



FAMILY LAW COUNCIL

RELOCATION

**A report to the Attorney-General prepared by
the Family Law Council**

MAY 2006

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Executive summary

On 13 February 2006, the Family Law Council released a discussion paper on relocation. There were 43 submissions made in response to the discussion paper. This report brings together the findings of that public consultation, and offers advice on the Attorney-General's terms of reference (set out in full in chapter 1).

Defining relocation

While relocation cases come before the court with regularity, there are no specific provisions in the *Family Law Act 1975* dealing with relocation. Therefore, the Act does not define the term "relocation". Council believes that if legislative provisions relating to relocation are added to the Family Law Act, a definition should be added to ensure it is clear when those legislative provisions are triggered.

The impact of relocation on children

The limited amount of social science research that there is on the impact of relocation on children tends to come from North America. However, Council has noted two major Australian studies which will provide greater insight into this question. The findings of these projects are likely to be of significant assistance to policy-makers, however, the results will not be available for a few years. Council recommends that if changes are made to relocation law, those changes should be reviewed when the results of these studies become available (Recommendation 1).

The impact of relocation on parents

Freedom of movement

Section 92 of the *Constitution* provides Australians with a right of freedom of movement between States within Australia. Council believes that this should be a factor to consider when making relocation decisions, but parents' rights are subordinate to the best interests of children. This view is consistent with the existing law.

Non-resident parents' obligations

Council believes there should be a stronger emphasis on the obligations of both parents to maintain a meaningful relationship with their child. Parenting orders should be considered mandatory, not permissive, and consequences should flow from breaches of those orders. Council proposes that sections 65N and 70NAE of the Family Law Act be amended to reinforce this idea (Recommendation 2). These changes will limit a parent's ability to enforce a parenting order against the other parent if they themselves have breached that order.

Notice provisions

Some submissions suggested a notice provision be inserted into the *Family Law Act 1975* to ensure a parent notifies the other parent before moving a child's residence. Council believes this is unnecessary because section 65DAC of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* requires decisions about "major long-term issues" to be made jointly.

The impact of relocation on other people

The discussion paper invited submissions to address how the law should take account of the interests of other people affected by relocation decisions. "Other people" include children not the subject of the parenting order (half-siblings, step-children), new partners, grandparents and other relatives. Most submissions believed, and Council agreed, that the current law is sufficient to take account of the interests of others.

Current law in Australia

The report outlines the law on relocation in Australia, including:

- provisions in Part VII of the Family Law Act,
- amendments contained in the Shared Parental Responsibility Act, and
- case law.

"Virtual visitation"

Paragraph 60B(2)(b) of the Shared Parental Responsibility Act provides for "communicating" with a child. There are a number of ways a parent might have contact with a child, such as by telephone, email, webcam or by letter. There is some literature on the new phenomenon of "virtual visitation". Council is of the view that communication over the telephone and internet does have a place, but is not sufficient for the child to maintain a meaningful relationship with a parent who lives elsewhere at some distance.

Best interests of the child

Council does not think it is necessary for the Family Law Act to be amended to provide a definition of "best interests of the child". Council believes that the current legislative approach of looking at a number of factors to determine best interests stresses the complexity of the task without the necessity of defining the concept.

Current law in other jurisdictions

The Attorney-General's terms of reference directed the Council to consider "approaches to the problem of relocation in other jurisdictions". The approaches taken in the United Kingdom, New Zealand, Canada, selected states in the United States of America and some European jurisdictions were considered. No uniform approach to relocation decision-making was discernible amongst the overseas jurisdictions considered by Council.

Recommended changes to the law on relocation

A legal presumption for or against relocation

Council recommends against inserting a presumption in the Family Law Act to deal with relocation cases (Recommendation 3). Council believes that a presumption is not an appropriate way for the law to deal with relocation cases, and would prefer a case by case approach to ensure the best interests of the child remain paramount.

LACA Committee recommendation

In August 2005 the Legal and Constitutional Affairs (LACA) Committee recommended in its report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 that a relocation provision be inserted into the Family Law Act. The Government response to this recommendation was that the Family Law Council give particular consideration to it as part of its inquiry into relocation.

Council is persuaded that enacting this particular provision would not be the optimal approach, but agrees that change to the Family Law Act would be appropriate and instead has recommended an alternative provision to apply to relocation matters.

Council's proposed relocation provision

Council has reached the conclusion that a specific relocation provision should be inserted into the Family Law Act (Recommendation 4). While the best interests of the child should remain the paramount consideration, Council would like some additional considerations relevant to relocation to be outlined. Such a framework might assist users of the Act to better understand the factors the court will consider and will be of particular assistance to unrepresented litigants.

Council has recommended a provision which:

- provides a definition of “relocation” in its preamble
- requires the court to consider the alternative proposals offered by the parties about where and with whom the child lives
- requires the court to consider what parenting order is in the child’s best interests having regard to section 60CC, the child’s age and development level, and the impact on the child of the emotional and mental state of either party if their proposals are not accepted
- requires the court to consider, if the relocation were to go ahead:
 - what arrangements can be made to protect the child from harm and to maintain the child’s meaningful relationships, and
- how the increased costs of maintaining the child’s relationship with the non-resident parent and other significant people should be allocated.

List of recommendations

Recommendation 1 (paragraph 3.23, page 24)

If changes are made to relocation law as a result of Council's report, any changes should be reviewed when the results of the Australian social science research currently underway become available.

Recommendation 2 (paragraph 3.62, page 32)

Council recommends two changes to reinforce that orders impose obligations, as follows.

1. Insert new subsection 65N(2) which reads "A parenting order that deals with whom the child is to spend time, imposes an obligation to maintain a relationship with a child in accordance with the terms of the order".
2. Add to section 70NAE a further subsection giving the respondent a reasonable excuse for contravention, which is that "the applicant has repeatedly failed to exercise his or her responsibilities in accordance with the order".

Recommendation 3 (paragraph 6.30, page 64)

Council recommends against inserting a presumption in the Family Law Act to deal with relocation cases.

Recommendation 4 (paragraph 6.72, page 73)

Council recommends that the following provision be inserted in the Family Law Act.

A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:

- (1) Consider the different proposals and details of where and with whom a child should live, including:
 - (a) What alternatives there are to the proposed relocation;
 - (b) Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
 - (c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.
- (2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:

- (a) Whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;
- (b) If a party were to relocate:
 - (i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;
 - (ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;
- (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

1. Introduction

Background

1.1 This report considers the law on relocation in Australia, including whether and how it should be reformed.

1.2 A number of parliamentary inquiries looking into aspects of family law have considered the issue of relocation,¹ however, none of these inquiries have focused solely on relocation nor explored the issue in great detail. This report offers a comprehensive assessment of the law on relocation as it is, and offers recommendations on how it might be improved.

Terms of reference

1.3 In May 2000 the Family Law Council discussed the amendments made to the *Family Law Act 1975* (hereafter referred to as ‘Family Law Act’) by the *Family Law Reform Act 1995*, in relation to the paramountcy principle (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the Family Law Act).

1.4 Council appointed a committee to develop draft terms of reference which were approved by the Attorney-General on 9 October 2000. On 3 June 2003 the Attorney-General agreed to extend the terms of reference to include an examination of relocation cases. The terms of reference are:

1. To examine the nature and application of the legal principle that the child’s best interests must be regarded as the paramount consideration in family law litigation concerning children and to consider whether the *Family Law Act 1975* should be amended in this respect.

The Council shall have particular regard to:

- the law before and after the *Family Law Reform Act 1995*; and
- the nature and scope of similar provisions in other jurisdictions.

¹ Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: aspects of its operation and interpretation* (November 1992) at 154–158; Family Law Pathways Advisory Group, *Out of the maze: pathways to the future for families experiencing separation* (July 2001) at 51; House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of family separation* (December 2003) at 32–33; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (August 2005) at 22–24.

2. To examine:

- (1) How the best interests of the child principle set out in section 65E of the *Family Law Act* operates in relation to other legitimate interests in a relocation case;
- (2) How best to take account of the interests of other children who may be affected by the relocation decision but are not the subject of proceedings;
- (3) How best to take account of the interests of other people affected by the relocation decision;
- (4) The significance of section 92 of the *Constitution* for the law of relocation;
- (5) Approaches to the problem of relocation in other jurisdictions; and
- (6) Whether the *Family Law Act* should be amended to provide specific criteria for making relocation decisions.

1.5 In December 2004 the Council released a discussion paper titled *The 'Child Paramountcy Principle' in the Family Law Act*. The scope of the discussion paper was limited to paragraph 1 of the terms of reference and did not examine paragraph 2. A letter of advice on the paramountcy principle was provided to the Attorney-General on 17 January 2006 (see Appendix C).

1.6 On 13 February 2006, Council released a discussion paper on relocation. The purpose of the discussion paper was to consult on the issues covered in paragraph 2 of the terms of reference. This report brings together the findings of this public consultation, and offers advice on the Attorney-General's terms of reference.

Public consultation

1.7 The discussion paper released in February 2006 set out the background and issues relating to relocation, and sought public comment on a number of questions. It was sent to over 800 individuals and organisations on the Council's mailing list and also to a number of stakeholders whom the Council considered, because of their work or expertise, might wish to make submissions. A copy of the discussion paper was also sent to all members of parliament and senators, and was made available on the Council's website.²

1.8 There were 43 submissions made in response to the discussion paper. A list of the persons and organisations making submissions is provided in Appendix A.

1.9 The Council found that the submissions put forward a range of relevant and helpful views on the issues being examined and wishes to thank those persons and organisations who made submissions. Those submissions have been of significant assistance in the drafting of this report.

² At <<http://www.law.gov.au/flc>>.

1.10 Submissions were received from groups in the following categories:

- academics (n=4)
- children's interest groups (n=1)
- Courts/judges/magistrates (n=1)
- dispute resolution organisations (n=3)
- government departments/agencies/advisory bodies (n=5)
- Indigenous interest groups (n=3)
- legal aid bodies/community legal services (n=2)
- legal practitioner groups/lawyers/law societies (n=5)
- members of parliament (n=2)
- men's interest groups (n=7)
- private citizens (n=7)
- women's interest groups (n=3).

Outline of this report

1.11 This report begins by describing what relocation is, its prevalence and how it is legally defined. Issues of definition are important to consider, because the way the concept is defined may affect how relocation decisions are made.

1.12 There is then a discussion of the impact of relocation on children, parents and other people. The chapter starts by considering impact on children and considers the available social science research. Discussion of the impact on parents includes consideration of freedom of movement, as provided for under section 92 of the *Constitution*. The impact of relocation on other people includes consideration of the interests of other children (for example, half-siblings and step-children) and grandparents.

1.13 The report then outlines Australia's current law on relocation. This includes consideration of the Family Law Act, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (hereafter referred to as the 'Shared Parental Responsibility Act') and the common law (including the High Court's decision in *U v U*³).

1.14 Next, the law on relocation in overseas jurisdictions is considered. Particular focus is placed on the United Kingdom, New Zealand, Canada and certain states in the United States of America. The approach to relocation in these jurisdictions varies. Some have presumptions in favour of relocation, some against, and some have no presumptions at all. Considering the ways other jurisdictions handle relocation is important because Australia may learn from their experiences about how to improve the law on relocation.

1.15 Finally, the report considers whether Australian law should be amended to make specific provision for relocation cases. The question of whether the law should adopt presumptions about relocation is considered, and the advantages and disadvantages of having specific legislative criteria for making relocation decisions are assessed.

³ *U v U* (2002) 191 ALR 289.

2. What is relocation?

2.1 In family law, cases involving a parent's move with their child are described as "relocation cases". These cases can involve moves of relatively short distances (eg 115 km⁴) to moves as far as from Australia to the United Kingdom.⁵ Intrastate, interstate and international relocation cases are all considered in this report. There is no definition of "relocation" in the Family Law Act. A discussion of some approaches to defining relocation is provided later in this chapter.

2.2 Relocation cases cause legal practitioners and judicial officers much angst, due to the competing interests involved. When appearing before the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Chief Justice of the Family Court of Australia described relocation cases as follows.

Relocation cases are the hardest cases that the court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the Full Court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble.⁶

2.3 Watts has described the "essential tension" in relocation cases to be "between the child's right to have a relationship with the non-resident parent⁷ and the child's interest in ordinarily living with a residence parent who is happy and not 'imprisoned' in a place the parent does not want to be".⁸

2.4 While relocation is a hard issue to adjudicate, it is not an uncommon issue in dispute before the court. While the precise number of children affected by relocation is unknown,

⁴ See for example *D and SV* (2003) FLC ¶93-137 which involved a move from Vermont South (in Melbourne's eastern suburbs) to Drysdale (near Geelong) in Victoria. In that decision, the Full Court made the following comments on whether relocation principles should apply to a relatively short move. "While it was not a ground of appeal, we raised with Counsel for the respondent the issue of whether in the context of this relatively short move, the relocation principles in those cases should apply to this case. It was her submission that any move of residence that requires a significant change in existing parenting arrangements can bring the principles discussed in those cases into play. While we did not hear argument contesting that proposition, it seems to us to be an approach that may be open in some cases. However, the normal reason for applying the reasoning used in such cases, particularly where residence is not seriously in issue, is to seek to restrict the freedom of movement of the residence parent. Where the move is over a relatively short distance such as this one, we would caution against the making of orders that restrict the residence parent's freedom of movement. The inquiry should be directed more at alternative contact or shared residence arrangements": per Nicholson CJ, Kay and Monteith JJ at [37].

