68 LFAA Submission to ALRC Equality Before the Law (hereafter, ALRC, Equality). See also text to n 18. In a parallel vein the Family Law Reform Association NSW Inc argues that property settlements make divorce more attractive for women (communication with research assistant). The Australian Family Law Action Group comments in their *Submission to the Joint Select Committee into the Family Law Act* (hereafter JSC FLA) that they have received "countless horrendous records of 'counselling' by the 'Family' Court which has directly resulted in the actual subversion, corruption and destruction of families".

destroying the family and consequently society.<sup>69</sup> For example, Equality for Fathers talks of the "Robin Hood" principle which permeates Australian society, and which:

states that you take from the parent who is most capable, has worked hardest, and is best able to earn the money, and give it to the parent which is least able to earn money, is in effect rewarding mediocrity, penalising the efforts of an individual to provide for himself, and destroying the very fabric of our society.<sup>70</sup>

Another common theme in submissions is that the welfare system contributes to the erosion of the family unit because it makes it too easy for women to walk out of their marriages and become dependent on the State. Some groups, like the Family Law Reform Party, don't just argue that under the present welfare system custodial parents get the opportunity to *survive* independently of their marriages, but go so far as to propose that many custodial parents are *better off* without their partners.<sup>71</sup> Other suggested consequences of the current welfare system are that there is no encouragement for women to develop job skills and become financially self reliant, that billions of dollars of public money is wasted,<sup>72</sup> and that young women are encouraged to get pregnant in order to get the sole parent's benefit.<sup>73</sup> The Family Law Reform Group argues that women leaving their marriages in turn leads to an increase in gays, lesbians, AIDS, murder and suicide.<sup>74</sup>

A related critique is that made of women's refuges, which provide temporary accommodation to women:

Now lesbians are a part of life as are gay men, and I accept that. But I have seen ads for positions in women's refuges, and being a lesbian is part of the job requirement. So the government funds lesbians to run women's groups. So when a woman leaves

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69 For example, the CSAG, NSW, (JSC CFLI: CSS). See below text to n 154 and following, and text to n 277 and following.

70 JSC CFLI: CSS.

71 JSC CFLI: CSS. See also LFAA Conference (1997) papers. The CSAG, NT, submits that "dissolution of the family is accelerated by one parent finding out that leaving with the children is financially attractive than staying and resolving problems" (JSC CFLI: CSS). See also Men's Confraternity (JSC CFLI: CSS); The Family Law Reform and Assistance Association NSW (JSC CFLI: CSS); DADs (Qld) (JSC CFLI: CSS). It should be noted that for some women, receipt of social security gives them financial security for the first time. Social security is a regular (if small) income which allows women to budget and plan in ways that they could not while they were dependent on their spouse's income — M Montague and J Stephens, *Paying the Price fore Sugar and Spice: A Study of Women's Pathways into Social Security Reciprocity*, Brotherhood of St Laurence and National Women's Advisory Council, AGPS, Canberra, 1985, pp 1–11.

72 LFAA, Sydney (JSC FLA).

73 LFAA, Newcastle-Hunter Region (JSC CFLI: CSS). Studies have found no real support for this perception. See P Pacek and G Hendershot, "Public Welfare and Family Planning: An Empirical Study of the 'Brood Sow' Myth" (1974) 21 *Social Problems* 658; M Montague, "Baby Booms and Benefit Bludging. Are Young Women the Victims of a Myth"(1983) 7 *Community Health Studies* 136; P Leahy, T Buss and J Quane, "Time on Welfare: Why do People Enter and Leave the System?" (1995) 54 *American Journal of Economics and Sociology* 33.

74 JSC CFLI: CSS, LFAA Conference (1997).

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her husband, the woman at the refuge puts her arm around her and says, "come in darling, I can help you. I can get you money and cheap accommodation and have your telephone connected".<sup>75</sup>

Various solutions are proffered to restrict the intrusion of the welfare system into family life. The first consists of proposals to withdraw welfare benefits from custodial mothers.<sup>76</sup> For example, Men's Confraternity favours the complete abolition of the sole parent pension in favour of the unemployment benefit on the basis that; "it should be established that sole parent mothers are no longer revered and protected in society and that they are expected to pull their own weight".<sup>77</sup>

The second solution is to favour the parent who is not on welfare when making decisions about child custody. For example, the Family Law Injustice Group Helping Together<sup>78</sup> suggests that the parent who can work *and* care for the child should be favoured in custody "as a positive role model". Clearly nobody can work full time and also provide round the clock care for preschool children. What this group apparently envisions then is that the parent who is in the workforce and thus able to pay for a substitute carer should be given custody, as opposed to the parent who has sacrificed workforce opportunities to undertake the labour of caring prior to separation.

Most of the claims set out in this section are presented by the groups as self-evident. In fact, they are almost invariably unsubstantiated and clearly comprise a highly politicised and controversial agenda. There are also tensions within some of the material.<sup>79</sup> In one world portrayed by the Lone Fathers Association, women are dependent on men and the state and hence subject to extreme work disincentives.<sup>80</sup> However, this sits uneasily with another world it inhabits, "a world where most females participate in the paid work force".<sup>81</sup>

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75 Spokesperson from DADs in communication with research assistant.

76 The CSAG (NT) proposes that the sole parent pension be available for one year only and then clients need to revert to unemployment benefits (JSC CFLI: CSS). The NSW branch suggests that the sole parent pension should be withdrawn when the youngest child reaches the age of 12 in order to encourage the custodial parent to re-enter the work force before their work skills are too outdated (JSC CFLI: CSS).

77 JSC CFLI: CSS.

78 JSC CFLI: CSS. LFAA, Sydney Branch, also argues that "[t]he present system of custodial parent [sic] being able to continue on social security payments must now be discouraged so that the parent who takes responsibility to financially maintain the well being of their children should be awarded first priority. This action will again eliminate the spiralling Single Parent Benefits annual Government pay out currently costing our community 1.8 billion dollars." (JSC FLA). See also; Men's Confraternity Equal Opportunity Sub-committee (ALRC, Matrimonial Property).

79 Some of these tensions might be a result of the adoption by some Australian fathers' rights groups of arguments from the New Right. Carol Smart suggested in 1989 that in the UK the fathers' rights movements, new fatherhood and the New Right had a symbiotic relationship: "Power and the Politics of Custody" in *Child Custody and the Politics of Gender*, above, n 9, pp 16-19. She explains, however, that the New Right consider that women should be returned to a "natural" state of dependency, while the fathers' rights movement is "quite content with the idea of women becoming financially independent, or dependent upon the state, after divorce". It is still true in Australia that the New Right and fathers' rights groups have a symbiotic relationship. Some of the groups are, perhaps unconsciously, adopting the rhetoric of the New Right in ways which produce tensions and schisms in their arguments.

80 See above, n 78.

81 LFAA, Newcastle-Hunter region, claim a court preference for granting custody to mothers

Equally, Men's Confraternity suggests that "[m]en should be given first consideration for custody of the children. . . [as] this. . . takes away the last remaining excuse for women not to train for proper employment."<sup>82</sup> However, at the same time it is:

concerned that two out of three new jobs are for women, and with women now moving into vocations once the sole domains of men, by the turn of the century there will be more women in the work force than men. We believe that it is far more important for the country's sake that the men of this country are employed. To have millions of men idle and adrift is an invitation to disaster.

The arguments of Men's Confraternity in favour of jobs for men, combined with its proposals to cut welfare benefits to single parents, in effect reduce to one argument. That is, that women should be forced to be financially reliant on men, and that financial reliance should be linked to being contained within a traditional family unit.<sup>83</sup>

## 2. Custody/residence

Some fathers' rights groups do not comment on the issue of which parent should be granted residence. A number of the groups do. Commonly they request a presumption in favour of shared parenting.<sup>84</sup> The Family Law Injustice Group Helping Together is more cautious than most. It commits itself to the comment that "co-parenting holds potential for resolving children's distress".<sup>85</sup>

Research on the benefits of shared parenting is at a very preliminary stage. Clearly shared parenting promises positive benefits for the children<sup>86</sup> and both parents<sup>87</sup> if it can be made to work. It is also obvious that in order to be successful there needs to be a capacity and commitment on the part of both parents to parent, a respect for each other as parents, a willingness to separate their relationship as parents from the spousal relationship they are choosing to terminate, and either some degree of compatibility in parenting approaches, or

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on the basis of "traditional" reasons "which no longer apply in a world where most females participate in the paid work force": JSC CFLI: CSS.

82 ALRC, *Matrimonial Property*. See also below, they believe that after divorce, each person should be responsible for their own destiny.

83 ALRC, *Matrimonial Property*, *Review of Restraining Orders*, at p 21.

84 The Family Law Reform Party (JSC CFLI: CSS); Parent Without Rights (communication with research assistant); Family Life (communication with research assistant); DADs (communication with research assistant); Women and Grandparents Treated Unfairly by Family Law (JSC FLA); The Family Law Reform Association NSW Inc (communication with research assistant); the Child Support Action Group (communication with research assistant); the Non-Custodial Men's Support Group (communication with research assistant); the LFAA (Executive Committee submission to JSC FLA); Equality For Fathers (JSC CFLI: CSS). Whether shared parenting means a genuine commitment to undertaking 50 per cent of responsibility for the actual work of child care for all groups, or simply an opportunity to have greater access and more involvement in decision-making processes, is not clear. See: Bertoia and Drakich, above, n 9.

85 JSC CFLI: CSS.

86 In that they get to have an ongoing relationship with both parents.

87 In that both get to maintain ongoing contact with the children, while neither has to bear the sole responsibility of residence. Thus both parents get the time to meet their own needs, develop new relationships and career opportunities. See the Family Law Council, *Access — Some Options for Reform*, AGPS, Canberra, 1987.

a deep commitment to co-operation with each other.<sup>88</sup> Where these elements are not present, and/or there is a high level of continuing conflict between the parents, preliminary research tends to suggest that the children will be much worse off than they would under sole parenting arrangements.<sup>89</sup> Many commentators take the view that court-ordered shared parenting is never appropriate, because it should only be encouraged in those cases where both parents voluntarily agree to it, and in such cases a court order is unlikely to be necessary. The degree of acrimony demonstrated towards the custodial parent by some fathers' rights groups indicates a level of interparental conflict that, if shared by the groups' members, would seem to make shared parenting an inappropriate option in the circumstances. It has also been suggested that a couple's shared ideological commitment to egalitarian and non-patriarchal relationships is conducive to successful shared parenting.<sup>90</sup> Again, for men who share the views of some of the groups, a commitment to the patriarchal family might make shared parenting unlikely to be successful.

The manner in which some of these groups juxtapose issues sometimes indicates that the appeal of shared parenting partly lies in a reduction in obligations for the payment of child support and/or a more even matrimonial property split. For example, Parent Without Rights comments that "custody should be shared 50/50 as the norm with no maintenance".<sup>91</sup> For some groups shared parenting is presented as the better option from the children's perspective in that it arguably produces better adjusted kids and prevents "parentectomy".<sup>92</sup>

For many of these groups, however, shared parenting is primarily cast as an equality issue between fathers and mothers. Participation in parenting is argued to be a "right"<sup>93</sup> of both parents. These groups argue that sole custody is overwhelmingly awarded by the Family Court to mothers and this demonstrates a bias in the system. For example, Parent Without Rights submits that only 5 per cent of fathers who are able to reach a full contested

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88 *In the Marriage of Cullen* (1981) 8 Fam LR 35; FLC 91-113; *In the Marriage of H* (1995) 19 Fam LR 165; D Coller, "Joint Custody: Research, Theory, Policy" (1988) 27 *Family Process* 459.

89 Wallerstein and Blakeslee, above, n 65; F Furstenberg and A Cherlin, above, n 66. See also J Behrens, "Shared Parenting: Possibilities... and Realities" (1996) 21 *Alternative Law Journal* 213; P Durst, N Wedemeyer and L Zurcher, "Parenting Relationships after Divorce: Implications for Practice" (Sept-Oct 1985) 30 *Social Work* 426. These authors also suggest that flexible work schedules and sufficient income may also be necessary to make joint custody work. For a contrary opinion see W Bender, "Joint Custody: The Option of Choice" (1994) 21 (3/4) *Journal of Divorce and Remarriage* 115.

90 G Russell, *The Changing Role of Fathers*, University of Queensland Press, London, 1983.

91 Communication with research assistant. See also DADs (NSW) (JSC CFLI: CSS); Equality for Fathers (JSC CFLI: CSS).

92 LFAA, Rockhampton, (JSC CFLI: CSS). This organisation also suggests greater emphasis be given to the wishes of the child and that the term "custody" be replaced by the term "parenting". Note that the latter request has been granted by the Family Law Reform Act 1995. See C Bridge, "Shared Residence in England and New Zealand — A Comparative Analysis" (1996) 8:1 *Child and Family Law Quarterly* 12, who argues that, while in theory the purpose of shared physical parenting is to improve the welfare of the child, the reality is that it may have a lot more to do with meeting the needs of the parents.

