



# Victorian Aboriginal Legal Service Co-operative Ltd.

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## *Submission to the Parliamentary Inquiry into Joint Residence*

From Victorian Aboriginal Legal Service Co-operative Limited  
Supported by: Victorian Aboriginal Community Services Association Incorporated  
Elizabeth Hoffman House Aboriginal Women's Refuge  
and Aboriginal Family Violence Prevention and Legal Service

Victorian Aboriginal Legal Service Co-operative Limited ("the Service") is opposed to the proposed changes to the Family Law Act providing for a rebuttable presumption of shared residence. We assume for the purposes of this submission that a 'shared residence' order in relation to children means that the children live for an equal amount of time with each parent.

The Service's opposition to a presumption of shared residence is based on the following:

1. There is no evidence to suggest that there is anything wrong with the current wording of the Family Law Act ("the Act") or the Family Court of Australia ("the Court")'s approach to residence cases, namely, that the issue of residence is one for the Court's discretion having regard to the factors set out in section 68F (2) and bearing in mind that the children's interests are the paramount consideration. The fact that residence orders are made more often in favour of the mother than the father is not attributable to any bias on the Court's part nor evidence of any need for a change to the Act, but rather is reflective of the fact that mothers are statistically far more likely to have been the primary carers of children and the children's interests likely to be best served by continuing to reside with their primary carer. However the mother is not always found to be the most appropriate residence parent. Between 1994/95 and 2000/02, there was an increase from 15.3% to 19.6% (a 28% increase) in residence order outcomes in favour of the father. This suggests the Family Court's responsiveness to the changing parenting roles of men.
2. The proposal that there be a presumption of shared residence is a parent-focused one, not a child-focused one. The Family Law Act provides that the best interests of children should be the paramount consideration, not the desires of parents.
3. There ought not to be a presumption that any one parenting arrangement is better than another. Each case must be determined on its own merits.
4. Where the Court regards it as being in the best interests of children in a particular case, it already has the option of ordering shared residence under the Act.
5. The number of cases resolved by the Family Court in which the Court has awarded shared residence is negligible (2.5% in 2000/01). This establishes that the Court does not regard joint residence as generally being an outcome that best serves the interests of children. It is submitted that the prescription in the Act of a rebuttable presumption of joint residence is unlikely to change the Court's assess-

ment that, in all but a small minority of cases, joint residence is not in the best interests of children. The number and percentage of joint residence decisions has been declining since 1993/94. Since 1995/96, joint residence has been the least likely outcome of any order.

6. In intact families, children are generally cared for primarily by one parent, which is usually the mother. In many families, one parent works in paid employment full-time, while the other cares for the children at home and is either not in paid employment or working part-time. It is submitted that it is not appropriate to establish a presumption of joint residence in circumstances where pre-separation arrangements in the majority of cases do not involve the care of children being shared by parents on anything approximating an equal basis. The presumption does not reflect traditional parenting practice. A 1997 study of Australian families found that employed and unemployed married women undertake 70% and 80% respectively of domestic duties, including the care of children (*Family Matters* no. 48, 1997: 15-18).
7. It is submitted that in the vast majority of cases it is not in children's best interests to live in a joint residence arrangement. Children's interests are best served by the preservation of a stable home life following marital or relationship breakdown. This is generally best achieved by arrangements which provide that children have one home rather than two. Children are vulnerable following marital or relationship breakdown and their interests dictate that they be provided with a stable routine and home environment. Having two homes is likely to lead to instability and stress for children who must negotiate two different living environments with different routines and rules. It is submitted that this may lead to behavioural and disciplinary problems.
8. In most cases, the maintenance of a joint residence arrangement will simply not be practical. The majority of cases that come before the Court will feature one or more circumstance that makes joint residence impractical, such as where:
  - a) either or both parents is not a suitable primary carer of children;
  - b) the parties' finances do not enable the maintenance of two separate households suitable to house the children;
  - c) parents do not have the flexibility of work commitments such as would enable them to care for children;
  - d) parents live too far apart from one another following separation such that children are unable to maintain friendships and schooling and other commitments; or
  - e) the history of Family Violence indicates too high a risk.

The US report *Non-Custodial Parent's Part in their Children's Lives* found that parents with equal joint residence of children had the highest education and household income levels at the time of separation compared to families with other custody types. Most parents in joint custody relationships also had only one child and were relatively friendly and cooperative before and after divorce.