⁵ See for example *VG & M* [2005] FamCA 1015 (27/10/05).

⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1 at 22.

⁷ Council is aware that the Shared Parental Responsibility Act will change the existing terminology.

⁸ G. Watts 'Can we go or must we stay? Being able to relocate with the children' (2002) 40(10) *Law Society Journal* 66 at 66.

data from courts such as the Family Court of Western Australia, as well as the amount of case law in this area,⁹ indicate that relocation is a regularly litigated issue.

Population mobility

2.5 The Australian population can be described as fairly mobile. Australian Bureau of Statistics data reveal that in the 2004–05 financial year a total of 358,800 people moved interstate. More than one in three of these movers were aged 20–34 years.¹⁰ Of course some people choose to go further afield and move overseas. In 2004–05 there were 62,600 permanent departures from the country. Furthermore, in the same year 276,400 Australian residents departed “long-term” (defined as more than 12 months).¹¹ In some instances this may be a return to country of origin, given that 24% of Australia’s residents were born overseas (2004 data).¹²

2.6 Australian Bureau of Statistics data on divorce reveal that in 2004, 52,747 divorces were granted and, of those, 49.8% (26,289) involved children. Both parties were born overseas in 6,904 divorces and in 14,375 divorces at least one party was born overseas.¹³ Following divorce, either or both of the parents may choose to return to their country of origin where they may have extended family to support them.

2.7 It is not surprising, therefore, that a significant number of children whose parents are separated or divorced are affected by a parent’s decision to move, either within Australia or overseas.

2.8 The Australian Institute of Family Studies provided some data to Council in their submission. This data informs us about:

- a) the extent to which parents move house after separation
- b) changes in the distance between the homes of former partners, and
- c) the extent to which these changes in distance are related to time since separation.

2.9 The Australian Institute of Family Studies’ analysis is reproduced here, although it is important to note that these analyses are preliminary and warrant further investigation.

Method

2.10 Data are drawn from Waves 1¹⁴ and 2 of the Household Income and Labour Dynamics of Australia (HILDA) survey.¹⁵ This survey, funded by the Australian

⁹ Recent reported cases on relocation in Australia include: *A v A: Relocation approach* [2000] FamCA 751; *U v U* (2002) 191 ALR 289; *ZN and YH and the Child Representative* [2002] FamCA 453; *CCC and MJR* [2005] FamCA 784; *Bolitho and Cohen* (2005) FLC ¶93-224; *P and P and Children’s Representative* [2005] FamCA 1032; *S and D* [2005] FamCA 1035; *VG and M* [2005] FamCA 1015; *W and R* [2006] FamCA 25. Case law is discussed in more detail in chapter 4 of this report.

¹⁰ Australian Bureau of Statistics, 3412.0 *Migration, Australia, 2004–05*.

¹¹ *Ibid.*

¹² Australian Bureau of Statistics, 1301.0 *Yearbook Australia 2006* (Chapter 5 – Population).

¹³ Australian Bureau of Statistics, 3307.0.55.001 *Divorces, Australia, 11/11/2005*.

¹⁴ Each set of data collected is called a “wave”. HILDA collects data annually.

¹⁵ HILDA is managed by the Melbourne Institute of Applied Economic and Social Research, University of Melbourne (the lead agency), in collaboration with the Australian Institute of Family Studies and the Australian Council for Educational Research.

Government through the Department of Family, Community Services and Indigenous Affairs, is a national representative study of income and work patterns.¹⁶

2.11 To explore patterns of relocation, the two most common post-separation family types – resident mothers (n=411) and non-resident fathers (n=268) – were examined. The participants in this analysis provided information in both waves, and their children continued to live with the mother. The youngest child was under 18 in Wave 2.

2.12 Two issues were explored: moving house, and changes in the distance between the homes of former partners. Specifically, in each survey wave, parents were asked to indicate how many kilometres they lived from their children's other parent: less than 5 km, 5–9, 10–19, 20–49, 50–99, 100–499, 500 km or more, or overseas. For simplicity, the first three categories were combined (less than 20 km).

2.13 It is important to note that this analysis is based on the reports of one separated parent. Without couple data, it is not possible to identify changes in the dwellings of both partners of a former relationship.

Findings

2.14 Waves 1 and 2 of the HILDA survey suggest the following key findings.

Moving house

- Nearly a quarter of resident mothers and non-resident fathers moved house between 2001 and 2003 (23% and 25% respectively) – that is, each group was equally likely to move.

Distance apart

- In 2001, more than half the resident mothers and non-resident fathers reported living within 50 km of their former partner (56–57%). At the same time, a substantial number were living at least 500 km apart or overseas (23% of resident mothers, 22% of non-resident fathers).
- More specifically, resident mothers and non-resident fathers most commonly reported living less than 20 km from a former partner (41–43%), followed by at least 500 km (17–18%), then 100–499 km (15%) or 20–49 km (13–16%). Only 5 to 7 per cent reported a distance of 50–99 km, and 4–6 per cent reported that their former partner lived overseas.
- A similar pattern of results emerged for Wave 2.

Changes in distance (Wave 1 to Wave 2)

- Seventy-two per cent of resident mothers, and 83 per cent of non-resident fathers, reported no change in the distance between their home and that of their former partner (based on the six categories described above).
- Twelve per cent of resident mothers, and six per cent of non-resident fathers, reported living closer to their former partner by Wave 2.

¹⁶ It should be noted that 13 per cent of respondents who were interviewed in Wave 1 did not participate in Wave 2. This sample loss similarly applied to the samples analysed here (resident mothers, non-resident fathers).

- By contrast, 16 per cent of resident mothers, and 10 per cent of non-resident fathers, reported living further apart from their former partner by Wave 2.
- In short, while most reported no change in distance category, there was a marginally greater tendency to report living further apart than closer.

Time since separation and distance

2.15 One question that emerges from the above data is to what extent time since separation is related to geographic distance between parents' households? To answer this question, data from the Institute's *Caring for Children after Parental Separation Project*¹⁷ was analysed.

2.16 These data suggest that recently separated respondents were more likely to report that they lived closer to their former partners than those who had been separated for a longer time. For example, 59 per cent of respondents who had been separated for less than two years reported living within 20 km of their former partner compared to 29 per cent of those who had been separated for 13 years or longer. By contrast, 25 per cent of those who had been separated for at least 13 years reported living in excess of 500 km (including overseas) of their former partner compared to 10 per cent of those who had been separated for less than 2 years.

Statistics on relocation

2.17 There have also been studies conducted on the number of relocation decisions made by the courts. Easteal, Behrens and Young carried out an empirical study of 46 relocation decisions made in the Canberra registry of the Family Court of Australia and the Perth registry of the Family Court of Western Australia over an 18-month period (from July 1997 to December 1998).¹⁸ Thirty-eight of the cases proceeded to judgment, while the remainder were settled by consent. Although this is a relatively small sample size, insight can be gained from the researchers' analysis of the demographic characteristics of the people involved in these cases.

2.18 Of the 38 cases which proceeded to judgment (18 in the Canberra registry and 20 in the Perth registry), 36 of the movers were women. Twenty-five (69%) were permitted to move. The male mover in Western Australia was permitted to relocate, whilst the male mover in Canberra was not.¹⁹ Easteal et al considered whether distance impacted on the outcome of the case and concluded it did not – 67% of those going a long distance or overseas were allowed to relocate, compared to 75% of those moving a short distance.²⁰

2.19 More recent data has been provided to the Family Law Council by the Family Court of Western Australia.²¹ A survey was conducted of all the relocation cases in the Family

¹⁷ This recent Australian study comprised 971 separated parents with at least one child under 18 years. Parents were interviewed by telephone for, on average, 45 minutes about parent-child contact and child support.

¹⁸ P. Easteal, J. Behrens and L. Young, 'Relocation decisions in Canberra and Perth: a blurry snapshot' (2000) 14 *Australian Journal of Family Law* 234.

¹⁹ *Ibid* at 240.

²⁰ *Ibid* at 241.

²¹ The Hon Justice Carolyn Martin, personal communication, 30 March 2006.

Court of Western Australia between 2000 and 2005. In that time there was a total of 70 relocation cases heard. Of these 70 cases:

- 51 residence parents were allowed to relocate (72.9%)
- 16 residence parents were not allowed to relocate (22.9%), and
- two of these decisions were overturned on appeal.

2.20 In three of the 70 cases a change of residence for the child was ordered (4.3%) and in a few cases the residence parent was allowed to relocate at a set time in the future. In one case the future relocation was permitted only once certain conditions were met. One family had two relocation cases.

2.21 The data from Western Australia indicate that relocation is a regularly litigated issue in their Family Court, with an average of 12 relocation matters per year since 2000.²² No precise data are available regarding the number of relocation matters heard in other Australian states and territories.

2.22 The frequency with which relocation matters appear in court is not surprising. Relocation is likely to be a contested issue because the proposed move of the child will affect the level of contact that child has with the parent left behind. The separation of the parents generally will have already reduced the level of contact the child has with one parent. A proposed relocation may make even this reduced level of contact difficult to sustain.

2.23 The Australian Institute of Family Studies has researched contact patterns of children with one parent living elsewhere and found the following:

- about a third (29.8%) have “little or no contact” – defined as less than once a year or never
- 18.9% have “intermittent contact” – defined as at least once every three months to once a year
- half (51.3%) have “regular contact” – defined as daily to once a month.²³

2.24 Of those children who have little or no contact, one reason was the physical distance between them and the non-resident parent. For example, the Household, Income and Labour Dynamics in Australia Survey conducted in 2001 found that 67% of both mothers and fathers in this category lived more than 50 km from their former partner. Further, 17% of mothers and 8% of fathers were not able to provide information about where their former partner was.²⁴ Of course it is not a simple case of physical separation equals little or no contact. There is a complex interplay of factors. In addition to relocation, the Australian Institute of Family Studies list three other important “R’s” that characterise this group – repartnered, residual bad feelings towards each other, and relative economic disadvantage.²⁵

2.25 These statistics on the prevalence of divorce, movement of separated parents, the number of relocation cases going to court, and patterns of contact after separation indicate

²² Calculated based on figures provided by Martin, *ibid*.

²³ B. Smyth (ed) *Parent-child contact and post-separation parenting arrangements*, Research Report No 9 (Australian Institute of Family Studies: Melbourne, 2004) at 4–5.

²⁴ *Ibid* at 121.

²⁵ *Ibid* at 120.

that relocation is a significant issue in family law. While relocation cases come before the court with regularity, the law on relocation has been described as “ambiguous”.²⁶ This ambiguity extends to the very definition of the term relocation which, as explained below, has consequences for the way relocation decisions are made.

Defining relocation

2.26 The current law in Australia does not provide a definition of “relocation” because there is no need to when these cases are considered to be “parenting cases where the proposal of one of the parties involves relocation” (which they are under the current law in Australia).²⁷ If the Family Law Act was to refer to “relocation”, it is likely to be necessary to define this term. The question then arises as to how relocation would be defined for this purpose. This is a complex task and there are several issues for consideration.

2.27 Some states in the United States of America use distance as a trigger for the operation of their law on relocation. For example, the Louisiana statute only applies where the relocation is out of the state or more than 150 miles (241.5 km) from the previous residence. This would have excluded the Australian case of *D and SV*²⁸ from being considered a relocation case, as it involved a move of 115 km (from Vermont South, in Melbourne’s eastern suburbs, to Drysdale, near Geelong, in Victoria).

2.28 The use of distance to define relocation does not take into account that the impact of distance may be different depending on the circumstances of the parties, or the place involved. For example, if the non-resident parent does not own a car, or cannot afford to spend large amounts of money on petrol, the availability of public transport services will impact on their ability to have contact with their child or children.

2.29 The following hypothetical illustrates the point. Ms Black is living in Canberra with her three children. Mr Black (the children’s father) lives a few suburbs away and the children stay with him every second weekend. He does not own a car, but can use the local bus service to collect the children from school on Friday afternoon and take them back to school the following Monday morning.

2.30 Ms Black proposes to relocate to Sydney with the children, which is 290 km north-east of Canberra. For Mr Black to travel from Canberra to Sydney and back to see his children there are a number of flights each day, two trains per day or a bus service that operates eight times per day (with the express service taking 3.25 hours and the non-express service taking four hours).²⁹

2.31 Compare this to a proposal that Ms Black relocate to Griffith with the children, which is 349 km west of Canberra. There are no flights from Canberra to Griffith, so flying would require going via Sydney. There is no train service, so catching the train would also require

²⁶ J. Roebuck, ‘*U v U: A chauvinistic approach to relocation?*’ (2003) 17 *Australian Journal of Family Law* 208 at 208.

²⁷ *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,453. This concept is explained fully in chapter 4 of this report.

²⁸ *D and SV* (2003) FLC ¶93-137. See note 4 above.

²⁹ There is more than one coach company operating services between Canberra and Sydney, but one was thought to be sufficient as an example for the purposes of this hypothetical.

going via Sydney. The same bus company which has eight services per day to Sydney has one service per day to Griffith. That service departs at 8:50pm and arrives at 3am (that is, a six-hour journey).

2.32 Therefore, while these two hypothetical relocations are of a similar distance, each would have markedly different consequences for Mr Black's ease of contact with his children.³⁰

2.33 The American Academy of Matrimonial Lawyers has developed a Model Relocation Act (upon which the Louisiana statute is based – discussed further in chapter 5 of this paper). The Model Act defines relocation in article 101(5) as “a change in the principal residence of a child for a period of [60] days or more, but does not include a temporary absence from the principal residence”.