93 DADs (NSW) (JSC FLA); Parent Without Rights (JSC FLA); Family Life (communication with research assistant).



hearing of their custody applications are successful.<sup>94</sup> Men's Rights Agency claims that, of the men who actually go to court, only 18 per cent get sole custody.<sup>95</sup> Equality for Fathers claims that only 2 per cent of males get custody through court decisions.<sup>96</sup> These statistical claims are generally unreferenced by the groups and so it is unclear what their data sources are.<sup>97</sup>

There has been no large scale empirical research in Australia into custody determinations. Two small studies of custody orders were conducted in 1980<sup>98</sup> and 1992<sup>99</sup> which found that only 10 per cent of the cases were actually contested. In these fathers got sole custody in 31 per cent of cases in both studies and custody of at least one child in 44 per cent of such cases in 1980 and between 37 per cent and 41 per cent in 1992.<sup>100</sup> These figures are quite high when it is considered that in the vast majority of families prior to separation it is women who are still primarily responsible for the actual work of caring for the children, and one would expect that to be reflected in custody determinations.<sup>101</sup> As Annette Hasche has stated, the results of the studies illustrate that:

fathers, for whatever reasons, do not apply for custody in a significant number of cases. . . Although the general community, that is a majority of the parents concerned, may decide that "the female of the species is the better parent", the figures presented in the studies do not show that the judges of the Family Court do likewise.<sup>102</sup>

Various explanations are proffered by the groups as to how the "bias against men" in the Family Court works. Parent Without Rights lists a number of barriers to fathers gaining custody. These are:

- A lack of legal resources;
- The status quo being established by the mother leaving home with the kids;
- Fathers having to take time off work to attend court sessions;
- False accusations that fathers are sexually abusing their children;

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94 JSC CFLI: CSS.  
95 Communication with research assistant.  
96 ALRC, *Matrimonial Property*.  
97 It would appear that one common statistical method used by fathers' rights groups involves polling their own members. See text to n 111.  
98 See F Horwill and S Bordow, *The Outcome of Defended Custody Cases in the Family Court of Australia*, Family Court of Australia, Research Report No 4, Sydney, 1983.  
99 S Bordow, "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" (1994) 8 *AJFL* 252.  
100 The latter figure includes split decisions, that is decisions where the children were separated or joint custody was awarded.  
101 R Dunlop, *The Influence of Mothers and Fathers Ten Years After Divorce*, Fifth Australian Family Research Conference, Brisbane, 27-29 November, 1996; S Boyd, "Investigating Gender Bias in Canadian Child Custody Law: Reflections on Questions and Methods" in J Brockman and D Chunn (eds), *Investigating Gender Bias: Law, Courts and the Legal Profession*, Thompson Educational Publishing Inc, Toronto, 1993, p 172. C Cowan and P Bronstein, "Fathers' Roles in the Family: Implications for Research Intervention and Change" in P Bronstein and C Cowan (eds), *Fatherhood Today: Men's Changing Role in the Family*, John Wiley, New York, 1988 argue that there is a significant discrepancy between men's actual involvement with their children and what men and women think that the male role in modern families ought to be.  
102 "Sex Discrimination in Child Custody Determinations", (1989) 3 *AJFL* 218 at p 220.

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- The general attitude of society that children are best brought up by their mothers;
- Family court counsellors and judges being biased towards mothers on the basis that they cannot get work as easily as men and therefore giving them custody is easier on the public purse; and
- Perjury committed by mothers.<sup>103</sup>

Equality for Fathers claims that the court doesn't look at which is the better parent but looks at whether the mother is a bad parent.<sup>104</sup> Julia Brophy suggests that fathers themselves may contribute to this. She states that, "In general fathers do not argue their case for the custody of children on the basis of a history of shared child care: rather they attempt to discredit the mothers".<sup>105</sup> Fathers who run such arguments may not have any history of truly shared child care to put before the court.

Only a few of the groups address the fact that in the vast majority of cases mothers end up with responsibility for the children by private arrangement with the father. Parent Without Rights<sup>106</sup> submits that men consent to women having sole custody for reasons such as misinformation by their lawyers, restraining orders, the threat of being denied access, being hassled by their ex-partner's new boyfriend, the enormous legal expenses they must incur in fighting custody, reconciliation hopes, and society's gender typecasting.

Men's Confraternity is alone in arguing that there should be a presumption in favour of sole custody for men. It says that:

Men should be given first consideration for custody of the children on the basis that they are more caring, better equipped for long-term planning and hence able to provide a more stable life for the children. Women on the other hand tend to be emotive, superficial and self centred.<sup>107</sup>

Yet in another of its comments it says that, "the courts have wrongly shown a tendency to place the child in the care of a single mother, even where the father has formed a new partnership which would make a substitute mother available".<sup>108</sup> If mothers are "emotive, superficial and self centred" it is surprising that fathers would want their children to be cared for by a substitute mother. The suggestion also presents the mother as disposable or replaceable which is in stark contrast to its claims that the biological father is irreplaceable or indisposable.

### 3. Enforcement of access/contact

#### A. The problem

Many fathers' rights groups<sup>109</sup> claim that court ordered contact is not enforced and is frequently disobeyed by the custodial parent. The Child Support Action

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103 JSC CFLI: CSS.

104 JSC CFLI: CSS.

105 "Custody and Inequality in Britain" in C Smart and S Sevenhuijsen above, n 9.

106 JSC FLA; Men's Confraternity (ALRC, Matrimonial Property).

107 ALRC, Matrimonial Property.

108 ALRC, Matrimonial Property.

109 The Family Law Reform Association NSW Inc (communication with research assistant); Parents Without Partners (communication with research assistant, compared with other submissions by this group); The Family Law Reform Party (LFAA Conference, 1997); The Australian Family Law Action Group (JSC FLA); the Non-Custodial Men's Support Group

Group, for example, says that custodial parents can “unilaterally decide that the non-custodial parent is an unsuitable parent or decide to punish them and withdraw access”.<sup>110</sup> Lone Fathers Association claims that the main source of continual litigation in family law is the frustration of court ordered contact by the custodial parent. This group is alone in attempting to provide some substantiation of these claims. It reports interviewing one hundred divorced or separated men to find that 85 per cent had experienced denial of access.<sup>111</sup> However a sample consisting solely of members of the Lone Fathers Association is clearly not representative of non-custodial parents generally, and we are not aware of any scholarly studies in Australia which either support or refute the claims made by fathers' rights groups in this regard.<sup>112</sup> Interestingly, the Australian Law Reform Commission has recommended that the Family Court should be more robust in refusing to make contact orders in the future where it is not in the best interests of the child to order contact.<sup>113</sup> Perhaps the over willingness of the court to grant contact in such cases has indirectly led to some of the problems in complex contact cases.<sup>114</sup>

For some fathers' rights groups denial of contact is presented as a denial of the rights of the child. For example, Lone Fathers' Association claims that when access is denied, children are denied their basic human right to have a relationship with their father and are “held hostage” in breach of the UN

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(communication with research assistant); The Family Life Movement (communication with research assistant); Women Who Want to be Women (JSC FLA); Parent without Rights (ALRC, Contempt); LFAA (WA) (JSC FLA), LFAA (ALRC, Contempt).

110 (NSW) JSC CFLI: CSS.

111 ALRC, Contempt.

112 In a document produced by LFAA and Men's Confraternity (Campaign for Child Support Justice) it is stated that “Studies show that 40 per cent of custodial parents deny access for vindictive reasons”. No reference for this claim is provided. In the US, Wallerstein and Kelly, above, n 65 at 33, *estimated* that 20 per cent of mothers in their study saw no value in the father's continued contact and actively tried to sabotage the meetings. Simpson, McCarthy and Walker, above, n 58 at p 42, acknowledge that there is a percentage of women who are “unable to resolve negative feelings towards ex-husbands and find it difficult to accept fathers continuing contact with children”. However, they also point out, at pp 30–34, that fathers who have lost contact with their children demonstrate high levels of bitterness towards their ex-wives, who may have very different accounts of what actually happened in this regard. They suggest that often fathers are at least equally responsible with their ex-partners for the demise of their relationship with their children, but are unwilling to see or take responsibility for this. See also J Pearson and N Thoenness, “The denial of visitation rights: A preliminary look at its incidence, correlates, antecedents and consequences” (1988) 10 *Law and Policy* 363 on factors which lead to denial of and problems with access; A McMurray and A M Blackmore, “Influences on Parent-Child Relationships in Non-Custodial Fathers” (1993) 14 *Australian Journal of Marriage and the Family* 151, on non-custodial parents' perceptions about access; C Smart, “The Legal and Moral Ordering of Child Custody” (1991) 18 *Journal of Law and Society* 485 and S Boyd, “W(h)ither feminism? The Department of Justice public discussion paper on custody and access” (1995) 12 *Revue Canadienne De Droit Familial* 331, on the invisible and undervalued work women do to sustain access.

113 ALRC, *For the sake of the kids; Complex Contact Cases and the Family Court, Report No 73*, AGPS, Canberra, 1995, p 32.

114 Interestingly research has suggested that once the court gets involved, the chances of long-term contact being successful are substantially reduced: S Hirst and G Smiley, “The Access Dilemma — A Study of Access Patterns Following Marriage Breakdown” (1984) 22 *Conciliation Courts Review* 41.

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Convention on the Rights of the Child.<sup>115</sup> For many of these groups the issue, however, is primarily one of equity between the parents. The perception is that court orders (such as protection orders, maintenance orders and child support payments) are harshly enforced against men, while women are dealt with lightly when they breach access orders.<sup>116</sup> For example, Parent Without Rights<sup>117</sup> claims that the Family Court doesn't jail mothers for denial of access, soft tactics like counselling and mediation are used instead, but that fathers are jailed "almost weekly". They also contrast the difficulties a non-custodial parent faces in enforcing an access order with their own private resources while the public enforcement of maintenance orders is the responsibility of the Child Support Agency.

The claim that court orders are harshly enforced against men is in fact controversial. Some would argue that criminal assault in the home is not prosecuted as it should be but diverted into quasi-criminal enforcement strategies, such as protection orders.<sup>118</sup> Others argue, in turn, that protection orders are not taken seriously enough and that there are limits to their effectiveness and enforceability.<sup>119</sup> The Family Court, in particular, has been criticised for failing to use the penalties available in the Family Law Act to deal with male violence.<sup>120</sup> It is also the case that spousal maintenance orders are rarely made and difficult to enforce,<sup>121</sup> and that the collection rate for child support is very poor.<sup>122</sup>

The Non-Custodial Men's Support Group stands alone amongst fathers' rights groups in acknowledging the need to accept that "lots of people don't want to see their kids".<sup>123</sup> It is important not to lose sight of this perspective. The Women's Legal Resource Centre<sup>124</sup> comments that, in its view, a more significant problem is not so much custodial parents failing to provide access

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115 Newcastle Branch (LFAA Conference, 1997); Parent Without Rights (submission to ALRC reference on Intractable Access, above, at n 113 (hereafter, ALRC, Intractable Access)).

116 The Family Law Council is currently monitoring the penalties imposed by Family Court. The Penalties Project should be completed in 1998.

117 ALRC, Intractable Access and JSC FLA. See also: DADs, NSW, (JSC FLA); LFAA, (ALRC, Contempt).

118 J Scutt, *Even in the Best of Homes: Violence in the Family*, 2nd ed, Penguin, Ringwood, 1990.

119 Joint Select Committee, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, AGPS, Canberra, 1992, paras 7.110-7.117.

120 Ibid, at pp 164-5; ALRC *Contempt Report No 35*, especially the submission of the Police Commissioner's Advisory Group (PCAG).

121 Orders for spousal maintenance are made in less than 5 per cent of cases, *Australian Family Law and Practice*, CCH Looseleaf, para 25-505. But note the recent increased interest in spousal maintenance, see M Quinlan, "Spousal Maintenance" (1995) 69 *Law Institute Journal* 872.

122 The Child Support Evaluation Advisory Group, *Child Support in Australia*, AGPS, Canberra, 1992, concluded that the enforcement activity by the Agency was very disappointing.

123 Communication with research assistant.

124 ALRC, Intractable Access. See the discussion in C Smart and B Neale, "Arguments Against Virtue — Must Contact be Enforced?" May [1997] *Family Law* 332; K Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" 30 (3) *Alberta Law Review* 852 at p 865; E Kruk, "Psychological and Structural Factors Contributing to the Disengagement of Non-Custodial Fathers After Divorce" (1992) 30 *Family and Conciliation Courts Review* 81.

as non-custodial parents failing to exercise access “despite repeated requests from custodial parents and children for access to occur”.

## **B. Suggested solutions to the problems of enforcing access**

### *(i) “Malicious” denial*

A range of solutions are proffered by the groups in respect of the “malicious” denial of access by the custodial parent. The first is that child support should be automatically withheld when “lawful”,<sup>125</sup> or even “reasonable”,<sup>126</sup> access is denied.<sup>127</sup> Men’s Confraternity argues that prior to the advent of the recent Child Support Scheme if the wife refused access the father could withhold payments of child support until his access was reinstated. According to Men’s Confraternity this was a “counterbalancing” that kept both parties relatively honest. With the administrative enforcement of child support payments under the Child Support Scheme this “father’s power of refusal” has been taken away.<sup>128</sup> An obvious attraction of this solution is the sense that access is what men pay for when they pay child support. Parent Without Rights makes this explicit when it claims that child support should be a “user pays” system.<sup>129</sup>

For other groups the converse argument is run. The poor record of fathers in paying child support is used to justify giving fathers more contact with children. For example, the Family Law Reform Party argues that access is the best and cheapest incentive to encourage non-custodial parents to support their children.<sup>130</sup>

Some of these comments betray an attitude of commodification towards children — a sense of children as possessions of their parents and an absence of the sense that children are dependent people with needs that are separate to and that must at times take priority over those of their parents. There is a lack of recognition, for example, that responsible and adult parenting sometimes means sacrificing one’s own immediate interests as an individual, including one’s sense of fairness, to ensure that the needs of one’s children do not go unfulfilled.<sup>131</sup> In keeping with this, few of these groups raise the point that withholding child support will impact adversely on the welfare of the children. The Child Support Action Group raises this concern but then goes on to say that “[t]he flaw in this argument is that the custodial parent makes a clear and conscious choice in the matter”.<sup>132</sup> If anything can be taken from this

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125 DADs, NSW, (JSC FLA).

126 The Campaign for Men’s Rights, Qld, (JSC CFLI: CSS). Clearly what is proposed by “unlawful” denial is denial of access where there is a court order in place. The proposal to withdraw child support where “reasonable” access is denied might go further than this.

127 The Family Law Reform Association NSW Inc (JSC CFLI: CSS); CSAG (JSC CFLI: CSS); Parent without Rights (JSC CFLI: CSS).

128 JSC CFLI: CSS.

129 JSC CFLI: CSS, LFAA (JSC FLA).

130 JSC CFLI: CSS. See also LFAA (ALRC, Contempt). This is not an uncontroversial claim. See, for example, B Simpson, P McCarthy and J Walker, *Being There: Fathers After Divorce*, above, n 58, who found no relationship between the payment of maintenance and the quantity or type of contact fathers had with their children. Compared with W Bender, “Joint Custody: The Option of Choice” (1994) 21 *Journal of Divorce and Remarriage* 115 at p 122.