9. Shared residence arrangements are likely to place an additional burden on single mothers who already comprise the most impoverished group in society. This is contrary to the interests of children. It is also likely to place additional financial burden on low income fathers many of whom already experience significant difficulty.

10. The Service's view is that there is likely to be an increase in Family Court litigation following the enactment of the proposed changes to the Act. In the vast majority of cases in which the issue of residence is presently a foregone conclusion, the onus will now be on primary carers to prove that the children's interests are not best served by a shared residence arrangement. In view of the Court's consistent assessment that shared residence does not ordinarily serve a child's best interests, this may be a low hurdle to get over. Nonetheless, it will be open to a spiteful parent with no reasonable prospect of being awarded anything approaching equal care of the children by the Court (typically fathers) to put the other parent (usually mothers) to proof that the presumption ought not apply (albeit at peril as to costs). This will require the other parent to proceed to a trial, potentially at considerable emotional and financial expense, while wasting the Court's already over-stretched resources.
11. The Service notes with concern the National Welfare Rights Network assessment of the proposal for Joint Residence which is that Social Security and Family assistance payments are usually determined on the basis that one parent is the primary carer of the children and that at best an extremely complex system will be made more complex and at worst it will create considerable inequities for parents seeking to share in the care and support of their children.

Shared residence according to the National Welfare Rights Network Submission would mean:

- significantly different post-separation arrangements;
  - present practical difficulties for parents on New Start;
  - require extensive changes to the criteria for a number of Social security payments and add to the complexity of determining eligibility;
  - increase the number of disputes that Centrelink and tribunals will have to mediate and resolve; and
  - require an increase in Social Security expenditure to adequately compensate parents for the additional costs associated with caring for their children to such a significant degree. Failure to do this would mean that children whose welfare depends on the financial welfare of both their parents would be placed at risk of poverty (*National Welfare Rights Network Submission to the Inquiry*, 2003).
12. According to Family Court Statistics (Source: [www.familycourt.gov.au](http://www.familycourt.gov.au) see Attachment One) the percentage of residence orders that were joint residence in 2000/01 was 2.5%. This is approximately half the level of 1993-1994. Over that same time frame residence orders to fathers have increased from 15.3% of orders to 19.6%. residence orders to adults other than the parent have increased significantly from a very low figure as has split residence (where each parent has one or more children residing with them). Apart from residence with the mother (small decrease) the only category which has a dramatic reduction is joint residence. These Court figures highlight that there has been change over time in the percentage of different kinds of residence order made and that joint residence is increasingly unlikely to be the most appropriate.

## Attachment One

### Family Court Residence Order Outcomes - 1994-95 to 2000-01

Financial	In favour of father	In favour of mother	Joint resi-	Split resi-	In favour of other applicant	Total
<b>Number</b>						
1994-95	2042	9833	680	402	376	13333
1995-96	2139	9824	660	378	424	13425
1996-97	2530	9795	432	799	570	14126
1997-98	2937	10419	483	707	665	15211
1998-99	2867	10047	428	734	577	14653
1999-00	2750	9473	305	558	727	13813
2000-01*	2585	9183	329	559	538	13194
<b>Percentages</b>						
1994-95	15.3%	73.7%	5.1%	3.0%	2.8%	100.0%
1995-96	15.9%	73.2%	4.9%	2.8%	3.2%	100.0%
1996-97	17.9%	69.3%	3.1%	5.7%	4.0%	100.0%
1997-98	19.3%	68.5%	3.2%	4.6%	4.4%	100.0%
1998-99	19.6%	68.6%	2.9%	5.0%	3.9%	100.0%
1999-00	19.9%	68.6%	2.2%	4.0%	5.3%	100.0%
2000-01*	19.6%	69.6%	2.5%	4.2%	4.1%	100.0%

Source Data: Outcomes Report Blackstone

#### Notes:

- Orders made in the Family Court of Western Australia are excluded as data is not available.
- Data for Darwin Registry have been available only since 1996-97.
- Figures include both orders made by consent and orders made as a result of contested hearings.
- The terminology was changed from custody to residence by the Family Law Reform Act 1995 which was proclaimed on 11 June 1996.
- "Joint" residence is where the order is for each child to spend some time residing with each parent and "split" residence is where the order is for each parent to have one or more of their children residing with them on a full time basis.

Source of table [http://www.familycourt.gov.au/court/html/residence\\_orders.html](http://www.familycourt.gov.au/court/html/residence_orders.html)