2.34 The comments provided by the American Academy of Matrimonial Lawyers about the definitions article of the Model Act describe why they chose not to use a particular distance.

The difficulties that may be engendered by a relocation are not limited to a move across state lines, or a move of an arbitrarily chosen distance within a state, eg 100 or 150 miles. A visitation schedule may be significantly affected any time that a move is made by either the custodial or non-custodial party, particularly in heavily urbanised areas. A move of even a relatively short distance may create other problems if it impedes access to the child or involves a change of school district.

2.35 These comments shift the focus to a consideration of the effect of the move on the non-resident parent's contact with the child. For the purpose of defining “major long-term issues”, the Shared Parental Responsibility Act uses the phrase “changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent”.³¹

2.36 Along these lines, one possible way of defining relocation which the Council proposed in the discussion paper is “a move which will result in changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent”.³² This would be a definition that takes into account the impact of the move, rather than just the distance, and is consistent with the best interests of the child being the “paramount consideration, but not the sole consideration”.³³

³⁰ The Family Law Council recognises that the challenges will be greater in more remote areas of Australia where there may be no public transport, where at certain times of the year people get flooded in or the only way to reach the area is to fly in on a private aircraft.

³¹ The Act is discussed in more detail in chapter 4 of this paper.

³² Family Law Council, *Relocation Discussion Paper* at [2.11].

³³ This concept is explained fully in chapter 4 of this paper.

2.37 The discussion paper posed the following consultation question in relation to the legal definition of relocation:

Consultation question

If the Family Law Act was to refer to “relocation”, it is likely to be necessary to define this term. The question then arises as to how would relocation be defined for this purpose?

2.38 Submissions received by the Council on this consultation question were generally in favour of the Family Law Act providing a definition of “relocation”. There were differing views about the formulation of a definition. Before considering these, the few submissions that were specifically opposed to defining relocation will be outlined.

Submissions against defining relocation

2.39 The Castan Centre for Human Rights Law stated that a definition of relocation would “serve no clear purpose”. The Centre believes that treating relocation matters as “parenting orders” within the meaning of section 64B is appropriate and that such cases would not benefit from being classified as a distinct category. The National Network for Indigenous Women’s Legal Services was similarly opposed to a definition, fearing this would marginalise the particular needs of Indigenous children. It cautioned that “one size does not fit all” and that it is important to take into account how a proposed relocation will affect Aboriginal children, their family lifestyle and social structure of the present and future.

2.40 The Chief Justice of the Family Court of Australia queried whether it would be necessary to define relocation, even if specific provisions were included in the Family Law Act and cited an unreported decision of Justice Faulks where he said:

It is an interesting definitional question as to whether children’s cases involving a proposal that they should be living about an hour and a half away from one parent or the other should properly be described as “relocation cases” given that in Sydney it would be feasible for the children to be living with their mother in the southern suburbs or with their father in the northern and spend a longer time getting between their parents than they would in travelling between Canberra, and in this case, G [township].

Nevertheless, the case was conducted at least in part on the basis that it was a relocation case and it is appropriate in those circumstances that I should approach the matter in accordance with the directions of the Full Court until such time as the Full Court determines that there are some matters which are not relocation cases when they simply involve the re-accommodation of one parent or the other.³⁴

2.41 It was noted that “neither the Full Court nor the High Court has been called upon to address the issue of the distinction between a ‘relocation’ and a ‘reaccommodation’”.³⁵

³⁴ Unreported, Family Court of Australia [2001] Fam CA 28 (8 February 2001).

³⁵ Submission from the Chief Justice, Family Court of Australia at 8.

Submissions in favour of defining relocation

2.42 Most submissions were in favour of relocation being defined. Most submissions also agreed that the definition should not be based on distance. The Human Rights and Equal Opportunity Commission made the point that if there was a definition, it should be based not on distance per se, but on the *impact* of the distance and relocation on children and their parents. This was echoed in the suggested definition from the Shared Parenting Council of Australia that relocation should be defined “in terms of the effect on children, particularly young children, who are affected by travel of 40–60 minutes or more per contact visit”. This was also the view expressed by Mr Sean Van Gorp.

2.43 Family Services Australia believes a definition should take account of a range of factors in addition to distance. It believes that a focus on the difficulty experienced by a child in spending time with a parent does not address the issue of when the non-resident parent relocates, and “places a somewhat unreasonable expectation on one parent in relation to ensuring that a child maintains contact with another parent who has moved away”. Family Services Australia therefore advocates a definition that reflects an understanding that a child’s move will result in significant changes to the child’s environment, social and emotional connections, education and lifestyle.

2.44 Of the respondents who thought there should be a definition, most broadly agreed with the formulation proposed in the discussion paper, namely that relocation is: **“a move which will result in changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent”**.³⁶

2.45 Women’s Legal Services Australia consider that a definition which takes into account the effect of the move in maintaining contact would be consistent with the definition of “major long-term issues” in the Shared Parental Responsibility Act mentioned above. The Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd stated that a transitory lifestyle is culturally entrenched in many Aboriginal and Torres Strait Islander people, and that the definition of relocation should be able to encompass a wide range of factual situations. They supported the definition in the discussion paper.

2.46 Some submissions suggested a few variations to the definition proposed in the discussion paper. For example, Centacare Sydney suggested adding to this definition the need to spend time with not only a parent but also “other relative”. The ACT Law Society similarly suggested adding “or other significant family member” to the end of the proposed definition. The Murray Mallee Community Legal Service said the suggested definition should be modified to read “a change to a child’s living arrangements that make it significantly **and substantially** more difficult for the child to **have contact** with a parent”.

2.47 The Chief Justice of the Family Court of Australia submitted that if this definition was to be recommended, it could be aligned with the amendments in the Shared Parental Responsibility Act by phrasing it as: “changes to the child’s living arrangements that make it significantly more difficult for the child to have a **meaningful relationship with one parent**”.

³⁶ Family Law Council, *Relocation Discussion Paper* at [2.11].

2.48 A few submissions agreed there should be a definition of relocation, but disagreed with the definition proposed in the discussion paper. The Victorian Department of Human Services suggested: “Relocation occurs when one parent changes their residence and thereby renders an existing or potential residence or contact arrangement or order impractical or inconsistent with the child’s best interests”. The submission from the Department of Family and Community Services and Indigenous Affairs suggested that relocation should be “defined in terms of the creation of significantly increased barriers to contact”.

2.49 Ms Donna Cooper, a lecturer from the Queensland University of Technology, suggested that the definition proposed by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report on the provisions of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 should be adopted, namely: “relocation is where a parent proposes to change the residence of a child in a way that would significantly impact upon the child’s ability to...reside regularly with the other parent and extended family...[and] spend time regularly with the other parent and extended family”.³⁷

Council’s view

2.50 Most submissions that addressed this consultation question agreed that a definition of relocation was warranted, and most also agreed in broad terms with the Council’s proposed definition. This definition makes clear that it is changes to existing arrangements that are important, rather than distance.

2.51 Council has concluded that if legislative provisions relating to relocation are added to the Family Law Act, a definition of relocation should also be added to ensure it is clear when those legislative provisions are triggered. This issue is revisited in chapter 6 where recommended changes to the law on relocation are discussed.

³⁷ This recommendation is discussed in more detail in chapter 6 of the report.

3. The impact of relocation

3.1 This chapter of the report considers the impact of relocation:

- on children
- on parents, and
- on others (including children who are not the subject of the order, new partners, grandparents and other relatives).

The impact of relocation on children

3.2 The impact of relocation on children will vary, depending on the age and personality of the child and the distance of the move. For example, a move within the same suburb may have minimal impact on the child's schooling, extra-curricula activities and contact with friends and relatives. A move to another state within Australia will mean they have to start attending a new school and make new friends. They may also have to change their extra-curricular activities. If the relocation is to another country, in addition to the changes involved with an interstate move, the child may be faced with learning a new language, learning about a different culture, as well as living in a different climate.

3.3 As Family Services Australia put it in their submission:

the issue of relocation of children resulting in significant changes to their living arrangements is complex. It involves not only a possible decrease in the time that a child might spend with a parent, but also the potential for a child to be obliged to learn about a new environment, to establish new social support systems and, sometimes, to change his or her self-view to accommodate new experiences and situations.³⁸

3.4 A clear issue raised by the submissions was the effect of the relocation on children's ability to maintain their cultural connections, particularly for Aboriginal and Torres Strait Islander children. The Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd outlined that it can be very difficult for a child to maintain connection with their culture after separation. This is due to the cost of travel and the "transitory lifestyle" of some Aboriginal and Torres Strait Islander people.

3.5 Cultural connection is not only important for Aboriginal and Torres Strait Islander children. A confidential submission raised the fact that if a proposed international relocation is not allowed by the court, the child will miss out on developing or maintaining their cultural ties with that other country, as well as contact with extended family in that country.

³⁸ Submission from Family Services Australia at 3.

Social science research on the impact of relocation on children

3.6 In relocation cases, the court has to decide whether or not to prevent a residence parent from relocating with the child if that relocation would affect the child's contact with their other parent. The court's paramount consideration when making this decision is the child's best interests (section 65E of the Family Law Act). However, determining "best interests" is difficult. There is little research available to assist the court in understanding the impact on a child of its decision either to allow or refuse the relocation.³⁹

Social science controversy in the United States of America

3.7 The limited amount of social science research that there is on the impact of relocation generally comes from North America. Particularly useful material has emerged from debates in the Californian Supreme Court by way of amici curiae briefs (which are written submissions handed to the court by an interested person referred to as a "friend of the court").

3.8 The Californian courts receive expert reports to ensure that the latest research involving children and the effects of relocation can be noted in each case to help the court ensure the best interests of the child are protected. While the court recognises that each case is different, the court also recognises that psychological research may be an invaluable tool for parties and the court to use when hearing relocation cases. Some of the different areas of studies that may be significant in relocation cases include

the influence of mothers and fathers on the child's psychological development; the effect of parental absence; the impact of divorce; the effects of father custody and joint custody; the effects of remarriage; and the impact of relocation on children in intact and divorced families.⁴⁰

3.9 In deciding the case of *In re Marriage of Burgess*⁴¹ an amici curiae brief was provided by Dr Judith Wallerstein and five other health professionals.⁴² The focus of Wallerstein et al is the relationship of the child with the custodial parent. Wallerstein and Tanke write "all of our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years. When courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent"⁴³.

3.10 Wallerstein et al argued that there is no evidence that the amount of time spent with the non-primary carer throughout the child's developmental years is significantly related to

³⁹ K. Waldron, 'A review of social science research on post-divorce relocation' (2005) 19 *Journal of the American Academy of Matrimonial Lawyers* 337 at 342

⁴⁰ R. Warshak, 'Social Science and Children's Best Interests in Relocation Cases: *Burgess* Revisited' (2000) 34 *Family Law Quarterly* 1 at 84.

⁴¹ *In re Marriage of Burgess* (1996) 13 Cal 4th 25.

⁴² J. Wallerstein, *Amica Curia Brief of Dr. Judith S. Wallerstein, PhD*, filed in Cause No. S046116. This brief was adapted into a journal article – J. Wallerstein & T. Tanke, 'To move or not to move: psychological and legal considerations in the relocation of children following divorce' (1996) 30(2) *Family Law Quarterly* 305.

⁴³ *Ibid* at 311.

the child's adjustment.⁴⁴ The development and adjustment of the child is primarily related to a close and stable relationship with the primary carer.

3.11 This may be contrasted with the amici curiae brief by Warshak, Braver, Kelly and Bray et al⁴⁵ filed in the case of *In re Marriage of Lamusga*.⁴⁶ The Warshak et al brief argues that Wallerstein et al's brief did not take into account the large amount of research that suggests children naturally develop close attachments to both parents and that it is in the child's best interests for both relationships to be maintained.⁴⁷

3.12 The authors cite a study that concluded that a child's welfare is not dependent on the frequency of visits by the non-primary carer but the type of contact that is experienced. Therefore, for meaningful involvement in the child's life the non-primary carer needs to play an active role in the child's everyday life. However this is unlikely to happen if the child is relocated to a different community.⁴⁸

3.13 In a review of social science research on post-divorce relocation, Waldron notes that the effect of relocation on a child will vary according to the child's age.⁴⁹ The risk factors for children change as their level of parental attachment shifts and they develop more social bonds outside the home. Other researchers have made similar observations.⁵⁰ Some submissions received by the Family Law Council cited these studies about the different impacts of relocation on children of different ages and urged against allowing very young children to be separated from a parent for even relatively short periods.⁵¹

Australian social science research

3.14 The discussion paper posed the following consultation question in relation to Australian social science evidence on the effects of relocation:

Consultation question

Are you aware of any Australian social science research that should be taken into account in the development of the law in Australia?

3.15 Four responses⁵² referred to the Australian Institute of Family Studies report titled *Parent-child contact and post-separation parenting arrangements*. That report was referred to above in chapter 2 of this report. In summary, the report focuses on the pros and

⁴⁴ *Ibid* at 312.

⁴⁵ R. Warshak, S. Braver, J. Kelly, J. Bray et al, *Amici Curiae Brief on Behalf of Lamusga Children*, filed in Cause No. S107355.