131 On this see also Bertoia and Drakich, above, n 9.

132 JSC CFLI: CSS.

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comment it seems to be that any harm done to the children by the withdrawal of child support is the custodial parent's fault. At another point, instead of suggesting that child maintenance should be denied, it suggests that it should be reduced, and adds, "of course, for the children's well being, it would be preferable for legal leverage to be applied to custodial parents who deny access".<sup>133</sup>

A second enforcement suggestion, which betrays a similar lack of sensitivity to the position of the children, is that custody should be used as an enforcement mechanism. In other words, when access is denied custody should be reversed. Parent Without Rights,<sup>134</sup> for example, suggests that custody should be switched to the father if the child has been brainwashed into not wanting access to the father, "as is usually the case if a child doesn't want access".<sup>135</sup>

A third suggestion is that criminal sanctions should be imposed if contact orders are breached. For example, Dads Against Discrimination suggests the imposition of fines on the custodial parent for non-compliance with court ordered contact.<sup>136</sup> Parent Without Rights<sup>137</sup> argues that denial of access should be treated as seriously as rape and that imprisonment should be imposed. To counter the suggestion that jailing the custodial parent will detrimentally affect the children, it suggests that this should occur while the non-custodial parent is taking holidays and can look after the children. Lone Fathers Association runs a similar argument and yet suggests, at another point in its submissions, that penal sanctions are not appropriate or effective in cases involving abduction/custody/access/maintenance where the offender is under emotional trauma and no injury or loss is sustained by the spouse or children of the marriage. In the same submission it suggests that disobedience of court orders is not contempt (and that violence and death will result if it is treated as such).<sup>138</sup> Clearly in these latter submissions it is contemplating situations where the non-custodial parent is breaching court orders.

Obviously there will be some custodial parents who have failed to resolve their issues around the demise of their relationship with the non-custodial parent and who allow this to cloud their ability to act in their children's best interests on the issue of contact. In the absence of research, any attempt to

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133 JSC CFLI: CSS.

134 ALRC, Intractable Access. See also: LFAA, Qld, (ALRC, Contempt); Parents Without Partners (communication with research assistant).

135 Mothers brainwashing children is a part of what it identifies as the "the parental alienation syndrome", (CSAG, JSC CFLI: CSS; Parents without Rights, JSC FLA) based on the work of R Gardner, *The Parental Alienation Syndrome and the Differentiation Between Fabrication and Genuine Child Sex Abuse*, Creative Therapeutics, New Jersey, 1987. In the Australian context see K Byrne, "Allegations of Child Sexual Abuse and the Expert Witness: Common Problems" (1991) 6 *Australian Family Lawyer* 14, who is cited by fathers' rights groups. See for example; LFAA, (ALRC, Children).

136 It is also sometimes suggested that the custodial parent should pay the non-custodial parent's costs when they need to take action to enforce an access order. See The Gay and Married Men's Association (ALRC, Contempt). The general rule in family law cases is that each party bears his or her own costs — s 117(1). The ALRC is considering whether this situation should be amended in its reference on the *Review of the Adversarial System of Litigation*.

137 See also the Family Law Reform Association NSW Inc (communication with research assistant).

138 LFAA, Qld, (ARLC, Contempt).

estimate the extent of this phenomenon is speculative and impressionistic. What is clear is that it is difficult to come up with solutions in such cases that don't unacceptably harm the children, particularly when one considers the extent to which their interests are bound up with the well being of the resident parent.<sup>139</sup>

*(ii) Violence against the custodial parent*

Solutions are suggested by some fathers' rights groups for the situation where the non-custodial parent is legally denied access because of domestic violence against the mother but "still long[s] to see their children as much as their children long to see them".<sup>140</sup> The language used by the few groups who address this issue generally does not explicitly acknowledge that they are talking about situations of violence by one of the spouses against the other. It tends to suggest conflict between the two, which does not bear on the relationship either has with the children. This contradicts the considerable evidence that witnessing domestic violence detrimentally influences the children's welfare.<sup>141</sup>

It is sometimes suggested that the provision of supervised contact centres might "cater for antagonistic parents".<sup>142</sup> Although supervised contact centres may provide assistance in some cases, there is no recognition by these groups of the disadvantages of such centres. The Women's Legal Resource Centre notes that such centres "can be used as an easy solution to a difficult problem, and contact may be ordered in circumstances where the child's safety and welfare is compromised".<sup>143</sup> Indeed, other commentators describe contact at such centres as "prison visits" and suggest that "[c]ontact centres and supervised contact should be abolished, since contact with violent and abusive fathers is unnecessary and not in the child's best interests".<sup>144</sup>

*(iii) Practical limitations*

The third scenario where access by the non-custodial parent may be impeded relates to practical considerations, such as distance and the costs of access.<sup>145</sup> Many fathers' rights groups seek to prevent the custodial parent from moving the children more than a specified distance from their previous place of residence. The Lone Fathers Association names it "abduction" or

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139 See further the discussion on this in ALRC, *For the Sake of the Kids*, above, n 113.

140 LFAA, WA, (JSC FLA).

141 For example, see H Davidson, *A Report to the President of the American Bar Association: The Impact of Domestic Violence on Children* 1994; P Jaffe et al, *Children of Battered Women*, Sage Publications, California, 1990; A Blanchard, "Violence in Families: The Effects on Children" (1993) 34 *Family Matters* 31; H Hughes, "Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims" (1988) 58 *American Journal of Orthopsychiatry* 77; J Alessi and K Hearn, "Group Treatment of Children in Shelters for Battered Women", in A Roberts (ed), *Battered Women and their Families*, Springer, New York, 1984; R Morley and A Mullender, "Domestic Violence and Children: What do we know from Research?" in Morley and Mullender, above, n 66.

142 To borrow the wording used by the Family Law Reform Association NSW Inc (communication with research assistant). LFAA (ARLC, Equality) also asks for funding of supervised access centres.

143 ARLC, *Intractable Access*.

144 L Harne and J Radford, "Reinstating Patriarchy: The Politics of the Family and the New Legislation" in Mullender and Morley, above, n 23, p 83.

145 ALRC, *Contempt*.

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“kidnapping” when the custodial parent takes the child out of the jurisdiction in order to deny access. Some put the distance it is permissible for the custodial parent to move as 50 miles,<sup>146</sup> some as 100 kilometres<sup>147</sup> and some talk about “reasonable proximity to the other parent”.<sup>148</sup> Most of these groups would permit such a move only with the consent of the non-custodial parent<sup>149</sup> and/or a Family Court order.<sup>150</sup>

The Child Support Action Group proposes that liability for child support should cease if the custodial parent does not get such permission. The Family Law Reform Party would permit the custodial parent to freely take the children away from the non-custodial parent, but only if they bear the non-custodial parent’s costs of access afterwards.<sup>151</sup> None of these groups suggest similar restrictions to prevent the contact parent from moving away from the children.<sup>152</sup>

A number of fathers’ rights groups suggest that fathers have difficulties exercising access because of the costs involved and propose that such costs be credited as the payment of child support.<sup>153</sup>

#### 4. Child support

All of the groups have major concerns about the current Child Support Scheme.<sup>154</sup> Some groups do acknowledge that under the prior system of child maintenance there were problems with the poverty of children and of single income families headed by women.<sup>155</sup> Others argue that more child

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146 LFAA, Newcastle, (LFAA Conference, 1997).

147 Equality for Fathers (JSC CFLI: CSS).

148 LFAA (ALRC, Matrimonial Property).

149 CSAG, NSW, (JSC CFLI: CSS); Parent without Rights (JSC FLA); LFAA (ALRC, Matrimonial Property).

150 CSAG, NSW, (JSC CFLI: CSS). LFAA, Newcastle, would allow the Family Court to give permission but submits that it should only grant permission if the father is either not interested in access or is abusing the child (*not* the mother), (paper to LFAA Conference, 1997). Parent Without Rights submits that the permission of a mediation centre counsellor should suffice (JSC FLA). It is interesting to note that comments in the media suggested that the recent amendments to the Family Law Act 1975 might have satisfied some of these suggestions by placing “constraints on custodial parents’ freedom of movement”. See for example B Arndt, “Landmark Case to Determine Custody Rights” *Sydney Morning Herald* 21 March 1997. For further comment on the effect of the amendments, see L Young, “Are Primary Residence Parents as Free to Move as Custodial Parents Were?” (1996) *Australian Family Lawyer*; S Christie, “There will be Bloodshed: Parental Relocation and the Family Law Reform Act 1995”, *Polemic*, 1997.

151 JSC CFLI: CSS. See also Equality for Fathers (JSC CFLI: CSS).

152 The issue was discussed by the Full Family Court in *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; FLC 92-517.

153 CSAG, NSW, (JSC CFLI: CSS); DADs, Qld, (JSC CFLI: CSS); The Non-Custodial Parents Reform Group (JSC CFLI: CSS). That income may be a significant factor in the preservation of the relationship between non-custodial parents and their children is supported by the findings of Simpson, McCarthy and Walker, above, n 58, p 18.

154 The current scheme has two central features. The first is that child support is collected administratively by the Child Support Agency. This part of the scheme is contained in the Child Support (Registration and Collection) Act 1988 and came into force on 1 June 1988. The second is that child support is calculated according to a formula, which is based on the income of the custodial and non-custodial parents. This part of the scheme is contained in the Child Support (Assessment) Act 1988 and came into force on 1 October 1989.

155 See DADs, NSW, (JSC CFLI: CSS). For a dismal picture of child maintenance payments



maintenance was paid than is claimed by official statistics and when it wasn't paid this was for valid reasons. For example, Parent Without Rights argues that under the previous scheme 75 per cent<sup>156</sup> of Family Court ordered maintenance was being paid. The 25 per cent of fathers who didn't pay were being denied access by the mother or through the legal system, or had crippling debts because of legal battles, or couldn't pay because of the costs of attempting to start life again with a new partner, or were out of work and below the poverty line. Some fathers' rights groups actually argue that the percentages of non-custodial parents paying child support have declined under the new Child Support Scheme because of the serious inequities in that scheme.<sup>157</sup> There are major problems with these two latter claims in that they contradict the official data<sup>158</sup> and the statistics cited in support are unsourced.

#### A. "Excessive" child support liability

One of the inequities upon which all groups uniformly agree is that the amounts levied under the current Child Support Scheme are too high. The Child Support Action Group expresses this forcefully when it states that, "the basis of the present system is injustice, tyranny, robbery and extortion regardless of human morality".<sup>159</sup> The Family Law Reform Party claims that child support and tax can consume up to 60 per cent of a non-custodial parent's income.<sup>160</sup> Parent Without Rights puts this figure at 88 per cent.<sup>161</sup> It is not clear how these groups have come up with the figures they cite in support of their arguments.<sup>162</sup>

All groups seem to agree that the consequence of such high rates of child

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prior to the introduction of the Child Support Scheme see M Harrison, G Snider and R Merlo, *Who pays for the Children?* Monograph no 9, Australian Institute of Family Studies, Melbourne, 1990, p 7. See also L Hancock, "Reforming the Child Support Formula: Who benefits?", forthcoming in *Just Policy*.

156 JSC CFLI: CSS. Harrison, Snider and Merlo, *ibid*, p 7 found that only 34 per cent of custodial parents were actually receiving regular, periodic child maintenance under the old scheme and they were receiving, on average, slightly less than twenty four dollars a week per child.

157 The Family Law Reform Party (JSC CFLI: CSS) says that "[i]n 1990 it was claimed by the Federal Government, in Judge Fogarty's report, that there was a compliance percentage of 70 per cent in child support payments, now it is claimed there is only a 56 per cent compliance ratio and they wonder why non-custodial parents don't pay". Men's Confraternity also claims that before the Family Law Act came into being 70 per cent were making regular child support payments. And that when the Child Support Agency started to collect monies the rate of payment dropped to 30 per cent, rising to 45 per cent in 1991 (JSC CFLI: CSS).

158 See n 111. The 34 per cent compliance rate under the previous regime can be contrasted with a compliance rate of around 65 per cent under the new scheme, Child Support Advisory Group Report 1992. Kate Funder has noted that, "Australian Institute of Family Studies research has shown that since the Child Support Scheme was introduced the rate of payment has doubled from one-third to two-thirds in divorced populations with dependent children" (K Funder, above, n 40 at p 37).

159 JSC CFLI: CSS. The Family Law Reform Party submits that "[t]he Child Support Agency... has become a gigantic octopus gobbling up a non-custodial parent's pay packet" (JSC CFLI: CSS).

160 JSC CFLI: CSS.

161 Communication with research assistant.

162 The DSS (JSC CFLI: CSS at p 146) produces a table showing the percentages of income a

support is that non-custodial parents are financially crippled.<sup>163</sup> The Lone Fathers Association says that fathers are “living out of cars and sheds and giving up employment. Suicide is the only escape from their shackles.”<sup>164</sup> The Campaign for Men’s Rights argues that:

The practical result of. . . [the Child Support Agency] has been to throw 90 per cent of all divorced men in Australia into poverty. This agency has done more to create a new class of poverty in Australia than any recession has done.<sup>165</sup>

Some groups say that this means that fathers do not have the means to exercise access,<sup>166</sup> get on with their lives, or remarry.<sup>167</sup> Many fathers’ rights groups also argue that the extreme financial burden the child support formula imposes on non-custodial parents who are working makes them better off on the dole,<sup>168</sup> and that there is little incentive under the formula for fathers to earn extra income.<sup>169</sup> Lone Fathers argues that excessive child support liabilities exacerbate conflict between the parents, which in turn detrimentally impacts on the children.<sup>170</sup>

A number of related criticisms attest to the general dissatisfaction with the amount of child support for which non-custodial parents are liable. The first is that children cost a lot less than the results produced by the application of the child support formula.<sup>171</sup> For example, Men’s Confraternity argue that maintenance payments for children should be equal to the allowances paid for children by government agencies<sup>172</sup> because welfare allowances have been set with the “survival of the recipients in mind”. The claim that children cost less

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non-custodial parent on different incomes will have left after payment of child support and tax. This table show that percentages of income paid in child support are lower than stated by these groups.

163 See, for example, the Family Law Reform Association NSW Inc (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS).

164 Newcastle-Hunter, (JSC CFLI: CSS). There are the familiar arguments that the child support provisions cause violence. For example, CSAG, NT, argues that the formula encourages murder and suicide (JSC CFLI: CSS).

165 JSC CFLI: CSS. Parent Without Rights comments that the Child Support Scheme has created “a new class of persons living below the poverty line” (JSC CFLI: CSS).

166 Parent Without Rights (ALRC, Contempt); LFAA, WA, (JSC FLA).

167 However, figures show that fathers are more likely to repartner than mothers after separation. See K Funder, *Remaking Families: Adaptation of Parents and Children to Divorce*, Australian Institute of Family Studies, Melbourne, 1996, pp 39–42.

168 LFAA (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS); Non-Custodial Parents Reform Group (JSC CFLI: CSS); Non-Custodial Men’s Support Group (communication with research assistant); FLIGHT (JSC CFLI: CSS); the CSAG, Vic, (JSC CFLI: CSS). The Family Law Reform and Assistance Association states that many non-custodial parents are giving up jobs rather than pay child support (JSC CFLI: CSS). Note however the Legal Aid Child Support Unit’s (JSC CFLI: CSS) argument that the formula functions to adjust payment according to ability to pay and that, therefore, the worker is always financially better off than the welfare recipient.

169 Non-Custodial Parents Reform Group (JSC CFLI: CSS); Men’s Confraternity (JSC CFLI: CSS). LFAA (National President’s Supplementary submission to JSC CFLI: CSS).

170 ALRC, Children.

171 CSAG, NT, (JSC CFLI: CSS); the Family Law Reform Party (JSC CFLI: CSS); LFAA, Newcastle-Hunter, (JSC CFLI: CSS); Equality for Fathers (JSC CFLI: CSS); Family Law Reform and Assistance Association (JSC CFLI: CSS).

172 Men’s Confraternity Equal Opportunity Sub-committee (ALRC, Matrimonial Property). See also the Non-Custodial Parents Reform Group (JSC CFLI: CSS); the Non-Custodial Men’s Support Group (communication with research assistant).

than the child support amounts is controversial.<sup>173</sup> Perhaps more problematic however is the fact that the child support formula is based on the principle of "resource sharing"<sup>174</sup> rather than "cost sharing". These arguments therefore amount to requests for a fundamentally different basis for the formula.<sup>175</sup>

The second criticism is the suggestion made by some groups that child support is either so excessive or not actually spent on the children that it is really spousal maintenance in disguise. Thus the Child Support Action Group submits that "children are being used as a source of income" and that the payment of child support "negates the final termination of marriage as it imposes an ongoing liability of 15–20 years on a non-custodial parent".<sup>176</sup> The Lone Fathers Association comments that child support is not always spent on the children. Instead:

Some custodial parents have taken holidays overseas, purchased properties and new cars, purchased expensive personal items, leave their children with babysitters while they go out to various clubs sometimes up to four times a week, then apply to the welfare systems for help. This... is not an uncommon factor and can easily be proved...<sup>177</sup>

Some groups accordingly argue that child support should be paid to the children rather than the custodial parent.<sup>178</sup> A common suggestion is that the custodial parent should be required to account to the non-custodial parent for how they spend child support.<sup>179</sup>

A number of groups go further to suggest that there are women who deliberately get pregnant in order to set themselves up financially. The Lone Fathers Association comments that:

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173 The DSS argues (JSC CFLI: CSS) that the child support amounts produced by the formula are less than the actual direct costs of supporting children. J Bowen, *Child Support: The Essential Guide*, Jacaranda, Sydney, 1992, p 48, suggests that if non-custodial parents have not been involved in the day-to-day budgeting for the household they may not realise the true costs of raising children.

174 In other words the intention of the scheme is to "give priority to the rights of children to share in the living standards [or resources] of both parents" rather than making the parents responsible for sharing the bare costs of the children. See F Carberry, "The Child Support Scheme: An Evaluation of its Personal Impact" (1992) *Social Security Journal* 43.

175 Equality for Fathers explicitly argues (JSC CFLI: CSS) that child support payments should not be based on income levels but should be equal to half the cost of supporting the children.

176 (Vic) JSC CFLI: CSS. Equality for Fathers says that "[t]he children should not be made into 'cash cows'". And "If the payment [of child support] is over and above an equal share of the cost of raising the children, the 'cash cow' situation exists" (JSC CFLI: CSS).

177 (JSC CFLI: CSS and ALRC, Children). Men's Confraternity also suggests that in many cases the spouse spends the child support money "on themselves or their paramour" (JSC CFLI: CSS). See also the Family Law Reform and Assistance Association (JSC CFLI: CSS).

178 DADs, Qld, provides a moderate variation of this argument by suggesting that once the children are aged 18 then there should be direct payment of support to them (JSC CFLI: CSS). The Family Law Reform Party argues that all child support payments should be made directly into a bank account in the name of the children (JSC CFLI: CSS).

179 For example, the Gay and Married Men's Association (ALRC, Contempt) suggests that the custodial parent should have to submit an audited account annually through the Family Court to the non-custodial parent for their approval. See also the Family Law Reform Party (JSC CFLI: CSS); Campaign for Men's Rights (JSC CFLI: CSS); Women and Grandparents Treated Unfairly by Family Law (JSC FLA); The Family Law Reform Association NSW Inc (JSC CFLI: CSS); CSAG; DADs, Qld, (JSC CFLI: CSS).

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It is a simple (and possibly financially rewarding) matter for a female partner to inform a male partner that contraceptive measures have been taken, when they have not, and then deliberately attempt to conceive a child so that she can receive "child support" payments for the next 18 years.<sup>180</sup>

A few of these groups would like to give men the right to avoid responsibility for their biological offspring in such circumstances. Equality for Fathers comments that "[i]t is totally inequitable for society to impose a crippling responsibility on an individual, for an act which is now acknowledged as being almost a universal social recreational activity."<sup>181</sup> The Family Law Reform and Assistance Association go so far as to argue that, with the advent of the new Child Support Scheme, paternity should no longer be presumed but should be proven:

This basic tenet exists in the Australian Criminal Law where a person is presumed innocent until proven guilty, surely this basic freedom should be extended to males, after all, why should they pay for a child who is not biologically their child, if this same child has been fraudulently passed off as their offspring?<sup>182</sup>

Only a few of the groups recognise that the Child Support Scheme might be failing custodial parents too. Lone Fathers, for example, says that the scheme is making some people pay more than they should be paying and not making others pay who should be paying and is therefore failing in two areas of fundamental importance.<sup>183</sup> In fact there are indications that a significant proportion of resident parents (more than half) are not receiving any child support payments, that outstanding debts under the scheme are often not recovered, and that non-resident parents who receive business or investment income have the ability to minimise their child support liabilities under the scheme.<sup>184</sup>

## B. Equality critiques

There are two equality critiques that are commonly run in relation to child support. The first is that the child support formula produces results that discriminate against non-custodial parents. For example, Men's Confraternity point out that 90 per cent of the calls it receives on this issue are from men. Only 1 percent of those attending the self-help groups run by Men's Confraternity on behalf of themselves were women, while other women attended with their sons, brothers and husbands. Nonetheless this is hardly

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180 Supplementary submission to JSC CFLI: CSS (by the National President).

181 JSC CFLI: CSS. Interestingly some feminist authors have also, from a different perspective, critiqued the construction in purely biological terms of kinship obligations under the Child Support Scheme. See R Boden and M Childs, "Paying for Procreation: Child Support Arrangements in the UK" [1996] IV *Feminist Legal Studies* 131.

182 JSC CFLI: CSS.

183 Supplementary submission to JSC CFLI: CSS (by the National President). At another juncture (JSC CFLI: CSS) it comments that "the fact that many self employed non-custodial parents can largely avoid child support payments while employed non-custodial parents are required to pay very high rates of child support is a most unacceptable feature of the present scheme" (having just made the point that the vast majority of non-custodial parents are highly responsible and would pay child support even if the scheme wasn't there). See also: Parents Without Partners, Maitland, (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS).

184 See the discussion in L Hancock, "Reforming the Child Support Formula: Who benefits?", forthcoming in *Just Policy*.

objective evidence of discrimination given that women are generally unlikely to contact a group for assistance which has the name, constituents and policies of this organisation.

Some rather punitive methods of gaining equity are suggested which do not actually reduce the child support paid by non-custodial parents but do reduce the custodial parents' income. The rationale seems to be that if the non-custodial parent is suffering, so should the custodial parent (and their children). For example, Dads Against Discrimination argues that the sole parent pension should be reduced dollar for dollar for that received in child support.<sup>185</sup> Men's Confraternity suggest that the custodial parent's income should be taxed, at least in some circumstances:

Custodial parents who derive child support from more than one father should have their child support income taxed as obviously they are in the business of ripping off men. They use children as income producing property, in effect, a form of child slavery.<sup>186</sup>

Most equality suggestions are, however, designed to reduce the alleged disparity between custodial and non-custodial parents' contributions to the children's upkeep. This disparity in financial contribution occurs because the child support formula allows the custodial parent "disregarded" income and the non-custodial parent "exempted" income, but the amount disregarded under the formula for the custodial parent is much higher than that which is exempted for the non-custodial parent.<sup>187</sup> This difference is designed to reflect the fact that the custodial parent is making non-financial contributions to the children in terms of the basic ongoing daily labour of caring, as well as paying opportunity costs in terms of forgoing income and career development in order to undertake such caring work.<sup>188</sup> However most fathers' rights groups argue that it is inequitable that the non-custodial parent should bear a greater financial burden in respect of the children.<sup>189</sup> The Campaign for Men's Rights, for example, claims that the child support formulas are based on the non-custodial parent being liable for 100 per cent of the cost of raising the children, and that "the effect of the child support agency is to find every man

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185 Qld, (JSC CFLI: CSS).

186 JSC CFLI: CSS. See also the CSAG, NSW, (JSC CFLI: CSS); LFAA (supplementary submission by National President) (JSC CFLI: CSS).

187 Essentially the custodial parent must earn more than the average weekly earnings before their income is brought into the child support calculations at all. They are also entitled to additional amounts for childcare. The non-custodial parent, if s/he has no other dependant children is only exempted an amount equivalent to the single rate of the social security pension.

188 M Smith, "Child Support Guidelines: Emerging Theories of Child Support" in *Child Custody, Support and Sexual Abuse Allegations in Divorce Litigation*, MCLE, 1987. Smith points out that the higher disregard level is also designed to avoid impairing work force incentives for the custodial parent. Broader structural questions of gender equity are implicit in the comment of the CSAG, NSW, that "consideration of the impact of child rearing responsibilities on women's future earnings has in recent times been negated by equal employment opportunity legislation" (JSC CFLI: CSS).

189 See the CSAG (JSC CFLI: CSS); LFAA, Newcastle-Hunter Region group and the National President, (JSC CFLI: CSS); the Family Law Reform and Assistance Association (JSC CFLI: CSS); the Campaign for Men's Rights (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS).

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guilty and sentence him to poverty through the taxation system".<sup>190</sup> For many of these groups, equality would mean that both parties' exempted income levels were either exactly the same<sup>191</sup> or closer together.<sup>192</sup>

Some argue that the custodial parent's income should be taken into account in the formula no matter how little s/he earns,<sup>193</sup> while others argue that the threshold where it is factored into the equation should be reduced to less than average weekly earnings.<sup>194</sup> Some groups go much further than this and argue that the custodial parent's *potential* income should be taken into account in the formula.<sup>195</sup> Lone Fathers expands on the argument about equity between parents by submitting that the Child Support Scheme fails to take into account the heavy direct costs of separation, mostly borne by the non-custodial parent.<sup>196</sup> Accordingly it argues that there should be a moratorium of three months on child support, while Men's Confraternity argues for 12 months.<sup>197</sup> Neither group suggests how the custodial parent is to support the children in the mean time.

Lone Fathers Association is one of the only groups that addresses the issue of the non-financial contribution of the custodial parent. It says that the "argument that the custodial parent is contributing as a result of caring for the child is weak especially where the non-custodial parent would have been happy to assist in caring for the child but was prevented by the custodial arrangements from doing so".<sup>198</sup> This comment fairly applies to those cases where the non-custodial parent is willing and able to take on a major active parenting responsibility, whether sole or equal parenting. However it does not address the situation in which the non-custodial parent is happy to relinquish residence to the other parent, as appears to be the most typical scenario.

The second equality critique is that the child support formula produces results that discriminate against, alternatively, children from second families,<sup>199</sup> second families themselves,<sup>200</sup> or spouses in second marriages.<sup>201</sup>

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190 JSC CFLI: CSS.

191 The Family Law Reform and Assistance Association (JSC CFLI: CSS); CSAG, NT, (JSC CFLI: CSS); DADs (LFAA Conference 1997); LFAA (Barry Williams, LFAA Conference 1997); Men's Confraternity (JSC CFLI: CSS); Equality for Fathers (JSC CFLI: CSS).

192 DADs (Qld) (JSC CFLI: CSS); the Family Law Reform Party (LFAA Conference 1997); the Non-Custodial Parents Reform Group (JSC CFLI: CSS).

193 CSAG, NSW, (JSC CFLI: CSS). Margaret Harrison notes that it is rare that custodial parents, especially when they are sole parents, ever earn close to average weekly earnings, thereby reducing the payable child support, "The Australian Child Support Scheme: Practicalities", in J Eekelaar and P Sarcevic (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century*, Mertinus Nijhoff Publishers, Dordrecht, 1993, p 583.

194 Parents Without Partners says that the custodial parent's income should be taken into account if it is above \$20,000 (JSC CFLI: CSS).

195 LFAA, Newcastle-Hunter, criticises the formula (JSC CFLI: CSS) for giving no consideration at all to the custodial parents capacity to earn an income. Men's Confraternity would take into account the ex-spouses potential to receive benefits from relatives (JSC CFLI: CSS).

196 Who can find themselves paying the mortgage and/or rent on two houses and other expenses while settlement is being worked out. (Newcastle-Hunter) (JSC CFLI: CSS).