⁴⁶ *In re Marriage of Lamusga* (2002) Unpub. For the Supreme Court decision, see *LaMusga v. LaMusga*, 32 Cal. 4th 1072 (2004).

⁴⁷ *Ibid*.

⁴⁸ C. Winquist Nord, D. Brimhall and J. West, *Fathers' Involvement in Their Children's Schools* (1997) US Department of Education, National Centre for Education Statistics.

⁴⁹ Waldron, above n 39 at 348.

⁵⁰ J. Kelly & M. Lamb, 'Developmental issues in relocation cases involving young children: when, whether and how?' (2003) 17(2) *Journal of Family Psychology* 193

⁵¹ Submission from Mrs Kay Hull MP at 1; submission from Relationships Australia at 2.

⁵² From the Association of Children's Welfare Agencies, the Department of Family and Community Services and Indigenous Affairs, Ms Donna Cooper and the Castan Centre for Human Rights Law.

cons of the different post-separation parenting arrangements that exist, including 50/50 care (the rarest arrangement), little or no contact (about 30% of cases), holiday-only contact, daytime-only contact and “standard” or 80/20 contact (the most common form of post-separation parenting arrangement). The report is based on interviews with 54 separated parents. The report stresses that given the small scale of the study, its observations should be taken as “insights” rather than concrete conclusions. It was found that higher levels of contact appeared to be associated with lower levels of inter-parental conflict, lower rates of repartnering, less physical distance between parents’ households, and higher levels of financial resources.⁵³

3.16 Ms Donna Cooper argues that the findings of this report “support the contention that the court should make decisions which ensure that children can continue to have a close and meaningful relationship with both parents, where possible. The findings also emphasise the importance of the geographical proximity of the child to both parents where possible”.⁵⁴

3.17 The Aboriginal Legal Service of Western Australia submitted that social science research (including, but not limited to, the Stolen Generations Inquiry⁵⁵) about the cultural needs of Aboriginal and Torres Strait Islander children, particularly in respect of identity, should be taken into account in the development of Australia’s law.

3.18 A couple of submissions referred to research on family violence and abuse, including national, State and Territory crime statistics and research by the Australian Domestic and Family Violence Clearinghouse.

3.19 No other specific social science research was identified in the submissions. However, at least two major Australian studies, both funded by the Australian Research Council, are currently underway which will provide greater insight into the impact of relocation on children.

3.20 The first of these is being conducted by Dr Juliet Behrens from the Australian National University, with the assistance of Dr Bruce Smyth, of the Australian Institute of Family Studies. The study is focusing on the experiences of parents and children after Family Court decisions about relocation. The project team provides the following synopsis of their research.

The Family Court often decides whether to allow a parent to relocate with children despite opposition from the other parent. A recent parliamentary review of the family law system lamented the lack of research about the aftermath of decisions about children. This project will begin to fill this gap by exploring experiences after relocation decisions. Interviews will be conducted with affected parents and, importantly, children. The resulting analysis will inform future decision-making on relocation after separation. It will also contribute to the debate about the development of a more flexible and responsive family law system.⁵⁶

⁵³ Smyth, above n 23 at xii.

⁵⁴ Submission from Ms Donna Cooper at 6.

⁵⁵ Human Rights and Equal Opportunity Commission, *Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) Commonwealth of Australia.

⁵⁶ Dr Bruce Smyth, personal communication, 27 March 2006.

3.21 The other study is being conducted by Professor Patrick Parkinson, Associate Professor Judy Cashmore and the Honourable Richard Chisholm. It is believed to be the world's first longitudinal prospective study. The researchers will look at recently resolved cases, and then follow them up over the next two years. They will consider issues such as the way parenting arrangements have developed, psychological measures of the wellbeing of children and parents, and views of the children. It is planned to be an international study, with a New Zealand team conducting a parallel study. Participants from the United Kingdom will also be recruited.

3.22 The aims of the study are:

- to examine parents' and children's experience of the outcomes of relocation disputes in the three to six months after a relocation dispute has been resolved and then about 18 months after the relocation
- to examine what factors are associated with the successful adaptation of children to relocation a substantial distance from the non-residence parent, and what factors are associated with problems in adaptation
- to determine what patterns of contact develop after relocation
- to examine how close to and involved with their non-residence parent the children are after relocation
- to examine the effects of a decision not to allow relocation on the relationship between the parents and the relationship of each of them with the children, and
- to examine (in the fully litigated cases) the accuracy of predictions made by the courts about the likely consequences for parents and children of permitting or refusing the proposed relocation.⁵⁷

3.23 The findings of these two research projects are likely to be of significant assistance to relocation policy-makers in the future. However, the results of these studies, which have only just begun, are unlikely to be available for a significant time. Therefore it may not be possible to wait for the results of this research before the law is amended. Council instead recommends that, if changes are made to relocation law as a result of the present report, those changes should be reviewed when the results of these two important studies become available.

Recommendation 1

If changes are made to relocation law as a result of Council's report, any changes should be reviewed when the results of the Australian social science research currently underway become available.

⁵⁷ Professor Patrick Parkinson, personal communication, 24 March 2006.

The impact of relocation on parents

3.24 It is not only children who are affected by a decision to relocate. Both parents also have a significant interest in the outcome of the court's decision. The current approach in Australia is to treat the child's best interests as "the paramount consideration, but not the sole consideration".⁵⁸ The importance of weighing other factors affecting the parents is acknowledged. Although he was in dissent in *U v U*, Kirby J's comments on the importance of considering parents' needs are apposite:

The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child.⁵⁹

3.25 Two issues affecting parents considered below are the potential impact on their freedom of movement by a relocation order, and the nature of the obligations imposed on them by parenting orders.

3.26 Like many other areas of family law, the law governing relocation does not have gender neutral impacts. There is clear evidence that the majority of residence parents are mothers. The Australian Bureau of Statistics Family Characteristics Survey in 2003 found:

[t]here were 1.1 million children aged 0–17 years in 2003 (23% of all children in this age group) who had a natural parent living elsewhere. Of these children, 76% lived in one parent families, 13% in step families and 9% in blended families. Children were more likely to live with their mother than their father after parents separate. The survey found that in 84% of cases it was the father who was the natural parent living elsewhere.⁶⁰

3.27 It is generally the mother whose proposed relocation is challenged in court. For example, in the empirical study by Easteal, Behrens and Young of relocation decisions made in Canberra and Perth between July 1997 and December 1998, of the 38 cases that proceeded to judgment, 36 of the movers were women.⁶¹ In 63 of the 70 applications (90%) in the Family Court of Western Australia in 2000–06, the mother was the residence parent.⁶²

3.28 Given it is generally the mother whose movement is scrutinised, Behrens writes that "restrictions on relocation operate unfairly against the person who is likely to be providing the majority of care to a child. In doing so, they compound the social and economic disadvantages that accompany the provision of care, particularly where the caregiver is a woman".⁶³

⁵⁸ *AMS v AIF and AIF v AMS* (1999) 199 CLR 160 per Kirby J at 207 [143] and per Hayne J at 330 [212].

⁵⁹ *U v U* (2002) 191 ALR 289 at 324 [159].

⁶⁰ Australian Bureau of Statistics 4442.0 *Family Characteristics, Australia*, 22/09/2004.

⁶¹ Easteal et al, above n 18 at 240.

⁶² Statistics cited in the submission from the Chief Justice, Family Court of Australia at 2.

⁶³ J. Behrens, 'U v U: The High Court on relocation' (2003) 27 *Melbourne University Law Review* 572 at 584.

3.29 Some submissions suggested that the law governing relocation may contravene a number of international human rights instruments to which Australia is a signatory. Women's Legal Services Australia outline the relevant conventions as follows.⁶⁴

These include Article 26 of the International Covenant on Civil and Political Rights (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”) and Article 2 of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (“(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”) Article 1 of this latter Convention explicitly recognises that “discrimination” against women may take the form of laws which appear ostensibly not to discriminate between the sexes, but which because of the differences between men and women's lives, have the effect of discriminating against women.⁶⁵

3.30 An alternative view which Council considered is that restrictions on relocation may in fact conform with certain rights protected in these international conventions. For example, recognition and protection of the family unit is articulated in Article 23 of the International Convention on Civil and Political Rights. Article 23(4) requires States Parties to the convention to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children”. Similarly, Article 10(1) of the International Convention on Economic, Social and Cultural Rights states: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”.

3.31 The rights of parents must also be balanced against the rights of children as provided, for example, in the United Nations' Convention on the Rights of the Child, which Australia has ratified. Article 7 of that convention states that the child shall have “as far as possible, the right to know and be cared for by his or her parents”. Particularly relevant to relocation is Article 9(1), which states that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence”.

⁶⁴ Submission from Women's Legal Services Australia at 3. This submission was endorsed by the ACT Women's Legal Centre. A confidential submission also referred to the human rights of mothers.

⁶⁵ Article 1 of CEDAW reads: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Freedom of movement

3.32 One potential effect of a court order is that the mother's freedom of movement, as provided for by Australian law, is restricted.⁶⁶ Section 92 of the *Constitution* provides Australians with a right of freedom of movement, as follows.

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

3.33 Whilst it is not immediately obvious that this section includes movement of people, the High Court confirmed that it does in the decision of *Cole v Whitfield*, when they said “[a] constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom ‘to pass to and fro among the States without burden, hindrance or restriction’: *Gratwick v Johnson*”.⁶⁷

3.34 This section has been established as only applying to domestic movement.⁶⁸

3.35 Freedom of movement was discussed in *U v U*. The majority held simply that “whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child if that were to be adversely affected by a movement of a parent”.⁶⁹ This has led one commentator to conclude that the right of freedom of movement and other reasons for wanting to relocate are to be given “no particular weight”.⁷⁰

3.36 Kirby J (dissenting) outlined his agreement with the English approach that “where the custodial parent herself...has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children”. This hesitation allows for consideration of “factors affecting the carer’s life, such as their freedom of movement, association, employment and personal relationships”.⁷¹ This is not an approach that has been accepted into Australian law.

3.37 A few submissions commented on the freedom of movement issue. Mr Colin Anderson argued in his submission that “[while] in general a person’s freedom to move needs no justification, when people have children they have an obligation to put them first, not themselves”. Similarly, Mr John Bottoms submitted that freedom of movement should be secondary to the child’s right to interact with both parents.

3.38 The Association of Children’s Welfare Agencies agreed that the judiciary should give some thought to the impact of restriction on freedom of movement when considering relocation applications, however the Association was “unable to say how it should be weighted against the best interests of the child, which are the paramount consideration”.⁷²

⁶⁶ Roebuck, above n 26 at 214.

⁶⁷ *Cole v Whitfield* (1945) 70 CLR 1 at 17.

⁶⁸ *ZN & YH & The Child Representative* [2002] FamCA 453 at [34].

⁶⁹ Per Gummow and Callinan JJ in *U v U* (2002) 191 ALR 289 at 308 [89]; (2002) FLC ¶93-112 at 89,090; Gleeson CJ and McHugh and Hayne JJ agreeing.

⁷⁰ Watts, above n 8 at 67.

⁷¹ *U v U* (2002) 191 ALR 289 at 324 [158]; (2002) FLC ¶93-112 at 89,101.

⁷² Submission from the Association of Children’s Welfare Agencies at 3.

3.39 Women’s Legal Services Australia submitted that the gendered impact of any law restricting freedom of movement must be borne in mind. They write “women’s care of and connection to their children means that the courts can demand that they sacrifice their freedom of movement for their children whereas the same expectation is not made of men”.⁷³ Further, they make the point that restricting the movement of primary caregivers will have an inevitable impact on children. Dawn House Women and Children’s Shelter’s submission also raises the effect on the child of restricting a custodial parent’s movement.

3.40 The Family Law Council believes that freedom of movement is an important and relevant factor to consider, but only after the child’s best interests have been ascertained. The issue of freedom of movement is revisited in chapter 6, where Council considers how parents’ needs and interests should be accommodated when relocation decisions are made.

Non-resident parents’ obligations

3.41 As the figures quoted earlier from the Family Characteristics Survey show, it is generally fathers who are non-resident parents. Also noted above was the fact that most relocation matters are prompted by a residence mother’s decision to relocate with the child. But what happens when a non-resident father wishes to relocate? Must he also obtain permission to do so? This raises the question whether his contact orders are mandatory or permissive. If a court order states that contact is to occur with the non-resident parent at particular times, does the non-resident parent *have* to exercise contact at those particular times?

3.42 In *B and B* the Full Court said:

That issue would ordinarily arise when a contact parent seeks to relocate and applied to the Court to vary the existing contact order. If the Court refused to do so because it considered that it would be contrary to the children’s best interests to have contact reduced, it may do so by refusing that application, and this may place the contact parent under an obligation to adhere to the existing order. It may also arise in other ways – for example, an application by the residence parent for contact orders to be made in particular terms which may be inconsistent with relocation by the contact parent. The use of injunctions is much less clear because it would raise the issue whether the best interests of the children is the paramount consideration in such applications: see s 68B.

In any of those eventualities it is possible that the failure of the contact parent to comply with those orders may amount to a breach of the orders in respect of which proceedings by way of enforcement could be brought.⁷⁴

3.43 This passage indicates that it is possible for a contact order to create an obligation on the non-resident parent to exercise contact. The passage is obiter, and there appear to be no decisions on the point. Typically contact orders are phrased in a way that does not precisely specify whether the non-resident parent has such an obligation, and different views have

⁷³ Submission from Women’s Legal Services Australia at 2.