197 JSC CFLI: CSS.

198 Newcastle-Hunter, (JSC CFLI: CSS).

199 See DADs, Qld, (JSC CFLI: CSS); the Family Law Reform Association NSW Inc (communication with research assistant & JSC CFLI: CSS); Men's Confraternity (JSC

These arguments are based on the fact that liable parents are allowed an exempted amount to acknowledge obligations they might have to subsequent dependent children. It is argued that this exempted amount tends to be lower than the child support obligations they may end up having under the formula in respect of children from their first family.<sup>202</sup> It is worth noting, however, that the exempted amount does not represent the amount that the liable parent actually has at the end of the day to spend on second family children. It represents only the amount of his/her income which is not subject to assessment under the child support formula in respect of the children from the first family.

Men's Confraternity run an unusual discrimination argument, which doesn't fit into either of these equality critiques. It submits that child support should only be payable until the child is 17 and add: "Who would pay if the father were dead? The father is discriminated against by virtue of the fact that he is alive."<sup>203</sup>

Other general critiques of the Child Support Scheme are couched in terms of rights. For example the Child Support Action Group argues that child support obligations under the scheme infringe individual rights. Namely, the right to property, the right to work and enjoy the rewards that flow from that, the right to dignity and the parental right to choose how they provide for their children.<sup>204</sup> Some of these rights arguments are re-characterisations of equity arguments. For example, the Non-Custodial Parents Reform Group argues that

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CFLI: CSS); the Gippsland Child Support Action Group (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS); Family Law Reform and Assistance Association (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS); Non-Custodial Men's Support Group (communication with research assistant); Campaign for Men's Rights (JSC CFLI: CSS); Non-Custodial Parents Reform Group (JSC CFLI: CSS).

200 CSAG, NSW, argues discrimination against the second family unit: "Poverty has been transferred to the non-custodial parent and the second family is the family unit which experiences a poor standard of living in order to meet the unreasonably high costs of child support to the first family." (JSC CFLI: CSS).

201 LFAA, Newcastle-Hunter, says that they receive complaints from women that their marriages have broken down because of the greed of the first wives and other complaints that new spouses need to work so that payments can be made to the non-custodial parent's former spouse (JSC CFLI: CSS). See also Equality for Fathers (JSC CFLI: CSS); Parent Without Rights (JSC CFLI: CSS); The Family Law Reform Party (JSC CFLI: CSS); the Gippsland CSAG (JSC CFLI: CSS). Some feminist writers have also critiqued the adverse effect the scheme might have on women whose partners are deemed to have more important financial commitments to previous children. See R Boden and M Childs, above, n 181.

202 If the liable parent has a new dependent child then the exempted amount goes from the single pension rate to twice the married persons rate *and* the child additions applicable to social security pensions. Presumably it is this latter amount that these groups are commenting on. For comments on the equity of the manner in which new families reduce the amount of child support paid to existing families see S Parker, "Child Support in Australia: Children's Rights or Public Interest?" (1991) 5 *International Journal of Law and the Family* 24 pp 46-7.

203 JSC CFLI: CSS.

204 CSAG (Vic) (JSC CFLI: CSS); Men's Confraternity argues (JSC CFLI: CSS) that it is a father's right and responsibility to provide for his children and dispose of his income as he deems best.

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it is a right not a privilege to remarry if desired, as it is to have children in a subsequent relationship.<sup>205</sup>

Clearly there are legitimate concerns underlying the claims made by many of the groups in relation to child support. Children are expensive to rear and for many Australian families there just is not enough money to adequately support one, let alone two, households. Where we would depart from the claims made by many of these groups is in their characterisation of this problem as being one of inequality between the parents or in their assumption that, because they are now being asked to bear a portion of the poverty formerly carried by the custodial parent and the children,<sup>206</sup> the custodial parent is either well off or is in some other way the problem. For example, their critiques or their suggested solutions, discussed below, do not address the extent to which the child support legislation is not directed towards supporting the custodial parent in their parenting role so much as reducing public expenditure on single parent families.<sup>207</sup>

### C. Further specific reform proposals

A number of specific suggestions that have wide support amongst the groups concern the alteration of the formula.<sup>208</sup> In addition to dealing with procedural issues, these suggestions also have the effect of lowering the amount of child support payable, thus "equalising" the financial burden between both parents. One such suggestion is that the formula should be based on after tax not pre-tax income.<sup>209</sup> Another is that child support should be calculated on a base

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205 Equality for Fathers speaks (JSC CFLI: CSS) of the human rights of fathers and non-custodial parents to continue a normal life.

206 Research suggests that after divorce about three quarters of men are better off financially, whereas the opposite is true for women. It also suggests that child support payments have been significant in reducing the poverty of resident mothers. See K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents after Divorce*, Australian Institute of Family Studies, Melbourne, 1993; L Hancock, "Reforming the Child Support Formula: Who Pays?", forthcoming in *Just Policy*, 1997.

207 It is general knowledge that the scheme was introduced in part in response to a crisis about public spending: S Parker, "Child Support in Australia: Children's Rights or Public Interest?" (1991) 5 *International Journal of Law and the Family* 24. Features of the scheme which demonstrate that one of its essential thrusts is public revenue saving include the following: if the recipient of child support is on social security then their pension is reduced by 50 cents for every dollar of child support received above a threshold of \$16.35 per week for the first child and \$5.45 per week for each additional child; private arrangements are available but in very limited circumstances if the recipient of child support is on a pension; lump sum payments or payments in kind cannot rise above 25 per cent of the assessment payable if the recipient is on social security without the liable parent running the risk of having to pay again in cash to the amount exceeding 25 per cent; the scheme only assists children who have non-custodial parents who can and do actually pay.

208 As well as many specific suggestions that don't have general currency, which we will not go into exhaustively here. For example, the CSAG, NT, argues (JSC CFLI: CSS) that custodial parents who are not on the dole should be required to pay the Child Support Agency a fee for their services to cover costs and encourage private agreement. Men's Confraternity argues (JSC CFLI: CSS) that the Child Support Agency must guarantee that the children are still alive. In their submission the father should at all times have their current address and if he can prove the address is not current payments should stop immediately.

209 CSAG, NSW, (JSC CFLI: CSS); DADs (Qld & NSW) (JSC CFLI: CSS); Parent Without Rights (JSC CFLI: CSS); LFAA (ALRC, Equality & *Lone Fathers' Noos*); The Family Law Reform Association NSW Inc (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS);



income that does not include overtime or income from a second job.<sup>210</sup> A number of groups argue that the Child Support Agency should cease deducting from wages for privacy reasons<sup>211</sup> and that liability should automatically cease on unemployment.<sup>212</sup> A number of groups attack the provisions for reviewing the application of the child support formula in particular cases. For example, Men's Confraternity argues that hardship should be taken into account in applying the formula. It suggests that:

While financial relief is given to the mother because she has the children, no such financial relief is given to the father who still has to pay. This effectively kills the goose that lays the golden egg. He is given no quarter, he is made to pay until he drops dead.<sup>213</sup>

Under the present child support formula the non-custodial parent is credited with their caring work under the formula once the amount of contact equals 30 per cent of the nights of the child support year.<sup>214</sup> A number of groups have suggested that the formula should be more closely linked to the amount of contact time spent with the non-custodial parent.<sup>215</sup> For example, Dads Against Discrimination argues that no payments should be made for any time children are on a contact visit.<sup>216</sup> Alternatively it submits that the substantial contact and shared residence provision should be changed to 20 per cent. This equals two nights a fortnight and half of school holidays which the groups argue is the "standard"<sup>217</sup> contact order made by the courts.

Another common submission is that non-custodial parents should be eligible for a pro rata portion of the sole parent taxation rebate in proportion

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Men's Confraternity (JSC CFLI: CSS); Non-Custodial Men's Support Group (communication with research assistant). But note Bowen, above, n 173, p 48, who argues that child support is not calculated on before-tax income because the costs of raising children are not a tax deduction for parents who are still married.

210 DADs, Qld, (JSC CFLI: CSS); Parent Without Rights (JSC CFLI: CSS); the Family Law Reform Party (JSC CFLI: CSS); LFAA, Newcastle-Hunter, (JSC CFLI: CSS and ALRC, Equality); The Family Law Reform Association NSW Inc (JSC CFLI: CSS); Men's Confraternity (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS); Family Law Reform and Assistance Association (JSC CFLI: CSS).

211 DADs, NSW, (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS).

212 CSAG, NSW, (JSC CFLI: CSS); DADs, NSW, (JSC CFLI: CSS); Men's Confraternity (JSC CFLI: CSS). In general a parent who is reliant on social security will not have to pay child support: J Bowen, *Child Support: A Practitioner's Guide*, LBC, Sydney, 1994, p 27.

213 Men's Confraternity (JSC CFLI: CSS); CSAG, NSW, argues (JSC CFLI: CSS) that the grounds for review are narrow and inflexible; LFAA, Newcastle-Hunter, suggests (JSC CFLI: CSS) that hardship cases are not being considered. For a different set of perceptions note the submission of the Single Mothers' Support Group (JSC CFLI: CSS) which comments on the ease with which non-custodial parents seem to be granted departure orders for lower amounts of child support.

214 See ss 8, 47-54 Child Support (Assessment) Act.

215 See for example, the Non-Custodial Parents Reform Group (JSC CFLI: CSS); the Family Law Reform Association NSW Inc (JSC CFLI: CSS); CSAG, NSW, (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS).

216 Men's Confraternity also argues that reductions in maintenance should start with 1 per cent access, and that child support access reduction should be based on hours not nights (JSC CFLI: CSS).

217 See above, n 63.

to their financial contribution to the children.<sup>218</sup> For example, Dads Against Discrimination queries why the non-custodial parent is taxed at the single rate when they are responsible for most, if not all, of the financial support of the children. Dads Against Discrimination also argues that child support should be tax deductible.<sup>219</sup>

Some groups argue that if the custodial parent re-partners then their new spouse's income should be taken into account under the child support formula, either invariably,<sup>220</sup> or once their combined income reaches a certain level.<sup>221</sup> The Family Law Reform and Assistance Association says that, "the new partner has the benefit of the children, and all the joy they bring, so why should they not share the cost?"<sup>222</sup> The Family Law Reform Party goes the furthest. It argues that if the custodial parent remarries or enters a de facto relationship then their new partner should be responsible for the financial support of the children leaving the non-custodial parent "free to remarry or enter a de facto relationship of their own, free of the financial responsibility of the previous relationship or marriage".<sup>223</sup> Somewhat inconsistently it also argues that the new partner of the non-custodial parent should not have their income pooled with the non-custodial parent for the purpose of child support payments as "we regard this as an infringement of civil liberties".<sup>224</sup>

In accordance with many of the groups' wishes to move towards alternative dispute resolution mechanisms generally,<sup>225</sup> most fathers' rights groups are committed to a system of private ordering in respect of the payment of child support.<sup>226</sup> Some of these groups see a role for the Child Support Agency and/or an administratively assessed formula in cases where the parents cannot agree.<sup>227</sup> The Non-Custodial Parents Reform Group is alone<sup>228</sup> in arguing that the current scheme requires too much private and not enough public

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218 CSAG, NT, (JSC CFLI: CSS); FLIGHT (JSC CFLI: CSS); The Family Law Reform Association NSW Inc (JSC CFLI: CSS); Campaign for Men's Rights (JSC CFLI: CSS).

219 DADs, Qld, (JSC CFLI: CSS); see also Parent Without Rights (JSC CFLI: CSS); the Family Law Reform Party (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS); Non-Custodial Parents Reform Group (JSC CFLI: CSS); Campaign for Men's Rights (JSC CFLI: CSS); LFAA, Newcastle-Hunter, (JSC CFLI: CSS).

220 Parents Without Partners (JSC CFLI: CSS); Men's Confraternity (JSC CFLI: CSS).

221 DADs, NSW, for example, argues that there should be an automatic financial review whenever the custodial parent remarries or lives de facto with someone and their combined wages are two and a half times greater than their average weekly earnings (JSC CFLI: CSS).

222 JSC CFLI: CSS. This is further evidence of the "user pays" mentality of some of the groups in relation to the connection between child support and access/contact. See above, text to n 129.

223 Ibid.

224 Ibid.

225 See text to n 305.

226 See, for example, CSAG, Vic, (JSC CFLI: CSS); Men's Confraternity (JSC CFLI: CSS); Non-Custodial Parents Reform Group (JSC CFLI: CSS); the Family Law Reform Party (JSC CFLI: CSS); and some groups of DADs, for example Qld (JSC CFLI: CSS).

227 See The Family Law Reform Association NSW Inc (JSC CFLI: CSS); Parents Without Partners, Maitland, (JSC CFLI: CSS).

228 Equality for Fathers comments that the government in making provision for child support has tried to shift unreasonable responsibility for sole parents onto fathers because it found it to be an "economical impossibility". It goes on to say that "[i]t is not society's responsibility to ensure that parents can reproduce without any responsibility for the care and happiness of their children... if it is solely a women's decision about whether or not they wish to

responsibility, and that the government should pay a guaranteed minimum amount for children of low income and no income non-custodial parents.<sup>229</sup>

Recently, Cabinet announced a series of proposed reforms in respect of the Child Support Scheme.<sup>230</sup> These include increasing the amount of exempted income for non-custodial parents<sup>231</sup> and decreasing the level of disregarded income for custodial parents,<sup>232</sup> exempting non-custodial parents overtime and work-related allowances from assessment under the child support formula, permitting non-custodial parents with second families to deduct 50 per cent of their child support payments from the household income when determining family payments and child care assistance, and encouraging parents using the Child Support Agency to move to private arrangements once regular payments have been established. Most of these proposed changes are clearly an attempt to accommodate the fathers' rights agenda.<sup>233</sup> Not all are. For example, also proposed is a requirement that all non-custodial parents, including those who are unemployed, contribute a minimum of at least 5 dollars a week in child support.

## 5. Domestic violence and child abuse

### A. False allegations of violence

A common complaint by fathers' rights groups is that women falsely allege domestic violence and/or child abuse on the part of their male partners in order to gain a tactical advantage in family proceedings. Parent Without Rights states that "[d]aily, false claims of child sexual abuse are being made (mainly by mothers) against fathers, particularly in regard to custody or access applications before the Family Court".<sup>234</sup> Parents Without Partners claims that 98 per cent of appeals against intervention orders are successful, presumably suggesting that this percentage of orders are based on false claims, and are simply obtained by women to get priority in proceedings.<sup>235</sup> The Lone Fathers Association states that:

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continue a pregnancy then she, or she and her partner, have the responsibility to ensure the ability to pay for the upbringing of the child". (JSC CFLI: CSS).