⁷⁴ *B and B* (1997) 21 Fam LR 676 at 750; (1997) FLC ¶92-755 at 84,234.

been expressed on the matter.⁷⁵ Dickey argued that contact orders are “permissive”, suggesting that they create no such duty, while Monaghan argued the contrary.⁷⁶

3.44 Council is not aware of a successful contravention application to have been made on the basis that the non-resident parent failed to exercise contact as provided in the contact order. It is likely that two beliefs contribute to this situation: the belief that contact orders create no such obligation and the belief that in practice it would be futile to seek to require an unwilling parent to exercise contact. Although the first belief appears contrary to the dicta in *B and B*, the second belief has some basis in dicta from the Full Court. In *B and B* the Full Court considered that even if an application were to be brought by a residence parent to enforce contact, they “think it unlikely that in the exercise of discretion a court would do so”.⁷⁷

3.45 To similar effect, in *Schorel v Elms*, the Full Court said:

you cannot force a parent to see a child that they do not want to see. The appropriate remedy for the consistent failure of a parent to avail themselves of the benefits of a contact order is not to be found in seeking to punish the parent or force the contact upon them but rather to relieve the residence parent of non-compliance with the order by discharging, suspending or varying the order.⁷⁸

3.46 Monaghan, however, points out that in *B and B* the Full Court indicated that there might be exceptions, and in *Schorel v Elms* the Full Court was considering “persistent failure”, and argues that enforcement of the non-resident parent’s obligation might be beneficial in some situations involving occasional failure to exercise contact.⁷⁹

3.47 The discussion paper asked the following consultation question.

Consultation question

Do you think that the Family Law Act should be amended to provide that it is necessary for a contact parent to apply to a court to amend the contact orders if the residence parent opposes the contact parent’s relocation?

3.48 The Association of Children’s Welfare Agencies suggests that residence parents should not be held in breach of their parenting order if compliance with the order is impossible due to the non-resident parent’s relocation. It suggests that, in such cases, the order could “automatically” be varied by the court on the basis of a parent’s submission, without significant legal costs being incurred.⁸⁰

⁷⁵ A. Dickey, ‘Mandatory parenting orders’ (1998) 72 *Australian Law Journal* 20; D. Monaghan ‘Can contact parents contravene a contact order?’ (1999) 73 *Australian Law Journal* 20.

⁷⁶ *Ibid.*

⁷⁷ *B and B* (1997) 21 Fam LR 676 at 750 [10.64]; (1997) FLC ¶92-755 at 84,234.

⁷⁸ *Schorel v Elm* (unreported, Appeal No SA 13 of 1998, 29 June 1998) cited by Monaghan, above n 75 at 20.

⁷⁹ Monaghan, above n 75 at 22.

⁸⁰ Submission from the Association of Children’s Welfare Agencies at 3.

3.49 The Castan Centre for Human Rights Law was opposed to the idea of an amendment requiring non-resident parents to seek a change in parenting orders when they wish to relocate. The Centre’s submission argues that it “is highly questionable whether the court should impose on a parent who, for various reasons, may not want to or is unable to have contact with his or her child the requirement to do so. It cannot be regarded as being in the child’s best interests to force an unwilling parent to exercise contact”.⁸¹ In addition, they suggest such a requirement would be almost impossible to enforce and result in an increase in litigation.

3.50 The Murray Mallee Community Legal Service was also opposed to any such amendment, noting that requiring a non-resident parent to access the court whenever their relocation is opposed by the residence parent would create enormous difficulties for non-resident parents from disadvantaged backgrounds who do not have the resources or skills necessary to do this.⁸²

3.51 Mrs Kay Hull MP believes that a non-resident parent should not be able to relocate if this will create difficulty for a non-resident child to have the same meaningful contact with that non-resident parent,⁸³ which would negate the need to apply to vary the contact orders. The Department of Family and Community Services and Indigenous Affairs suggested that “a resident parent should not be deemed to be in breach of existing contact orders where travel for changeover becomes unreasonable following a contact parent’s relocation”.⁸⁴

3.52 The Shared Parenting Council of Australia, Dawn House Women and Children’s Shelter, National Legal Aid and the ACT Law Society agree that the Family Law Act should be amended to oblige parents to amend their contact orders. Centacare Sydney agreed that non-resident parents ought to seek permission to relocate, however prior to lodging an application there should be an obligation on both parties “to attempt to resolve the change to the contact arrangements through a primary dispute resolution method”.⁸⁵

3.53 Ms Donna Cooper argues that the presumption of equal shared parental responsibility being introduced into the Family Law Act requires both parents to be involved in making joint decisions on major long-term issues. She suggests it “is clear from draft subsection 4(1) that a major long-term issue involves a move which makes it ‘significantly more difficult for a child to spend time with the other parent’”.⁸⁶ The Law Society of New South Wales equally thought that in light of the amendments in the Shared Parental Responsibility Act “both parents should have the same responsibility to seek agreement or otherwise obtain orders varying the arrangements for spending time”.⁸⁷

⁸¹ Submission from the Castan Centre for Human Rights Law at 9–10.

⁸² Submission from the Murray Mallee Community Legal Service at 6.

⁸³ Submission from Mrs Kay Hull MP at 2.

⁸⁴ Submission from the Department of Family and Community Services and Indigenous Affairs at 4.

⁸⁵ Submission from Centacare Sydney at [2.4].

⁸⁶ Submission from Ms Donna Cooper at 6.

⁸⁷ Submission from Law Society of New South Wales at 3.

Council's view

3.54 The majority of the submissions are in favour of imposing an obligation on non-resident parents who wish to relocate to seek to vary their parenting orders. It should also be noted that subsection 60CC(4) provides that a court can take into account the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, to spend time with the child. It follows that failure to spend time with a child pursuant to court orders is a reason to relieve the other parent of the obligation, also referred to in subsection (4), to facilitate that contact.

3.55 Council is of the view that there should be a stronger emphasis on the obligations of *both* parents to maintain a meaningful relationship with their child. There should be a cultural shift in attitude, to reinforce that repeated breaches of parenting orders by non-resident parents are just as serious as repeated breaches by residence parents. This view was strongly supported by the submissions received by Council.

3.56 Council believes that if parents are serious about seeking a parenting order, they should abide by that order, whatever the type of obligation it imposes. If parents wish to have a more flexible arrangement, they should not seek a parenting order from the court, but instead formulate their own parenting plan. Council is persuaded by the view that parenting orders should be considered mandatory, not permissive. Consequences should flow from breaches of parenting orders.

3.57 Council proposes that provisions in the Family Law Act could be amended to reinforce the idea of orders imposing obligations and it would be consistent with the government's reforms in the Shared Parental Responsibility Act to do so. Specifically, sections 65N and 70NAE could be amended towards this end.

3.58 Section 65N specifies the general obligations created by a contact order. Council proposes that a new subsection 65N(2) be inserted in the Act which reads "A parenting order that deals with whom the child is to spend time, imposes an obligation to maintain a relationship with a child in accordance with the terms of the order". [Consequently, the current subsection (2) should become subsection (3).]

3.59 Section 70NAE, enacted by the Shared Parental Responsibility Act, specifies what reasonable excuses are for contravening an order. Council proposes that a further subsection be added to section 70NAE giving the respondent a reasonable excuse for contravention, which is that "the applicant has repeatedly failed to exercise his or her responsibilities in accordance with the order". In other words, the fact that a non-resident parent has repeatedly failed to turn up at arranged times and exercise contact will provide the residence parent with a reasonable excuse for not complying with the contact order. In effect, the orders for contact will no longer be enforceable against the resident parent.

3.60 These amendments will create more serious consequences for parents who breach contact orders. They will not affect a parent's freedom of movement. Nor will they oblige a parent to exercise contact with the child if he or she is unwilling to do so. It is recognised that forcing an unwilling parent to have contact with a child is undesirable. However, these changes will limit a parent's ability to enforce a parenting order against the other parent if they themselves have breached that order.

3.61 Council considered that such a change may result in an increase in litigation. However, as the compulsory dispute resolution provisions are phased in, most contravention order applicants will go to a Family Relationship Centre before going to court. Those who do go to court are likely to be ordered to attend a post-separation parenting order program (for less serious contraventions without a reasonable excuse) and this will provide an opportunity to get professional assistance.

3.62 A child is adversely affected no matter which parent breaches the parenting order. In the Family Law Council's opinion, breaches by either party should be equally discouraged.

Recommendation 2

Council recommends two changes to reinforce that orders impose obligations, as follows.

1. Insert new subsection 65N(2) which reads "A parenting order that deals with whom the child is to spend time, imposes an obligation to maintain a relationship with a child in accordance with the terms of the order".
2. Add to section 70NAE a further subsection giving the respondent a reasonable excuse for contravention, which is that "the applicant has repeatedly failed to exercise his or her responsibilities in accordance with the order".

Notice requirement

3.63 In the discussion paper it was noted that Article 2 of the American Academy of Matrimonial Lawyers' Model Relocation Act contains provisions requiring both adults with custody or visitation rights to give notice to the other party about their intended relocation in a way that is almost identical.⁸⁸ This could be additional to a requirement to seeking a variation of the orders.

⁸⁸ § 202. Notice of Intended Change of Residence Address of Adult

Except as provided by Section 205, an adult entitled to [visitation with] a child shall notify every other person entitled to [custody of or visitation with] the child of an intended change in the primary residence address of the adult as required by Section 203.

§ 203. Mailing Notice of Proposed Relocation or Intended Change of Residence Address

(a) Except as provided by Section 205, notice of a proposed relocation of the principal residence of a child or notice of an intended change of the primary residence address of an adult as provided in this article must be given by:

- (1) [first class mail] to the last known address of the person to be notified;
- (2) no later than:
 - (A) the [60th] day before the date of the intended move or proposed relocation; or
 - (B) the [10th] day after the date that the person knows the information required to be furnished by Subsection (b), if the person did not know and could not reasonably have known the information in sufficient time to comply with [60] day notice, and it is not reasonably possible to extend the time for relocation of the child.

(b) Except as provided by Section 205, the following information, if available, must be included with the notice of intended relocation of the child or change of primary residence of an adult:

- (1) the intended new residence, including the specific address, if known;
- (2) the mailing address, if not the same;
- (3) the home telephone number, if known;
- (4) the date of the intended move or proposed relocation;
- (5) a brief statement of the specific reasons for the proposed relocation of a child, if applicable;

3.64 Some submissions recommended a notice requirement. The Association of Children’s Welfare Agencies state that “it seems reasonable that parents should advise each other formally of proposed relocation, unless it is necessary for the safety of either parent or the child for that information not to be provided”. The Shared Parenting Council of Australia wrote “common courtesy would suggest that advance notice should be provided in writing between the parents for practical reasons and so that parents have the peace of mind as to where it is proposed their children will reside, no matter how much time they would be spending in either parent’s care and residence”.⁸⁹

3.65 Council agrees that it is desirable for a parent wishing to relocate to let the other parent know. Council understands it is best practice for lawyers to advise their clients to notify the other parent of their intention to move.

3.66 This issue is dealt with by the Shared Parental Responsibility Act. A key change in Schedule 1 of the Act is a presumption of equal shared parental responsibility when making parenting orders (section 61DA). The presumption will not apply in certain circumstances. The effect of an order that provides for shared parental responsibility will be that decisions about a “major long-term issue” are required to be made jointly (section 65DAC). “Major long-term issue” is defined as including (among other things) “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent” (inserted into subsection 4(1)).

3.67 Therefore, Council does not consider that any additional legislative provision is required.

The impact of relocation on others

3.68 A proposed relocation brings to the forefront all the social and economic connections people have, which may be with more than one place. It is not only the interests of the parent who wants to move which have to be weighed in the balance with the child’s interests. It could also be the interests of grandparents and other extended family members, the residence parent’s new partner or their children from another relationship.

3.69 As Family Services Australia put it in their submission, “children are embedded in a system that includes nuclear and extended family members, friends, school communities and sporting and social groups. Members of these sub-systems are also affected when a child moves to a new location”.⁹⁰

3.70 To take just one example – new partners – anecdotal evidence supports the contention that their interests are often an issue in relocation matters. For example, data was provided

(6) a proposal for a revised schedule of [visitation with] the child, if any; and

(7) a warning to the non-relocating parent that an objection to the relocation must be made within [30] days or the relocation will be permitted.

(c) A person required to give notice of a proposed relocation or change of residence address under this section has a continuing duty to provide a change in or addition to the information required by this section as that information becomes known.

⁸⁹ Submission from Shared Parenting Council of Australia at 19.

⁹⁰ Submission from Family Services Australia at 3.

to the Council regarding relocation cases heard between 2000 and 2006 in the Family Court of Western Australia. Of these 70 relocation matters, in at least 26 cases (37%) the involvement of a new partner was a factor.⁹¹ The ACT Women's Legal Centre, which conducted a survey of all the relocation matters it dealt with in 2005, indicates that 12% of the relocation matters it saw were because a new partner needed to relocate.⁹²

3.71 If we bring into play the possibility that the non-resident parent might move to be close again to the residence parent following her relocation, as *U v U* indicates, then we have another set of interests to take into account. His employer, and its interests in his services in the present location, his new partner, her children and her employer's interests, and the future of their relationship if he decides to move but she cannot. There may also be financial issues, since relocation from, say, Kalgoorlie to Perth raises a whole lot of major financial issues in being able to enter the housing market in Perth on the basis of the proceeds of sale from the property in Kalgoorlie. A move from an existing employer to a new one may also risk loss of seniority and prospects for advancement. A relevant factor, therefore, is whether it is reasonable to expect the non-resident parent to sacrifice his economic interests to support the relocation of the other parent.