229 The Australian Council of Social Service and the Women's Electoral Lobby withdrew their support for the Child Support Scheme in 1987 when it became clear there would be no such guaranteed minimum amount or "advance maintenance guarantee". See R Graycar, "Family Law and Social Security in Australia: The Child Support Connection" (1989) 3 *AJFL*, 70 p 83.

230 *Sydney Morning Herald*, 24 Sept 1997, p 1; *Sydney Morning Herald*, 2 October 1997, p 15. These reforms were prepared by the Assistant Treasurer and the Minister for Social Security. They have not yet been reduced to a bill and will not be implemented before 1999. Note that in June 1997 Roger Price MP introduced a private members bill, which, to date, has had a first reading only.

231 By \$901.

232 From \$37,424 to \$29,598.

233 Although they would say the changes have not gone far enough. See B Arndt, "Wimping on Child Support", *Sydney Morning Herald*, 2 October 1997; "Father Slams Child Support Changes", *The Age*, 2 October 1997.

234 ALRC, Children. See also LFAA (ALRC, Equality and LFAA Conference, 1997); the Family Life Movement (JSC FLA); Men's Confraternity *Review of Restraining Orders*; the Family Law Reform Party (LFAA Conference, 1997); The Men's Rights Agency (communication with research assistant).

235 ACT (JSC FLA).

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A growing body of evidence supports the contention that women are increasingly using false allegations *in the shadow of the law* to achieve better bargaining positions in child custody and property settlements, or merely to discharge vindictive feelings against former intimates.<sup>236</sup>

Men's Confraternity also suggests that women are making false allegations not just for tactical gain, but for pleasure in the suffering they thereby cause men:

The woman then plays "carrot and stick games" with access and tries to turn the children off their father. A nasty "catch-22" means of gaoling the father is used by women who obtain a restraining order the day before access is due, tip off the police the moment the father appears and suggest a scene of massive violence thus drawing the police force into the game as useful and effective pawns to provide them with a quite sadistic form of entertainment. . .<sup>237</sup>

Furthermore, Lone Fathers suggests that some mothers may be suffering from:

A contemporary manifestation of Munchausen by proxy. . . in which a parent or other adult caretaker fabricates or induces the idea that a child has been abused and then gains recognition from professionals as the protector of the abused child.<sup>238</sup>

It goes on to say that "it is not the intention of this Issues Paper to underplay the importance of protecting the sexually or otherwise abused child whether in a custody dispute or in any other judicial forum".<sup>239</sup> Despite this qualification, the shift in focus onto the woman's pathology does induce the disappearance of the reality of sexual abuse. As Lynne Harne and Jill Radford have noted when discussing other psychological syndromes sometimes utilised by fathers' rights groups, such as Parental Alienation Syndrome,<sup>240</sup> the shifting of child welfare discourses into the province of experts in psychotherapy makes them "unchallengeable except by other experts of the psyche".<sup>241</sup>

Many fathers' rights groups suggest that there aren't adequate checks in the system to weed out false from genuine complaints of violence or abuse. Parent Without Rights, for example, states that mothers only need to allege impropriety, without providing any proof, and they are believed. In its opinion intervention orders are handed out by magistrates like "lollies at a children's party".<sup>242</sup> The Lone Fathers Association says that "men are branded as guilty of domestic violence and incest on allegations alone and must live with the

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236 ALRC, Children. See further B Williams, *Custody, Access and Accusations of Incest*, LFAA, Canberra, 1992 (written by the National President of LFAA).

237 Equal Opportunity Sub-committee (ALRC Matrimonial Property).

238 ALRC, Children.

239 Ibid.

240 See for example, the papers by Dr F Williams, "Child Custody and Parental Co-operation", presented at *AMA Family Law Section Conference*, 1988 and "Preventing Parentectomy Following Divorce" Keynote Address, *National Council for Children's Rights*, 5th Annual Conference, Washington DC, 20 October 1990, which have been attached to submissions by LFAA.

241 "Reinstating Patriarchy: The Politics of the Family and the New Legislation" in Mullender and Morley (eds), above, n 66, pp 73-4.

242 ARLC, Intractable Access.

stigma for the rest of their lives even when proven innocent".<sup>243</sup>

In fact research does not support the allegation that either sexual abuse or domestic violence is commonly falsely claimed. Australian research on child sexual abuse allegations made during Family Court proceedings suggested that in the majority of cases where allegations were made they were not being used as the tool of a vindictive parent.<sup>244</sup> Similarly research by the NSW Bureau of Crime Statistics into the use of apprehended domestic violence orders found that the majority of complainants had experienced physical violence on more than one occasion.<sup>245</sup>

Some fathers' rights groups acknowledge that genuine cases of violence and abuse may exist, but for them preventing false complaints is more important than the protection of the victim in genuine cases. For example, some have suggested that apprehended violence orders should only be granted if the offence of assault has been established in a criminal court.<sup>246</sup> The Gippsland Child Support Action Group has submitted that ex-parte protection orders should be abolished.<sup>247</sup> Men's Confraternity suggests that restraining orders should be backed up by "physical, photographic and medical evidence immediately after the alleged event and further corroborated by witnesses to the event".<sup>248</sup> It suggests that if a domestic violence complaint is made and no internal or external evidence of physical violence can be found on medical examination, then the complainant should be charged with making a false complaint.

## B. Violence as "marital discord"

Other groups suggest solutions that imply that domestic violence either does not really exist or is the responsibility of both parties. For example Parent Without Rights states that:

Magistrates should ignore the hype and hysteria created by very vocal women's groups and sensationalised by the mass media. Intervention orders create more hostility between the parties and do nothing towards the health and well being of the children.<sup>249</sup>

The Family Law Reform Party asserts that "state laws on domestic violence should be amended to require where domestic violence is alleged to have occurred that both parties attend counselling immediately".<sup>250</sup> The implication in offering mediation or counselling as a solution to violence is that violence

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243 ALRC, Equality.

244 M Hume, "Study of Child Sexual Abuse Allegations within the Family Court of Australia", Conference Paper in *Enhancing Access to Justice: Family Court of Australia*, Second National Conference, 20-23 September 1995, Sydney, NSW: Family Court of Australia, 1996, pp 205-12.

245 L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, NSW Bureau of Crime Statistics and Research, Sydney, 1997.

246 LFAA, Sydney, (JSC FLA).

247 JSC CFLI: CSS.

248 *Review of Restraining Orders*.

249 ALRC, Children.

250 JSC CFLI: CSS. Men's Confraternity also suggest that a night court should be established and that both parties should be taken there for compulsory counselling and determination of fault if a domestic violence complaint is made (*Review of Restraining Orders*).

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is a negotiable interpersonal issue.<sup>251</sup> This group also suggests that mediation and access centres be established. Amongst other services, these centres could maintain child contact for:

Fathers accused of child sexual molestation. . . These centres could prove or disprove any accusations made against the father of any child sex abuse by inhouse camera support of access visits.<sup>252</sup>

This suggestion obviously could not assist in proving or disproving accusations about the father's *past* behaviour. While it might go some way towards placating a mother against whom a contact order has been made contrary to her wishes, there seems to be little consideration of the trauma that a child would be put through if the accusations were true.<sup>253</sup> As Elizabeth Jones and Patrick Parkinson have noted, contact in such circumstances might "be made safe by supervision, but it cannot readily be regarded as healthy".<sup>254</sup>

### C. Degendering violence

Some groups go further and argue that there is an inherent bias in focussing on the protection of women and children from male violence because women are in fact as violent or abusive as men and this is unreflected in official practice. For example, Men's Confraternity argues that "[b]oth men and women are equally capable of being aggressors and have an equal chance of being victims".<sup>255</sup> The studies that the groups rely on, if any, in making these assertions are those which are based on a system of measuring domestic violence, called the "conflict tactics scales" (CTS) which measures discrete acts of violence and ignores the motivations for these acts.<sup>256</sup> For example, from CTS measurements, it is unknown whether an act was done in an attempt to coerce compliance, to induce fear, or in self defence. Additionally, the CTS does not connect injury with the violence that caused it. The results are, therefore, extremely problematic, and many criticisms made of the CTS have now been accepted by its creator.<sup>257</sup>

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251 See H Astor, "Violence and Family Mediation: Policy", (1994) 8 *AJFL* 3; F Kaganas and C Piper, "Domestic Violence and Divorce Mediation", *JSWFL* 265.

252 The Family Law Reform Party home page: <http://www.gil.com.au/famlaw/>.

253 It is also uncertain whether the fathers would be aware of the presence of cameras. If so, it is questionable how much the proposal achieves, given what we know about the ability of abusers to abuse in situations which maintain the secrecy of the abuse: A Hartan, B Johnson, L Roundy and D Williams (eds), *The Incest Perpetrator*, Sage, California, 1990; C A Dietz and J L Craft, "Family Dynamics of Incest — a New Perspective", [1980] *Social Casework* 602.

254 "Child Sexual Abuse, Access and the Wishes of Children" (1995) 9 *International Journal of Law and the Family* 54, p 63.

255 *Review of Restraining Orders*. Elsewhere this group suggests that women are the "main protagonists in family violence". CSAG also claims that women are the perpetrators of domestic violence as much as men. The Men's Rights Agency says that there is no acknowledgment of the fact that women are perpetrators of domestic violence and no provisions protecting men and children from their violence.

256 For example, M A Straus, R J Gelles and S K Steinmetz, *Behind Closed Doors: Violence in the American Family*, Sage, California, 1980; M A Straus and R J Gelles, "Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys" (1986) 48 *Journal of Marriage and the Family* 465. Such studies are referred to expressly by LFAA in their submission to ALRC, Children.

257 See further: R E Dobash and R P Dobash, *Women, Violence and Social Change*, Routledge,

Even more questionable methods of demonstrating that women are as violent or abusive as men are used by some groups. Men's Confraternity submits that women abuse men verbally and psychologically by denying them their sexual needs.<sup>258</sup> This submission appears to give credence to the recently abolished legal fiction that a wife has given advance and irrevocable consent to sexual intercourse with her husband.<sup>259</sup> Lone Fathers argue that provocation to domestic violence is in itself domestic violence.<sup>260</sup> Other groups argue that denial of access, characterised as primarily a female form of behaviour, is child abuse because it deprives the child of access to their male parent and causes them trauma and suffering.<sup>261</sup> Lone Fathers argues that divorce is child abuse, and goes so far as to suggest that Family Court judges are perpetrators of child abuse when they do not enforce access orders.<sup>262</sup>

#### D. Violence as evidence of victimisation

An uneasy fit with this minimisation or disappearance of male violence is the fact that almost all fathers' rights groups at some point strategically acknowledge the existence of the phenomenon of male violence. But they rarely take responsibility for it, or acknowledge the impact it has on its targets. In fact the violence is generally blamed on factors outside the men who perpetrate it, such as the custodial parent, the Family Court<sup>263</sup> and the Family Law Act.<sup>264</sup> It is linked to the use of restraining orders,<sup>265</sup> the fact that sole custody is invariably vested in women,<sup>266</sup> the adversarial system,<sup>267</sup> the cost

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London, 1992, particularly pp 271–84; R E Dobash and R P Dobash, "The Politics of Research" in K Yllo and M Bograd (eds), *Feminist Perspectives on Wife Abuse*, Sage, California, 1988.

258 Men's Confraternity provide a list of psychological, physical, economic, social and institutional violence perpetrated against men. This list includes "withholding", "shunning", "tampering with car brakes", "credit excess", "misuse of family budget funds", "mind poisoning of friends, neighbours, children and relatives to induce them to shun, avoid and deny men an open social relationship", and "religion" (the example provided is "admission of women priests against the Bible's teachings"), (*Break the Silence*).

259 See K O'Donovan, *Family Law Matters*, Pluto Press, London, 1993, ch 1; M Freeman, "But if You Can't Rape Your Wife, Who(m) Can You Rape?" (1981) 15 *Family Law Quarterly* 1; C Boyle, "Married Women — Beyond the Pale of the Law of Rape" (1981) 1 *Windsor Yearbook of Access to Justice* 201.

260 ALRC, Equality; S Hatty, "On the Reproduction of Misogyny: The Therapeutic Management of Violence" in S Hatty (ed) *Proceedings of National Conference on Domestic Violence*, Vol 1, pp 321–33, describes misogynist ideologies in which women are blamed for their victimisation and men are absolved of responsibility for their violence.

261 LFAA (ALRC, Children).

262 LFAA (Barry Williams, LFAA Conference, 1997).

263 The Australian Family Law Action Group talks about the large number of murder-suicides for which the Family Court is directly responsible (JSC FLA). The Family Law Action Group suggests that judges are "accessories to murder, suicide and countless cases of mental breakdown" (JSC CFLI: CSS).

264 Women Who Want to be Women comment that the injustice of the Family Law Act has driven otherwise law-abiding citizens to actions of desperation — suicide, kidnapping etc (JSC FLA).

265 The Family Law Reform Party argues (JSC CFLI: CSS) that making ex parte restraining orders available "totally ignores the emotional trauma that is created by an order that fails to hear both sides of an argument and creates an emotional crises that many times leads to murder and suicide".