3.72 A final factor is whether relocation could affect the interests of other children. For example, if the question is raised whether the non-resident parent should relocate with the residence parent, then it may be necessary also to consider his contact with a child from a previous relationship where that contact might be affected by his relocation.

3.73 Below is a discussion of how relocation can affect the interests of other children, as well as the interests of new partners, grandparents and other relatives.

Other children

3.74 In *A v A: Relocation Approach* the impact of relocation on contact with a half-sibling was considered. The mother proposed to relocate to Portugal with the child of the marriage, M. She had another child, C, from a previous marriage. At the time of the trial, C was living with her father in Portugal. The mother had remarried. The Full Court of the Family Court held that the trial judge had placed too much emphasis on M's contact with her father in Sydney. The trial judge had not given sufficient consideration to "the child's relationship and prospects for contact with C"⁹³ under subsection 68F(2).⁹⁴

3.75 The court's willingness to consider the interests of other children has also been demonstrated in non-relocation matters. For example, in *MQ and A*,⁹⁵ an international child abduction matter, the half-sister (A) of the abducted child (S) was a party to proceedings appealing the decision to return the child to the United States. One of the issues considered by the court was whether the half-sister's application for contact with the child brought into play the paramountcy provisions of section 65E of the Family Law Act, so as to require the court to give those matters paramountcy over the orders that would require the return of the child to the United States. The Full Court noted that:

⁹¹ Martin, above n 21.

⁹² Submission from the Women's Legal Centre (ACT) at 1.

⁹³ *A v A: Relocation Approach* (2000) FLC ¶93-035 at 87,553-54.

⁹⁴ The matter was remitted for re-hearing.

⁹⁵ *MQ and A (By Her Next Friend) and Department of Community Services* [2005] FamCA 843

there may be circumstances in which a sibling can bring an application for a parenting order and accordingly [the Full Court does] not wish to be seen to endorse the view...that [the half-sister] could not be a person concerned with [the child's] care, welfare and development.⁹⁶

3.76 However, the court went on to note that the paramountcy principle as it applied to the applicant sister must be subservient to the paramountcy principle as it applied to the child the subject of the proceedings. Therefore, “as S is the subject of the orders sought in A’s application any orders made must focus on S’s best interests rather than A’s if there is any conflict in those interests”.⁹⁷ The half-sister’s application was refused.

New partners

3.77 Repartnering is often a catalyst for the decision to relocate, and the interests of the new partner may sometimes be a relevant factor in deciding a relocation case.

3.78 In *Bolitho and Cohen*⁹⁸ the children’s relationship with a new partner was a relevant factor. The father was permitted to relocate to Japan with his children, where they would live with him and his new wife. He had employment in Japan as a wine marketing consultant.⁹⁹ One of the factors that was relevant to the decision was that the children had “a strong and comfortable bond with the father and the new wife”.¹⁰⁰

3.79 The decision in *ZH & YH and The Child Representative*¹⁰¹ exemplifies the complexity of children’s contact with their extended family and a parent’s new partner. At the time of the application the parties were all living in Tasmania. The children were residing with their mother and her new husband. The mother wished to relocate with the children to the United States because her new husband was a citizen of the United States and they wanted to live with his mother.

3.80 The mother did not have any extended family in Tasmania. She had developed “a warm relationship” with her husband’s extended family in Sharon, Massachusetts.¹⁰² The father’s extended family and the children’s friends were in Tasmania. After balancing these factors and the children’s wishes, Nicholson CJ concluded in relation to “the likely effect of separation on the children from their parents or other significant persons”, that the children should remain in Tasmania.¹⁰³

Grandparents and other relatives

3.81 The important role grandparents can play in their grandchildren’s lives was recognised in the *Every picture tells a story* report. The House of Representatives Standing

⁹⁶ *Ibid* at [34].

⁹⁷ *Ibid* at [63].

⁹⁸ *Bolitho and Cohen* (2005) FLC ¶93-224.

⁹⁹ *Ibid* at [5].

¹⁰⁰ *Ibid* at [73].

¹⁰¹ *ZH & YH & The Child Representative* [2002] FamCA 453.

¹⁰² *Ibid* at [55].

¹⁰³ *Ibid* at [145]–[148]

Committee on Family and Community Affairs recommended that the Commonwealth Government:

ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interests of the child, make specific plans for contact with those individuals in the parenting plan.¹⁰⁴

3.82 The Shared Parental Responsibility Act makes specific provision for the interests of grandparents when determining a child’s best interests. Subparagraph 60CC(3)(d)(ii) provides that an additional consideration in determining a child’s best interests is the likely effect on the child of any separation from “any grandparent or other relative of the child...with whom he or she has been living”.

3.83 Subparagraph 60CC(3)(f)(ii) provides that an additional consideration in determining a child’s best interests is the capacity of “any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs”.

3.84 Another amendment of relevance to grandparents is in the Objects provision to Part VII of the Act. Paragraph 60B(2)(b) states that one of the principles underlying the objects of the Part is that “children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)”.

3.85 A new definition of “relative” has been inserted into the general definitions in subsection 4(1) of the Act. It includes step-parents, siblings, half-siblings, grandparents, uncles, aunts, nephews, nieces and cousins. This broad definition is intended to ensure the court takes account of other significant relationships that may be of benefit to a child in making children’s orders.

Taking account of other peoples’ interests

3.86 The discussion paper posed the following consultation question:

Consultation question

Please address how you think the law should take account of the interests of other people affected by relocation decisions.

3.87 A number of submissions expressed a desire for greater emphasis to be given to other people affected by a relocation. For example, Ms Donna Cooper argues that “due to the importance of the child maintaining a relationship with other significant persons such as grandparents...such a consideration should be a mandatory consideration for the court in considering whether to permit the relocation”.¹⁰⁵ The Murray Mallee Community Legal Service suggests that there should be a specified list of factors to consider in relocation cases. One of these factors should be a requirement to consider the interests of any people

¹⁰⁴ House of Representatives Standing Committee on Family and Community Services, above n 1 at 121.

¹⁰⁵ Submission from Ms Donna Cooper at 5.

who are likely to be significantly affected by a relocation decision. The Shared Parenting Council of Australia takes this further and submits that “relocation that seriously delimits the involvement of grandparents and significant others should not be allowed to proceed”.¹⁰⁶

3.88 The Non-Custodial Parents Party’s submission argues that the best interests of the child should be a primary but not the paramount consideration, and that “the rights of the parents and other applicants in the matter [should] stand alongside those of the child”.¹⁰⁷

3.89 The law currently allows consideration to be had of relationships between the child and their grandparents or “other people significant to their care, welfare and development” when determining what decision is in the child’s best interests.¹⁰⁸ The law’s focus is on the *child’s* interest in having a relationship with others rather than other people’s right to a relationship with the child. As already outlined, the Shared Parental Responsibility Act has added more references to grandparents and other relatives.

3.90 Council believes that the current approach (combined with the amendments in the Shared Parental Responsibility Act) is sufficient to take account of the interests of others. This opinion was generally supported by the submissions. The Castan Centre for Human Rights Law, for example, argues that the rights of grandparents and extended family members are well established and are referred to in the new Act.¹⁰⁹ That submission asks: “How many people’s interests are to be permitted to have an impact on the child’s best interests? Where do we draw the line?”

3.91 The submission from Centacare Sydney also acknowledged that people who are significant to the child’s care, welfare and development are captured by provisions in the Family Law Act and the Shared Parental Responsibility Act. The Law Society of New South Wales and the ACT Law Society agreed. The Chief Justice of the Family Court of Australia noted that “any further amendment to the Act in this area would be superfluous and may in fact encourage unnecessary litigation”.¹¹⁰

3.92 A confidential submission expressed the need for the extended family on both sides to be treated equally. Given the difficulty for the law to achieve this goal, the author concludes that the focus should remain on the nuclear family. The submission from the ACT Department of Education “would support less emphasis on, but due consideration of the interest of other people affected by the relocation. The important focus must be on the value the child places on their relationship with significant others”.

3.93 Therefore, in relation to this aspect of the law on relocation, Council believes that no change is necessary. The interests of other people affected by the relocation are already captured by the Family Law Act, including the amendments contained in the Shared Parental Responsibility Act. There are no further amendments to the law required for protecting the child’s interest in maintaining these important relationships with other people.

¹⁰⁶ Submission from the Shared Parenting Council of Australia at 23.

¹⁰⁷ Submission from Non-Custodial Parents Party at 3.

¹⁰⁸ *Family Law Act 1975*, sections 60B(2)(b), 68F(2).

¹⁰⁹ Specifically at sections 60B(2)(b), s 60CC(3)(b)(ii), s 60CC(3)(d)(ii), s 60CC(3)(f)(ii), s 63C(2) and (2A).

¹¹⁰ Submission from the Chief Justice, Family Court of Australia at 15.

4. Current law in Australia

4.1 The previous chapter referred to a number of judgments which considered the relevance of parents' and other people's interests when making relocation decisions. This chapter provides a fuller discussion of the current law on relocation in Australia. Recent changes to the Family Law Act which may affect relocation decision-making are also described. These are the amendments in the Shared Parental Responsibility Act.

Family Law Act provisions

4.2 Part VII of the Family Law Act concerns children. It begins by setting out the object and principles underlying this Part (section 60B). Relevant principles for the purposes of relocation cases are that "children have the right to know and be cared for by both their parents" and "children have a right of contact, on a regular basis, with both their parents".

4.3 Pursuant to section 65D of the Family Law Act, the court has the power to make "such a parenting order as it thinks proper". A parenting order sets out where the child will live (residence) and the contact the child is to have with the non-resident parent. Therefore if one parent wishes to relocate, they may seek to vary the parenting order under subsection 65D(2) to allow for this, especially if the relocation will impact on the contact arrangements.

4.4 The child's best interests are the paramount consideration when the court is deciding whether to make a particular parenting order (section 65E). There are a number of matters which the court must consider when determining what is in the child's best interests. Until 1 July 2006, these are set out in subsection 68F(2) as follows:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

- (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.

Amendments to sections 65E, 68F(2) and 60B

4.5 The Shared Parental Responsibility Act contains numerous amendments which may have an impact on the way relocation decisions are made.

4.6 The content of section 65E (which provides that the best interests of the child are the paramount consideration) is not changed by the Act. The section has been moved so that it follows the objects provision and therefore has become section 60CA.

4.7 Subsection 68F(2) (factors to consider when determining a child's best interests) has been moved, becoming section 60CC. The section has been amended so that the court must consider "primary considerations" and "additional considerations", as follows.

Determining child's best interests

(1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

- (2) The primary considerations are:
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

- (3) Additional considerations are:
- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
 - (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
 - (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
 - (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

- (i) either of his or her parents; or
- (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
- (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
- (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

4.8 The objects provision (s 60B) has also been amended by the Shared Parental Responsibility Act. The section number is unchanged. The new section is as follows.

(1) The objects of this Part are to ensure that the best interests of children are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

- (a) to maintain a connection with that culture; and
- (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

4.9 "Communicating" with a child (referred to in paragraph 2(b) above) would presumably not be limited to face to face communication. There are a number of ways a parent might have contact with a child, such as by telephone, email, webcam or by letter. There is some literature on the new phenomenon of "virtual visitation".¹¹¹

4.10 In new subsection 63C(2), which sets out what a parenting plan might deal with, paragraph (e) refers to "the communication a child is to have with another person or other persons". For this purpose, communication includes (but is not limited to) "communication by (a) letter; and (b) telephone, email or any other electronic means".

4.11 The Shared Parenting Council of Australia submits that "virtual communication" should not be seen as a substitute for physical contact. In contrast, Shefts has written that:

¹¹¹ S. Gottfried, 'Virtual visitation: the wave of the future in communication between children and non-custodial parents in relocation cases' (2002) 36(3) *Family Law Quarterly* 475; K. Shefts, 'Virtual visitation: the next generation of options for parent-child communication' (2002) 36(2) *Family Law Quarterly* 303.

[i]n relocation cases, a virtual visit is the next best thing to being there so that where the court determines that it is in the best interests of the child to move with a parent, virtual visitation is far superior to not communicating or being involved with the children at all.¹¹²

4.12 Council is of the view that communication over the telephone and internet does have a place, but is certainly not sufficient for the child to maintain a relationship with their parent.

Other relevant amendments

4.13 A key change in Schedule 1 of the Shared Parental Responsibility Act is a presumption of equal shared parental responsibility when making parenting orders (section 61DA). The presumption will not apply in certain circumstances. It is proposed that the effect of an order that provides for shared parental responsibility will be that decisions about a “major long-term issue” are required to be made jointly (section 65DAC). “Major long-term issue” is defined as including (among other things) “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent” (inserted into subsection 4(1)).

4.14 Further, where a parenting order provides that the parents are to have equal shared parental responsibility for the child, the court must consider the child spending equal time or substantial and significant time with each parent in certain circumstances (section 65DAA).

4.15 In this context the Shared Parental Responsibility Act seems to presume that face to face contact is required.

For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child’s daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

4.16 At the time of writing this report, the Shared Parental Responsibility Act had been passed by both Houses of Parliament. It is anticipated that the new law will commence on 1 July 2006.