266 Parent Without Rights (JSC FLA).

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of child support<sup>268</sup> and the denial of access to men.<sup>269</sup> In an ironic twist, male violence is used by these groups to demonstrate how victimised men are by the family law system. Violence is something caused in men like stress or illness, and is therefore evidence of their suffering. For example, Parent Without Rights states that “if our pleas had been heeded there would be more children and their fathers alive today. Custodial parents using children as a weapon has led to tragedies, violence, bitterness and murder-suicide”.<sup>270</sup> Men’s Confraternity comments that men need to be given a legal alternative to violence which is caused by frustration because wives don’t maintain their marriage vows and promises (to provide satisfaction of his “physiological need for constant sperm release”) whereas men are legally obliged to live up to theirs (to satisfy her need to be “financially dependent”).<sup>271</sup> Lone Fathers says that domestic violence and child abduction “will continue to be the remedies and escape routes for distraught people who have been betrayed by their partner’s false and neglected promises in marriage and by the gender biases prevalent in our society and in the Family Court”.<sup>272</sup> According to this organisation, being asked to pay maintenance without getting access and being charged with contempt of court for disobedience of court orders<sup>273</sup> are some of the causes of such violence. It adds that:

The people who resort to violence are reacting to the reality of their children being kidnapped (however officially so) their possessions being unfairly divided and their voices being unheard by the functionaries of the Family Court system. This is not a time to tell these people that “you do not own your children, they are not material possessions”. These people own the relationship with their children and they act on the consideration of life with or without their relationship with their children. . . .<sup>274</sup>

McMurray and Blackmore, interviewing non-custodial fathers, comment that the “most alarming issue related to the men’s coping strategies concerned their attitude towards violence against women. . . [34 per cent]. . . spoke sympathetically of custody-related murder-suicides.”<sup>275</sup>

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267 The Family Life Movement blames the violence on the inappropriate adversarial system and suggests that mediation results in less stress, illness and “provoked” violence (JSC FLA).

268 The Family Law Reform and Assistance Association comments that “if Australia is appearing to lead the way in child support reforms then it is doing so through anguish, heartaches, marital breakdowns and murder/suicide” (JSC CFLI: CSS).

269 Parents Without Partners (communication with research assistant); The Family Life Movement (JSC FLA).

270 ALRC, Intractable Access.

271 “[W]omen have had their marriage needs [children] fulfilled but men’s ongoing need for sexual release will require servicing continuously by her in a monogamous marriage relationship.” So she institutes a “post-pregnancy programme of verbal and psychological abuse, particularly to avoid having sexual intercourse with her husband. This non-servicing of his needs is not enforceable under the marriage vows and he can in fact be punished under rape in marriage legislation.” (*Break the Silence*).

272 LFAA, (ALRC, Equality): “The Family Law Court has demonstrated its lack of respect and contempt towards the community and its rulings, has encouraged the violence never before known in Australian history.”

273 LFAA, Qld, (ALRC, Contempt).

274 LFAA, Rockhampton, (JSC FLA).

275 “Influences on Parent-Child Relationships in Non-Custodial Fathers” (1993) 14 *Australian Journal of Marriage and Family* 151 at p 154. Some groups and/or individuals use the violence in an attempt to bully the Family Court or reform bodies. See for example, T



One of the few strong expressions condemning the use of violence in the context of family break up is to be found from the Family Law Injustice Group Helping Together. In its newsletter it strongly advises men against responding to frustration with violence:

ABOVE ALL, SHOW NO VIOLENT EXPRESSIONS, NO AGRO. . . I don't mean to be harsh but I can't water it down. . . no matter how bad you feel, hurting the children or killing yourself won't change anything, neither will battering your ex.<sup>276</sup>

## 6. Property division and spousal maintenance

Some fathers' rights groups have submitted that women are getting the better matrimonial property deal on divorce, although their claims are not generally supported by the research in this area.<sup>277</sup> For example, Men's Confraternity believes that women get more of the matrimonial property, thus creating a window of opportunity for "an army of divorcee women" who marry poor and divorce rich. It comments that "[o]ften the multiple-marriage divorcee specialist conceals her actual worth when making a "kill" in order to accumulate a growing nest egg".<sup>278</sup>

When the groups have made suggestions for reform in relation to property division on marriage breakdown many of their concerns are about the nexus between property settlements, spousal maintenance and child support. For example, the Lone Fathers Association states that the courts "tend to agree with female partners' requests to double and even triple dip, allegedly on behalf of the children by getting child support and larger property settlements to make allowance for the children and spousal maintenance because they need to look after the children".<sup>279</sup> According to Lone Fathers this means that the non-custodial parent is left in poverty, with 98 per cent of their total wage going in property settlements and child support, while the custodial parent can "live a life of small luxury". The Lone Fathers Association considers that the courts should adhere to the clean break principle after divorce, a sentiment endorsed by Men's Confraternity, who propose the abolition of spousal maintenance because:

When men and women divorce each other they have ended their commitment to each other. As such they should each be personally responsible for their own destinies. There is no valid basis for making one person responsible for the other person's future, in particular where there is an inability or lack of desire to get off

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Taylor, "Australian Terrorism: Traditions of Violence and the Family Court Bombings" (1992) 8 *Australian Journal of Law and Society* 1 at p 29, who discusses the response of some fathers' rights groups to the family court bombings:

It is not surprising that a man in the audience told a meeting of FLAG (Family Law Action Group), "You will get more response from the politicians about changing the (Family Law) Act if a few more get killed."

<sup>276</sup> FLIGHT Newsletter.

<sup>277</sup> See P MacDonald (ed), *Settling Up: Property and Income Distribution on Divorce*, Prentice Hall, Sydney, 1986; K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents After Divorce*, AIFS, Melbourne; 1993.

<sup>278</sup> ALRC, *Matrimonial Property*. The Family Law Reform Party (JSC CFLI: CSS).

<sup>279</sup> LFAA, Newcastle-Hunter, (JSC CFLI: CSS).

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their beam's end and create their own path of success or failure as it is involved considering that equal opportunity legislation has been enacted to assist all to obtain employment.<sup>280</sup>

Nonetheless fathers' rights groups in Australia are not generally as vocal about the need for reform of the matrimonial property regime under the Family Law Act as they are about the need for reform in relation to custody and child support.<sup>281</sup> This is interesting in the light of Martha Fineman's comments on the targets for reform of fathers' rights groups in the USA. She says that "child support and custody were important targets, probably because they were the only areas in which it could even be argued that women had any significant, demonstrable advantage".<sup>282</sup>

### 7. Reintroduction of fault into divorce proceedings

A number of groups<sup>283</sup> support the reintroduction of the concept of fault into divorce proceedings. The Family Law Reform Association NSW Inc seems to go further and favour the introduction of considerations of fault into the counselling process and/or child custody decisions when it submits that "counsellors shouldn't support the parent who has taken the child from the marriage".<sup>284</sup> Lone Fathers also argues that the deserting parent should be given less consideration "before the Family Court", and that sole parenting should be awarded to the parent who is "most responsible" during the separation, but does not indicate how responsibility is to be measured or whether it is considered as it is manifested towards the children or towards the other spouse.<sup>285</sup>

Implicit in some of these submissions appears to be the feeling that women

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280 It is worth noting that, in fact, spousal maintenance is rarely granted, see above, n 121.

281 LFAA (ALRC, Matrimonial Property) suggests a 50/50 split of property acquired in marriage and considers that no reference should be made to non-financial contributory factors such as home-making and child-rearing. They believe that property brought into the marriage, or its value, should belong to the individual party who brought it in. They also suggest that at any time during the marriage the parties should have the option of "contracting out" of the property regime. Their proposals can be contrasted with those made by Parents Without Partners (ALRC, Matrimonial Property) which are that adequate provision for the present and future needs of the children of the marriage should have priority over the claims of either parent in respect of property division. They emphasise the need to "alleviate the poverty trap and take into account the disadvantaged earning capacity of almost all custodial parents". Accordingly they suggest a flexible 60/40 guideline in favour of the custodial parent and suggest that it would benefit both parents and the children if the non-custodial partner were to forgo any or part of a claim to the marital home in lieu of paying maintenance. It must be recognised that these proposals were made before the introduction of the new child support regime, and can be contrasted with the position taken in their submission on that scheme. This was that "custodial parents live well while non-custodial parents live in poverty". It is not clear whether this dramatic difference in opinion reflects the fact that these submissions were prepared by different authors and/or branches, or whether the effect of the scheme has resulted in a shift in their official position.

282 M Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, University of Chicago Press, Chicago, 1991, p 89.

283 LFAA (ALRC, Equality); the Family Law Reform Party (LFAA Conference, 1997); the Family Law Reform Group (JSC FLA); Men's Confraternity (JSC CFLI: CSS); Women Who Want to be Women (JSC FLA).

284 Communication with research assistant.

285 LFAA (ALRC, Matrimonial Property).

are at fault for leaving their marriages<sup>286</sup> and that, when fault is not factored into property and custody proceedings, this behaviour is either encouraged, or men fail to get appropriate recognition of their innocence. For example, the Non-Custodial Parents Reform Group argues that many non-custodial parents are forced out of marriage by the custodial parent and that the current family law system makes a farce of marriage because the non-custodial parent then loses the marriage, the bulk of their property and life savings, and access to the children without any compensation.<sup>287</sup>

As a corollary some groups argue that, while fault has supposedly been removed from divorce proceedings, in fact it is automatically attributed to men, either through the consideration of domestic violence<sup>288</sup> or because of the general bias against men in the system.

A number of groups also argue that the availability of divorce should be restricted.<sup>289</sup> For example, Neville Abolish Child Support and the Family Court, as spokesperson for Parent Without Rights, comments that divorce is too easy and that the "divorce industry" is enormous. He argues that judges, lawyers and politicians find divorce extremely lucrative and have a vested interest in the status quo.<sup>290</sup>

## 8. Secrecy and s 121

Section 121 of the Family Law Act does not totally prohibit the publication of details of proceedings. However it does make publication which identifies a party concerned with the proceedings an offence. Generally fathers' rights groups making submissions on s 121 feel that it "silences critics and hides the work of a draconian system".<sup>291</sup> Parent Without Rights argues that

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286 Research supports the proposition that women are more likely to initiate the termination of marriage than men are. Research in Australia and overseas indicates that women initiate divorce in approximately 60 per cent of cases. However a notion of fault based on this fact will be decontextualised and simplistic. For a discussion of the emotional difficulties that men have following separation, particularly when it is one they have not initiated, see P Jordan, *The Effects of Marital Separation on Men — 10 Years On*, Research Report No 14, Family Court of Australia, Sydney, 1996, p 13.

287 LFAA, Newcastle-Hunter, also argues (JSC CFLI: CSS) that non-custodial parents are discriminated against as a result of the high incidence of termination of marriages by the female partner without their consent or agreement (65 per cent). A fact which they say is encouraged by the lack of a consideration of fault in divorce proceedings.

288 See, for example, Men's Rights Agency (communication with research assistant). The LFAA submits (Barry Williams, LFAA Conference, 1997) that the fact that apprehended violence orders are taken into account in property cases is inconsistent with the no fault principle. In fact many commentators would argue that this is not being done and that more consideration should be taken of violence in property proceedings: J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *AJFL* 9; J Behrens, "Violence in the Home and Family Law: An Update" (1995) 9 *AJFL* 70. See also R Graycar, "The Relevance of Violence in Family Law Decision Making" (1995) 9 *AJFL* 58 at p 59-60.

289 The Family Law Reform Association argue (JSC FLA) that no legal action around family break up should be permitted without participation in 12 months of counselling. Men's Confraternity (communication with research assistant) favours the complete abolition of divorce for couples who have been married for less than five years.

290 Communication with research assistant.

291 The Family Law Reform Party (JSC CFLI: CSS) argues that "s 121... allows a large amount of secrecy and allows star chamber tactics that would do the Spanish Inquisition proud".

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proceedings should be published “so that we can expose bias and see if justice is being done”.<sup>292</sup> The Australian Family Law Action Group also argues for the unrestricted publication of Family Court proceedings:

No names or descriptions of people involved (description means appearance, dress, age or occupation) may be used by the media in these matters. Obviously the public will not follow any case governed by these restrictions, nor will the media publish or publicise with these regulations. . . To expand on this situation we, as John Citizen, just aren't interested in reading or hearing stories without these embellishments, so that thousands of horrendous stories coming from the Family Court do not become known to the general public. . . A story without names and without description is without interest and colour.<sup>293</sup>

But contrary views can be found. The NSW branch of Dads Against Discrimination<sup>294</sup> speaks of retaining s 121 because it is an important safeguard of privacy of those involved in Family Court proceedings.

A recent report to the Attorney-General by the Former Chief Justice of the West Australian Family Court, the Honourable Ian McCall, has recommended relaxing the restrictions on publicity under s 121.<sup>295</sup> The Attorney-General seems to favour the report's recommendations.<sup>296</sup> Media coverage has made it clear that the recommendations are supported by fathers' rights groups,<sup>297</sup> although opposed widely by many women's groups,<sup>298</sup> civil rights groups, and others.<sup>299</sup>

## 9. Bias in the process of family law decision making

### A. The family law “system”, the Family Court, the Family Law Act, and the child support legislation

There are claims by some groups that the “system” victimises, persecutes and abuses men.<sup>300</sup> Other claims are not so overtly gender specific. The Sydney Men's Network claims that the current family law system is oppressive to non-custodial parents.<sup>301</sup> There are also claims of bias or discrimination in respect of the legislation. Equality for Fathers, for example, submits that the

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292 JSC FLA. See also LFAA, Sydney, (JSC FLA) and Qld (ALRC, Contempt).

293 JSC FLA.

294 JSC FLA.

295 I McCall, *Publicity under the Family Law Act: Proposals for the Amendment of Section 121*, April 1997.

296 Attorney-General's Press release, 25 June 1997.

297 “Silence in the Court” The *Sydney Morning Herald* 18 August, 1997. The *Sydney Morning Herald* ran two articles, one in favour of relaxing the restrictions, the other opposed. The article which argued for relaxation was authored by Michael Green, QC, a prominent spokesperson for fathers' rights interests. See also *Sex/Life* episodes 19 and 20, featuring Mr Green.

298 J Harrison, *Submission to the Attorney-General on Publication in Family Law Proceedings*, National Women's Justice Coalition, 1997.

299 Above, n 297.

300 CSAG, Vic, (JSC CFLI: CSS); LFAA (ALRC, Equality).

301 Communication with research assistant. See also Men's Confraternity (ALRC, Matrimonial Property).

basic concepts of family law need to be brought into line with “true sexual equality for both sexes”.<sup>302</sup> A number of groups claim generally that the Family Court is biased.<sup>303</sup>

Parent Without Rights hints at something akin to corruption when it suggests that the government and the Family Court occasionally exert pressure on media executives and proprietors not to publish certain information relating to Family Law matters and cases. As evidence of this claim, a representative of this group cites the numbers of media interviews he has done which have not gone to press. He also cites the fact that he once told the Chief Justice of the Family Court that he was releasing a copy of the letter he was writing to the Justice to the media and yet none of the 20 media outlets he sent the letter to gave it a mention.<sup>304</sup>

## **B. The adversarial process and alternative dispute resolution mechanisms**

A number of groups criticise the adversarial process as being inappropriate to the resolution of family disputes, primarily because it aggravates conflict.<sup>305</sup> Many of these groups advocate alternative forms of dispute resolution, such as mediation, counselling or arbitration, to replace or supplement the adversarial system.<sup>306</sup> For example, Parent Without Rights submits that mediation centres should be set up and that parties who refuse to negotiate during mediation should be ordered to pay the other sides costs. It states that “people must be made to attend counselling or mediation, before running to lawyers”.<sup>307</sup>

While they appear to favour alternative methods of dispute resolution, most groups are unhappy with the manner in which these processes have manifested within the Family Court. For example, Parent Without Rights argues that there is bias in the counselling process and states that:

The counsellors must. . .make it clear to both of the parties that they are counselling whether they (the counsellors themselves) are lesbian, gay or espouse feminist ideology. It goes without saying that the majority of normal heterosexual parents

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302 Men's Confraternity also argues that new legislation should be enacted within a framework of equality (JSC CFLI: CSS). It suggests that the Family Law Act was prepared before the “proclamation of equality” and is therefore an anachronism (ALRC, Matrimonial Property).

303 Parent without Rights (communication with research assistant and JSC FLA); The Men's Rights Agency (communication with research assistant); LFAA (ALRC, Equality); Equality for Fathers (JSC CFLI: CSS).

304 JSC FLA.

305 ALRC, Children. See also LFAA (Executive Committee) (JSC FLA); Parent Without Rights (ALRC, Children); Parents without Partners (NSW) (JSC FLA); The Family Life Movement (JSC FLA); The Family Law Reform Party (JSC CFLI: CSS); The CSAG (communication with research assistant).

306 Note that a number of authors have cautioned against private ordering on the basis that it replicates and perpetuates power imbalances that currently exist in the private sphere between men and women. See J Behrens, above, n 32.

307 ALRC, Children. The Family Life Movement (JSC FLA); Parents without Partners, NSW, (JSC FLA); the Family Law Reform Party (JSC CFLI: CSS); the CSAG (communication with research assistant); the Family Law Reform Group (JSC FLA); DADs, Qld, (JSC CFLI: CSS); LFAA (ALRC, Matrimonial Property); the Family Law Reform Association NSW Inc (communication with research assistant); Women and Grandparents Treated Unfairly By Family Law (JSC FLA). The Australian Family Law Action Group is alone in arguing that the adversarial process should be replaced with an inquisitorial system (JSC FLA).

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object to the above types being involved with their family problems...  
[C]ounselors are biased, because of their own personal views and lifestyle!<sup>308</sup>

It also argues that Family Court counselling is not orientated to keeping relationships intact<sup>309</sup> and says that "counselors must be more than just social workers, with a short diploma in social or women's studies".<sup>310</sup>

### C. Lawyers and Legal Aid

A couple of groups see lawyers as being highly problematic. For example, the Lone Fathers' Association<sup>311</sup> argues that legal advocates are divisive, some erroneously<sup>312</sup> telling men they will be defeated if they choose to contest residence. In its view, this causes a number of men to agree to relinquish residence.

The overwhelming number of complaints by fathers' rights groups, however, are based on the impression that women are getting legal aid and men are not.<sup>313</sup> Various consequences are said to follow from this. Some groups perceive that women have an advantage because they have unlimited legal resources and can therefore hold out or engage in protracted negotiations that men cannot afford to engage in. Parent Without Rights argues that fathers incur enormous expenses in attempting to obtain custody and in consequence can't pay child support.<sup>314</sup> Alternatively the cost of legal representation prevents men from actually gaining custody and access. Men's Confraternity argues that unbalanced legal representation builds up a wealth of precedent in favour of women, which makes it harder for men to get satisfactory

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308 ALRC, Children. This group argues that many of the counsellors are female and therefore not empathetic to men — what they label a "brigade of female chauvinistic counsellors". LFAA, Sydney, is another organisation arguing (JSC FLA) that the Family Court counselling service (and the Family Court Mediation service) is biased, uninformative, creates animosity and is not subject to scrutiny. They say that counselling is coercing men into making unfavourable agreements.

309 Similarly, FLAG comments (JSC FLA) that they have received "countless horrendous records of 'counselling' by the 'Family' Court which has directly resulted in the actual subversion, corruption and destruction of families".

310 ALRC, Children.

311 LFAA (ALRC, Contempt). Parents Without Partners say (communication with research assistant) that they try to "get people away from the solicitors who are the real problem". Parent Without Rights argues (JSC FLA) that men often consent to the woman having sole custody because of misinformation or pressure by their lawyers.

312 This acknowledgment sits uncomfortably with the statistics they cite in the context of custody. See above text to n 93 and following.

313 The Men's Rights Agency claims that the legal aid dollar is split 2:1 in favour of women (communication with research assistant). LFAA (Executive Committee) claims (JSC FLA) that there is unlimited legal aid for mothers and prohibitive costs of legal representation for fathers. At another point they say that legal aid for the non-custodial parent is "never granted". See also Men's Confraternity (ALRC, Matrimonial Property); DADs (communication with research assistant); Parent Without Rights (JSC FLA); the CSAG, Northern Rivers, (JSC CFL: CSS). In contrast, Legal Aid Statistics indicate that women are legally aided because of their financial position, that both men and women benefit from Child Support fora run by Legal Aid and that men receive between approximately 32–39 per cent of all Legal Aid funding in family law matters, *Legal Aid in Australia 1993–1994, Statistical Yearbook*, Attorney-General's Dept, June 1995.

314 JSC CFL: CSS.

judgments.<sup>315</sup> The solution to this state of affairs according to some groups is that legal aid should be awarded on a case basis. That is, it should be available to both parties regardless of their financial circumstances.<sup>316</sup>

#### **D. The Child Support Agency**

Complaints about the inefficiency of the staff at the Child Support Agency and the agency itself are common.<sup>317</sup> There are also a number of complaints that staff are unsympathetic to, or biased against, non-custodial parents.<sup>318</sup>

### **10. Funding for men's groups**

A common complaint is that women's groups are getting government funding and men's groups are not. For example, the Child Support Action Group comments that:

Women appear to have been very effective at obtaining funding and resources to counter past deficiencies in child support, and this is to be commended. It is to be hoped that organisations representing men will also be able to obtain funding and resources to counter the problems that are now affecting them.<sup>319</sup>

Some of these complaints are directed at women's refuges. Parents Without Partners comments that women's refuges get 15 million dollars a year, for

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315 ALRC, Matrimonial Property.

316 LFAA, Sydney, (JSC FLA); Women and Grandparents Treated Unfairly by Family Law (JSC FLA); Men's Confraternity (ALRC, Matrimonial Property).

317 For example, the Non-Custodial Parents Reform Group describe lengthy delays before phones are answered, inconsistent information and advice, a high number of errors, no acknowledgment of the receipt of correspondence and no pamphlets explaining the scheme in English or otherwise (JSC CFLI: CSS). LFAA, Newcastle-Hunter, comments that most of the staff in the Child Support Agency were of "ethnic origin" and were extremely difficult to communicate with. When people asked to be transferred to a more fluent English-speaking person, "ethnic discrimination was threatened" by the staff (JSC CFLI: CSS). See also the Child Support Action Group (NSW, NT & Vic) (JSC CFLI: CSS); Parents Without Partners (JSC CFLI: CSS); The Family Law Injustice Group Helping Together (JSC CFLI: CSS); DADs, Qld, (JSC CFLI: CSS).

318 DADs, NSW, (JSC CFLI: CSS); the Non-Custodial Parents' Reform Group (JSC CFLI: CSS); Men's Confraternity (JSC CFLI: CSS). For a contrast in perspective note the evidence regarding the difficulties custodial parents have experienced under the scheme in obtaining child support or dealing with the Child Support Agency. See the submissions on the Child Support Scheme of the WA Legal Aid Child Support Unit; Women's Information and Referral Exchange, Illoura Centre (Qld); Single Mothers' Support Group; Women's Electoral Lobby (ACT); Dale Street Women's Health Centre (SA); Domestic Violence Interagency (ACT); Centacare (Tas & NSW); Canberra One Parent Family Support Service (Birthright) (JSC CFLI: CSS).

319 NSW, JSC CFLI: CSS. A representative of DADs speaking to our research assistant also commented on the inequity of funding women's groups. He illustrated this point by the fact that at "the Attorney-General's meeting in Melbourne" there were 140 "women's groups" (it is not clear what criteria he was using to classify the groups) and only 40 "men's groups". Men's Confraternity suggests that there has been a tendency for the feminist organisations who have spearheaded the change in women's roles (described as "free[ing] themselves in recent years of their role obligations without accepting the obligations of men or relinquishing aspects of their former lifestyle when it suits them") to be funded. Men's Confraternity formed itself "to present an alternative view to these organisations". (ALRC, Matrimonial Property). The Men's Rights Agency (communication with research assistant).

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which they are not accountable, whereas men's groups get no funding.<sup>320</sup> There are also claims of "capture" and financial mismanagement. For example, Parent Without Rights comments that "hardline feminists [are] controlling and running women's refuges" and that "it's about time there was a comprehensive inquiry into these refuges and the ways in which taxpayers money has been misspent".<sup>321</sup> Men's Confraternity says that "[w]omen's refuges provide a safe base from which lesbians and men-haters launch attacks on men and the family. The operation and purpose of women's refuges should form the basis of an inquiry."<sup>322</sup> The Lone Fathers Association comments that "claims [that certain women's shelters had become known centres for child abuse] must be addressed by child protection agencies".<sup>323</sup>

### Conclusion

Men (and women) involved in the Family Law system are undoubtedly hurting and hurt.<sup>324</sup> It is obvious that the fathers' rights agenda is, to some degree, fired by this hurt. There is a strong and impassioned sense of grievance in much of what is said by these groups. Nonetheless, while the feelings of suffering are real, the framework of values and understandings which is used to characterise and make sense of both those feelings and the experiences which give rise to them is very much open to debate.<sup>325</sup> Richard Collier makes such a distinction when he talks about the "disjunction between the very real *experience* of personal disempowerment which appears to exist on the part of many of these men and the *facts* of power".<sup>326</sup> We are concerned that the fathers' rights movement, and a number of the media representatives and public figures who deal with these groups, do not draw such a distinction.

We are also concerned that the agenda of the fathers' rights movement is often presented as the male perspective on family law. It is certainly the only such perspective having a real influence in the media and in political debate and law reform. Where do fathers who have experienced pain over the breakdown of their spousal relationship, and in their subsequent attempts to maintain relationship with their children, look to make sense of their experiences? As Ros Coward has said, fathers in this situation:

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320 Communication with research assistant. Men's Confraternity argue that the same refuge facilities should be set up for men (JSC CFLI: CSS). In fact, a Wesley Mission Report revealed that approximately one third of the homeless in Sydney are women yet there are only 83 crisis beds for women: "Two Million Trapped in Life of Poverty", *Sydney Morning Herald* 15 May 1996. The Homeless Person's Information Centre commented that there are up to 640 crisis beds for men in Sydney, *Sydney Morning Herald* 8 February 1995.

321 JSC CFLI: CSS.

322 Review of Restraining Orders.

323 ALRC, Children.

324 Jordan (1984 and 1996), above, n 286; M Harrison, *Attitudes of Divorced Men and Women to the Family Court*, Australian Family Research Conference, ANU, Canberra, pp 23-25 November 1983.

325 For example, it is unfortunate that the feelings of disempowerment suffered by some men have been translated and transformed by the groups into punitive measures towards single mothers and lesbians.

326 Collier, above, n 9 at 35.



... suddenly find themselves without any automatic role and seeking a language to embody what has been positive, and what they want to protect, in their relationship with their children. The only place to articulate this is the right wing, pro-family lobby.<sup>327</sup>

Yet not all hurt fathers share the political framework underpinning much of this agenda or would necessarily characterise their experiences in accordance with it. The agenda we have described is not *the* fathers' viewpoint of family law, only one highly politicised perspective which is "open to question on empirical and logical grounds".<sup>328</sup> Let the questioning begin.

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327 R Coward, "How Fatherhood became a Taboo", *The Age*, 8 May 1996.

328 D Brown and R Hogg, "Law and Order Commonsense" (1996) 8 *Current Issues in Criminal Justice* 175 at p 175.

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## Appendix

### Key to Abbreviations used in this paper

#### Father's Rights Groups

##### *Law reform bodies/Parliamentary inquiries*

- ALRC — Australian Law Reform Commission
- ALRC, Children — *Speaking for ourselves: Children and the legal process*, Issues Paper 18, AGPS, Canberra, 1996
- ALRC, Contempt — *Contempt*, Report No 35, AGPS, Canberra, 1987
- ALRC, Equality — *Equality before the Law: Justice for Women*
- ALRC, Intractable Access — *For the Sake of the Kids: Complex Contract Cases and the Family Court*, Report No 73, AGPS, Canberra, 1995
- ALRC, Matrimonial Property — *Matrimonial Property*, Report No 39, AGPS, Canberra, 1987
- JSC CFLI: CSS — Joint Select Committee into Certain Family Law Issues: Child Support Scheme
- JSC FLA — Joint Select Committee into the Family Law Act
- *Review of Restraining Orders* — Taskforce on Family and Domestic Violence and the Ministry of Justice (WA) May, 1995
- Break the Silence — *Break the Silence: Report of the Taskforce on Domestic Violence to the Western Australian Government*, January 1986.

##### *Fathers' rights groups*

- CSAG — Child Support Action Group
- DADs — Dads Against Discrimination
- FLAG — Family Law Action Group
- FLIGHT — Family Law Injustice Group Helping Together
- FLRP — Family Law Reform Party
- FNF — Families Need Fathers (UK)
- LFAA — Lone Fathers Association, Australia