¹¹² Shefts, above n 111 at 305.

Defining “best interests of the child”

4.17 The Family Law Act does not provide a definition of “best interests of the child”. As outlined above, the Act sets out matters the court must consider when determining what is in a child’s best interests. However, while there are matters that may or must be taken into account in considering a child’s best interests in different jurisdictions, definition of the concept itself is seldom attempted. This may be due to the complexity of the concept and the fact that it is not strictly a legal concept, even though it is often a consideration in legal proceedings and appears in different legislation. It is a concept which is difficult to define as it necessarily varies from child to child, even within one family, and it is not constant over time or circumstance even when applied to a particular child.

4.18 Section 5 of New Zealand’s *Care of Children Act 2004* provides some principles which may be useful in spelling out what is best for children. These principles are set out below at 5.27.

4.19 The discussion paper posed the following consultation question in relation to the best interests principle:

Consultation question

Please consider formulating a definition of the “best interests of the child”.

4.20 Most submissions that addressed this question stated it is not necessary to define what “best interests of the child” means, or that, if it is desirable, it is too difficult.

4.21 Of those few submissions that did think a definition of this concept was desirable, there was no agreement about the formulation. The ACT Department of Education, for example, suggested: “[a]nything which impedes upon the rights of the child as stated in the United Nations’ Declaration of the Rights of the Child is against the ‘best interests of the child’”. Other submissions that advocated a definition took a more checklist approach. For example, Ms Donna Cooper, a lecturer at the Queensland University of Technology, proposed a list of mandatory factors the court could consider when determining best interests in the context of relocation and Dawn House Women and Children’s Shelter referred to the checklist in New Zealand’s *Care of Children Act 2004*.

4.22 However, most submissions did not believe a definition would be helpful or appropriate, given the widely differing interests of individual children. The Castan Centre for Human Rights Law wrote that the “common denominator of what constitutes a child’s best interests cannot be restrictive”. The Human Rights and Equal Opportunity Commission wrote:

There is little international jurisprudence to assist in the interpretation of what amounts to the “best interests of the child” and due to the plethora of circumstances that arise, it will be extremely difficult to develop a precise definition...Further, given the wide scope of issues and circumstances that may arise in each individual case, the Commission is concerned that defining the “best interests of the child” may restrict the ambit of the term and limit the important emphasis on examining the individual circumstances of each and every child.

4.23 Quite a few submissions suggested that the factors set out in sections 60B and 68F(2) of the Family Law Act are adequate.¹¹³ Those submissions were of the view that having a set of guiding principles to determine best interests, as the current Act does, is more appropriate than having a single definition.

4.24 The Chief Justice of the Family Court of Australia commented that the concept is “deliberately open-ended” and referred to Justice Carmody’s recent observations.

Best interests are values, not facts, they are not amenable to scientific demonstrations or conclusive proof. The same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. There is not always only one right answer. Sometimes, the least worst situation may be the best available. Most cases are finely balanced with the only option being a choice between two or more imperfect alternatives. Predictions, perceptions, assumptions and even intuition and guesswork can all play a part in search of the best interests solution.¹¹⁴

4.25 Other jurisdictions have adopted a similar approach. For example, the submission from the Victorian Department of Human Services alerted Council to the Victorian Government’s new legislative framework for child, youth and family services in Victoria. Best interest principles have been introduced into the *Children, Youth and Families Act 2005* (Vic) to guide community service organisations, child protection and the Children’s Court to focus on the whole context surrounding the child or young person to ensure the best possible decisions can be made. Rather than providing a definition of “best interests”, the Victorian legislation provides a set of principles the court is to consider in determining whether a decision is in the best interests of the child.

Council’s view

4.26 Council believes that the current legislative approach of looking at a number of factors to determine best interests stresses the complexity of the task without the necessity of defining the concept. Therefore, Council does not think it is necessary for the Family Law Act to be amended to provide a definition of “best interests of the child”. The current framework of factors to consider in sections 60B and 60CC are sufficient for determining whether a decision is in the child’s best interests.

¹¹³ Chief Justice of Family Court of Australia, Association of Children’s Welfare Organisations, Centacare Sydney, Murray Mallee Community Legal Service, ACT Law Society.

¹¹⁴ *W & R* [2006] FamCA 25 (unreported, 30 January 2006) at [54] cited in the submission from the Chief Justice, Family Court of Australia at 9.

Case law principles guiding relocation decisions

4.27 Prior to the *Family Law Amendment Act 1995* (the Reform Act) the welfare of the child was the paramount consideration, but the following principles, summarised succinctly by Kaspiew, were also relevant:

The Full Court in *In the Marriage of Holmes* set out a tripartite test listing factors to be taken into consideration in such cases.¹¹⁵

First, is the application to remove the child from their previous environment bona fide? A negative answer to this would mean the inquiry should proceed no further.

Second, could the court be reasonably satisfied that the custodial parent would comply with access and other orders designed to continue the relationship between the children and the non-custodian? A negative or uncertain answer to this question would not be decisive but would be a “weighty” factor against the application.

Third, what would be the general effect of either an affirmative or negative response to the application? Factors to be taken into account at this stage were: how the children would be affected by less contact with the non-custodial parent, disadvantages to the welfare of the children in the proposed new environment and the genuine wishes of the custodial parent.

In *In the Marriage of Fragomeli* the court enunciated a further principle which has been seen as important in this area; that “a custodian should be left to order his or her own life without interference from the other parent or from the court, so long as he or she does what may be reasonably expected to be done by him or her for the child in all the circumstances”.¹¹⁶

4.28 In the decision in *B and B*,¹¹⁷ the Full Court of the Family Court interpreted the effect of the 1995 amendments, including the new objects provisions. The case involved an application by the mother (the residence parent of the two daughters) to relocate from north Queensland to Victoria to marry a man who had business interests in Victoria and his two children living with him. At trial, Jordan J decided in favour of the mother’s application. On appeal the father and the Attorney-General submitted that the mother could move as long as she did not take the children with her. The Full Court recognised that this was “no choice”, commenting that:

It would be untenable to suggest, as it was in this case, that a parent who had been the primary carer of the children during the five years of the marriage and in the 6½ years since separation would leave her children and relocate elsewhere. That is true of most relocation cases.¹¹⁸

¹¹⁵ *In the marriage of Holmes* (1988) FLC ¶91-918 the mother had applied for custody (as it then was) of the two children and proposed to relocate permanently with them to the United States of America. An order was made granting her custody, but requiring her not to take the children out of Australia. On appeal, the matter was remitted for rehearing.

¹¹⁶ R. Kaspiew, ‘Equal parenting or the effacement of mothers? *B and B* and the Family Law Reform Act 1995 (Cth)’ (1998) 12 *Australian Journal of Family Law* 69 at 74.

¹¹⁷ *B and B* (1997) 21 Fam LR 676; (1997) FLC ¶92-755.

¹¹⁸ *Ibid* at 750 [10.60]; 84,233.

4.29 The Full Court dismissed the father’s appeal and the mother was allowed to relocate. The court made it clear that relocation cases are to be dealt with in the same way as other proceedings under Part VII of the Family Law Act. They outlined the effect of the Reform Act on the inter-relationship between sections 60B, 65E and 68F(2). A judge should regard section 65E as the paramount consideration, then go through each of the factors in subsection 68F(2) and discuss the weight to be given to each. This should be followed by discussing the factors in section 60B “which appear relevant or may guide that exercise”.¹¹⁹

4.30 Provided this approach is followed, the three-tiered test from the pre-Reform Act decision in *In the Marriage of Holmes* was held to have ongoing relevance. Other factors that may be considered in individual cases include:

- the degree and quality of the existing relationship between the children and the residence parent
- the degree and quality of the existing contact between the children and the contact parent
- the reason for relocating
- the distance and permanency of the proposed change
- the age and wishes of the children
- the feasibility and costs of travel, and
- alternate forms of contact.¹²⁰

AMS v AIF

4.31 The next important decision in the development of the law on relocation was the High Court’s decision in *AMS v AIF*.¹²¹ The child was born when the parties were living in Darwin in the Northern Territory. After they had separated, the mother was the residence parent and the father had regular contact with the child. They both moved to Perth in Western Australia, but a year later the mother decided she wanted to move back to Darwin.¹²²

4.32 The Family Court of Western Australia issued an injunction restraining the mother from leaving Perth. Holden J held that “[f]rom the point of view of the welfare of the child it seems to me that he has been in as ideal a situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation *in the absence of any compelling reasons to the contrary*”.¹²³

4.33 The High Court held (Callinan J dissenting), in overturning Holden J, that it was erroneous to have required the mother to demonstrate “compelling reasons” for wanting to

¹¹⁹ *Ibid* at 734 [9.58]; 84,220.

¹²⁰ *Ibid* at 735-37; 84,221-22.

¹²¹ *AMS v AIF and AIF v AMS* (1999) 199 CLR 160. Whilst the case concerned numerous matters, including inconsistency between Commonwealth and State laws, the focus of this discussion will be the way the High Court dealt with relocation principles. For commentary on the decision, see for example L Young, ‘*AIF v AMS: The High Court and Relocation*’ (1999) 13 *Australian Journal of Family Law Journal* 264.

¹²² Per Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF and AIF v AMS* (1999) 199 CLR 160 at 167; [1999] HCA 26 at [4]–[5].

¹²³ Cited by Gleeson CJ, McHugh and Gummow JJ at 174; [31].

relocate. Hayne J clearly explains that to focus on the mother's reasons for wanting to move distracts from the proper focus of inquiry, which should be what is better for the child.¹²⁴ The best interests of the child must be the paramount consideration in relocation cases, but is not the "sole" or "only" consideration.¹²⁵ The interests of the parents may be relevant to the best interests of the child, depending on the case.¹²⁶ Kirby J stated that in the event that there is a conflict, the child's interests take priority.¹²⁷

A v A: Relocation approach

4.34 In *A v A: Relocation approach*¹²⁸ the Full Court of the Family Court laid down seven guiding principles that apply generally to relocation cases. These principles were derived from the High Court decision in *AMS v AIF* and subsequent Full Court decisions.¹²⁹ Confirming the statement in *B and B* that relocation cases are not a "special category" of cases, the Full Court chose the description "parenting cases where the proposal of one of the parties involves relocation".¹³⁰

4.35 The case involved a proposed international move. The mother sought a parenting order permitting the child to relocate with her to Portugal. The trial judge had ordered that the child live with her mother in Sydney. The mother's appeal was allowed and the matter was remitted for rehearing.¹³¹ The reasons why the appeal was allowed will be outlined to show the practical application of the guiding principles.

4.36 The Full Court started by outlining two binding principles from *AMS v AIF*, namely that:

- the best interests of the child are the "paramount consideration, but not the sole consideration", and
- a court cannot require the applicant to demonstrate "compelling reasons" for the relocation.¹³²

4.37 The third principle is that the court must evaluate the competing proposals presented by the parties and weigh up the advantages and disadvantages of each for the child's best interests. Fourthly, this should not be done in a way that separates the issue of relocation from that of residence.¹³³ In the case of *A v A*, the Full Court held that the trial judge focused on the child's contact with the father in Sydney. He did not compare this with the proposal that the mother relocate to Portugal.¹³⁴

4.38 The fifth principle is that the evidence must be weighed as to how each proposal would hold advantages and disadvantages for the child's best interests. It follows that,

¹²⁴ Per Hayne J at 232; [218].

¹²⁵ Per Kirby J at 207; [143] and per Hayne J at 330; [212].

¹²⁶ Per Hayne J at 232; [218].

¹²⁷ See Kirby J at 207; [144].

¹²⁸ *A v A: Relocation approach* (2000) FLC ¶93-035.

¹²⁹ Including *Paskandy v Paskandy* (1999) FLC ¶92-878 and *Martin v Matruglio* (1999) FLC ¶92-876.

¹³⁰ *A v A: Relocation approach* (2000) FLC ¶93-035, quoting *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,453.

¹³¹ *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,555.

¹³² *Ibid* at 87,544-545.

¹³³ *Ibid* at 87,545.

¹³⁴ *Ibid* at 87,553-4.

sixthly, the evaluation of the competing proposals is carried out by referring to the relevant sections of the Family Law Act that relate to the best interests of the child – section 60B and the factors in subsection 68F(2).¹³⁵ About the relationship between these sections, the Full Court held that “the object and principles of s60B provide guidance to a court’s obligation to consider the matters in s68F(2) that arise in the context of the particular case” (this is the seventh principle).¹³⁶ In *A v A* the Full Court held that the trial judge’s consideration of section 60B and subsection 68F(2) matters (for example, the child’s wishes) was “inadequate”.¹³⁷

4.39 After discussing the guiding principles outlined above, the Full Court set out a three-step summary of the correct approach to determining a parenting case that involves a proposal to relocate the residence of a child.¹³⁸ The first step is to identify the relevant competing proposals for future care of the child.

4.40 The second step is to explain the advantages and disadvantages of each proposal by examining the factors set out in the Family Law Act (that is, each relevant subsection 68F(2) factor with regard to section 60B). One relevant factor to be weighed will be the “reasons for relocation as they bear upon the child’s best interests”.¹³⁹ This must be weighed against other factors.

4.41 The third step is to explain why one proposal is to be preferred, having regard to the best interests of the child as the “paramount consideration, but not the sole consideration”. No single factor should determine which proposal is to be preferred. As part of this process, the Full Court held that regard must be had to the following issues:

- none of the parties bears an onus – in *A v A* the Full Court considered that the trial judge had erred in requiring the mother to justify the relocation¹⁴⁰
- the importance of a party’s right to freedom of movement,¹⁴¹ and
- matters of weight should be explained – in other words, the court must indicate which of the relevant matters under sections 60B and 68F(2) were of greater significance and how the matters balance out.¹⁴²

High Court’s decision in U v U and beyond

4.42 The most recent High Court consideration of relocation is the 2002 decision of *U v U*,¹⁴³ another international relocation case. The mother sought to move to India with her daughter. The Family Court ordered that the child remain in Australia and the High Court dismissed her appeal by a 5-2 majority. The facts of the case were that the parties married in India and moved to Australia where the child was born. The mother wanted to move back to India because she had better employment prospects there, as well as extended family support and friends. Between August 1995 and January 1998 the

¹³⁵ *Ibid* at 87,545 – 87,546.

¹³⁶ *Ibid* at 87,547.

¹³⁷ *Ibid* at 87,554.

¹³⁸ *Ibid* at 87,547.

¹³⁹ *Ibid* at 87,548.

¹⁴⁰ *Ibid* at 87,554.

¹⁴¹ Freedom of movement is considered in chapter 3 of this paper at [3.30]–[3.37].

¹⁴² *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,551.

¹⁴³ *U v U* (2002) 191 ALR 289; (2002) FLC ¶93-112; [2002] HCA 36.

mother and child had lived in India, during which time the father visited on five occasions and had unrestricted access to his daughter.

4.43 So what were the competing proposals for future care of the child? The mother was proposing that she be the residence parent, that she and her daughter would reside in India and the daughter would have contact with her father. The father's proposal was that the child reside with him in Australia for most of the time and have contact with the mother at certain times, for example, school holidays. His alternative proposal was that the child reside with her mother in the "Sydney/Wollongong area".¹⁴⁴

4.44 The final orders made by the trial judge were different to the proposals made by the parties. In the course of cross-examination, the mother had admitted that if she was not permitted to relocate to India with her daughter, she would stay in Australia with her daughter. This was considered to be "an alternative proposal" made by the mother.¹⁴⁵

4.45 The majority of the High Court held that "the Court is not, on any view, bound by the proposals of the parties".¹⁴⁶ Hayne J explained that:

to confine the inquiry [to the parent's proposals] would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact.¹⁴⁷

4.46 In a more recent case, it was held that where a trial judge does formulate an alternative proposal, they are required "to afford the parties procedural fairness by indicating and inviting comment on changes to the parties' own proposals, for example, by way of additional or different contact to that proposed by the relocating party".¹⁴⁸

4.47 In light of the decision in *U v U*, Watts has argued that there are four proposals which need to be considered in relocation cases:

1. child relocates with residence parent
2. child does not move and there is a change of residence parent (this may be contrasted with the view expressed in *B and B* that this suggestion would be untenable for most residence parents)
3. the child does not move and the residence parent also stays
4. the child relocates with the residence parent and the contact parent also moves.¹⁴⁹

4.48 The fourth proposal was not explored at the trial in *U v U*. Gaudron J (dissenting) stated that the failure to consider the possibility of the father moving to India, "particularly given [his] origins, his professional qualifications and family contacts in India, seems to me to be explicable only on the basis of an assumption, inherently sexist, that a father's choice

¹⁴⁴ *Ibid* per Gummow and Callinan JJ at 299 [57]; 89,084.

¹⁴⁵ Trial Judge cited by Gaudron J, *ibid*, at 293-94 [21]; 89,080.

¹⁴⁶ Gummow and Callinan JJ, *ibid* at 306 [80]; 89,089. Gleeson CJ and McHugh J agreed with this judgment.

¹⁴⁷ Per Hayne J at 326 [171]; 89,102.

¹⁴⁸ *Bolitho v Cohen* (2005) FLC ¶93-224.

¹⁴⁹ Watts, above n 8 at 67-68.

as to where he lives is beyond challenge in a way that a mother's is not".¹⁵⁰ Kirby J (also dissenting) considered the burden this imposed on the mother.¹⁵¹

4.49 Hayne J suggested that in future cases it must not be assumed that the father cannot relocate because "[i]t is the interests of the *child* which are paramount, not the interests or needs of the parents, let alone the interests of one of them".¹⁵² Gleeson CJ, McHugh and Gaudron JJ expressed agreement with Hayne J's comments.

4.50 The decision in *U v U* has been interpreted by the Full Court of the Family Court as having "ameliorated the somewhat rigid and/or formulaic approach set out in *A v A*".¹⁵³ That observation was made in *Bolitho and Cohen*,¹⁵⁴ where the Full Court was satisfied that the trial judge had balanced all the relevant factors and the decision that the children should live with their father in Japan was upheld.¹⁵⁵ In interpreting the High Court's decision in *U v U*, the Full Court stated:

In *U v U* the High Court said that the proper approach to be adopted in a relocation case is a weighing of competing proposals, having regard to relevant s 68F(2) factors, and consideration of other relevant factors, including the right to freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child.¹⁵⁶

4.51 A reading of other cases since the decision in *U v U* reveals that an observation made by Kirby J in *AMS v AIF* still holds true. That is, the facts of every relocation case are "unique" and have to be carefully analysed. Previous judicial decisions are only of assistance to the extent that they promote "a general consistency of approach".¹⁵⁷

Summary of current law

4.52 In summary, the "general consistency of approach" that can be drawn from the discussion above about the legislative provisions and case law regarding the best interests of the child prior to the Shared Parental Responsibility Act is as follows.

- Relocation cases are not a special category of cases. The Family Law Act does not specifically mention "relocation" and the cases are best described as "parenting cases where the proposal of one of the parties involves relocation".¹⁵⁸
- The best interests of the child is the "paramount consideration, but not the sole consideration". For example, the interests of the parents can be considered if they are relevant to the best interests of the child.

¹⁵⁰ *U v U* (2002) 191 ALR 289 at 296 [35]; (2002) FLC ¶93-112 at 89,081.

¹⁵¹ *Ibid* at 320-21 [142]; 89,099.

¹⁵² Per Hayne J at 327 [176]; 89,103.

¹⁵³ *Bolitho and Cohen* (2005) FLC ¶93-224 at [72].

¹⁵⁴ *Bolitho and Cohen* (2005) FLC ¶93-224.

¹⁵⁵ *Ibid* at [73]-[74].

¹⁵⁶ *Ibid* at [72].

¹⁵⁷ Per Kirby J in *AMS v AIF and AIF v AMS* (1999) 199 CLR 160 at 206-7; [1999] HCA 26 at [142].

¹⁵⁸ *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,541, quoting *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,453.

- The court must consider the competing proposals for the future care of the child, but is not limited to the proposals presented by the parties. All the proposals need to be evaluated in terms of the advantages and disadvantages for the child and the court should explain why a particular proposal is preferred.
- The issue of relocation cannot be separated from the issue of residence and the best interests of the child. The relevant factors in subsection 68F(2) must be considered and the weight given to each should be explained by the court. The object and principles in section 60B provide guidance for this exercise.
- A court cannot require the person who wishes to relocate to demonstrate “compelling reasons” for relocation as this would incorrectly focus on the parent’s interests instead of the best interests of the child.
- It should not be assumed that the non-resident parent cannot relocate as well, as the interests of the child (not the parent/s) must be paramount.

Immigration status of parties in relocation cases

4.53 A matter that was not covered by Council’s discussion paper was how the law takes into account the immigration status of the child, the parents and any other relevant people involved in a relocation case. This was brought to the Council’s attention by the Department of Immigration and Multicultural Affairs (DIMA).

4.54 DIMA submitted that cases involving international relocation should be treated separately due to the added complexity of immigration requirements that need to be considered when the courts make decisions relating to custody of children, particularly where one parent wishes to reside in Australia and the other does not. DIMA makes the point that even if the court considers that it would be in the child’s best interests for both parents to remain in Australia, this may not be possible under Australia’s migration laws.

4.55 DIMA also submits that when dealing with international relocation cases, the court should have regard to the immigration status of the child, the parents and any other relevant persons. Where a case involves persons who are not Australian citizens, it would assist DIMA if the orders specified which person or persons has the right to decide in which country the child can live.

4.56 Council considers that because these matters mainly concern how orders are formulated, they would be best dealt with by an amendment to the courts’ rules, or the bench handbook referred to by judicial officers, as opposed to an amendment to the law. The Council would be happy to raise this with the Family Court of Australia, Federal Magistrates Court and Family Court of Western Australia, with the agreement of DIMA.

5. Current law in other jurisdictions

5.1 The Family Law Council's terms of reference direct the Council to consider "approaches to the problem of relocation in other jurisdictions". This chapter provides a summary of the law in the United Kingdom, New Zealand, Canada and selected states in the United States of America. Consideration is also given to the approach in some European jurisdictions.

5.2 Some of these jurisdictions have presumptions either in favour of or against relocation. The discussion of overseas laws in this chapter is grouped according to each jurisdiction's tendency to allow or disallow relocation applications.

5.3 Three general approaches to relocation have been ascertained. The first is in favour of relocation. The United Kingdom and the state of Indiana are both examples of this approach. The second approach is more neutral. Decisions are made on a case by case basis, with the emphasis on the best interests of the child in each case. Canada and the state of New York are examples of this approach. The third approach is against relocation, as in the state of Louisiana. New Zealand may also fall into this category, if predictions about the potential impact of its new *Care of Children Act 2004* are accurate.

"Pro-relocation" jurisdictions

United Kingdom

5.4 The United Kingdom's *Children Act 1989* (Children Act) prohibits the removal of a child from the country without the written consent of "every person who has parental responsibility for the child or the leave of the court" (subsection 13(1)).

5.5 Relocation decisions are made by reference to the child's welfare as the paramount consideration, as they are a question "with respect to the upbringing of a child" (which requires the child's welfare to be the court's paramount consideration pursuant to subsection 1(1) of the Children Act). A checklist of factors (including the child's wishes and needs) is provided in subsection 1(3) of the Children Act.

5.6 The primary carer must establish that the relocation is reasonable. When making this decision the court may look at career prospects, housing, education, distance, cultural difficulties, the reason for the move, contact arrangements, the child's bond with the primary carer and the child's wishes.¹⁵⁹ Once the court is satisfied that the relocation is reasonable, the court will grant leave to move unless it can be clearly shown that the relocation would be detrimental to the child's welfare.¹⁶⁰

5.7 The leading relocation case in the United Kingdom is *Payne v Payne* (an international relocation case) in which the court held that refusing an application of a primary carer who has made a reasonable proposal for relocation is likely to be detrimental to the welfare of

¹⁵⁹ *M v A (Wardship: Removal from Jurisdiction)* [1993] 2 FLR 715.

¹⁶⁰ *Payne v Payne* [2001] 1 FLR 1052.

the child.¹⁶¹ The same approach applies in domestic relocation cases, except that the weighing up of competing interests against relocation will be less stringently applied.¹⁶²

5.8 The court's rationale for not interfering with the reasonable decision of the primary carer is that the carer is still going to be responsible for the child, and refusal of an application to relocate would result in bitterness which would have an impact of the quality of life the child experiences.¹⁶³

5.9 Whilst the United Kingdom has neither a presumption for or against relocation, in practice it is rare for applications to relocate to be refused.¹⁶⁴

United States of America

5.10 Family law in the United States of America is a state responsibility, so there are different approaches across the country. All the states start with the general rule that the best interests of the child are paramount.¹⁶⁵ However, in some states there is a presumption in favour of allowing a custodial parent to relocate. Indiana is one such state.

Indiana

5.11 The Indiana courts assess an application for relocation on the basis that it may require a change in custody arrangements and the application must be heard with the court mindful of its child custody modification statute.¹⁶⁶ In other words, if the primary carer wishes to relocate the court must consider granting custody to the other parent.

5.12 The child custody modification statute provides that the court cannot change existing custody arrangements unless there is a substantial and continuing change in circumstances that would justify the court modifying the custody arrangements.¹⁶⁷ The burden of proof to establish a substantial change of circumstances is on the non-primary carer.

5.13 An out of state move is not of itself sufficient to constitute a substantial change in circumstances that would justify the court's conclusion that the primary carer's continued custody is unreasonable.¹⁶⁸

“Neutral” jurisdictions

New York State, United States of America

5.14 In New York State, there is neither a presumption for nor against relocation. The courts decide each relocation case on its own merits and do not rely on any preconceived assumptions.¹⁶⁹

¹⁶¹ *Payne v Payne* [2001] 1 FLR 1052.

¹⁶² *Re H (Children: Residence Order: Condition)* [2001] 2 FLR 1277.

¹⁶³ Per Ormrod LJ in *Chamberlain v De La Mare* (1983) 4 FLR 434.

¹⁶⁴ R. Spon-Smith 'Relocation revisited' [2004] *Family Law* 191 at 193.

¹⁶⁵ T. Sample and T. Reiger, 'Relocation standards and constitutional considerations' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 229 at 229.

¹⁶⁶ *Swonder v Swonder* 642 NE 2d 1376 (Ind. Ct. App. 1994).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

5.15 The courts' primary focus is on the best interests of the child and it may weigh up numerous factors to determine what the best interests of the child are in each case. Some of the factors the court may consider include:¹⁷⁰

- the impact of the move on the relationship of the child and the non-primary carer
- the motives behind the move
- the benefits and harms the child may experience from the change in circumstances
- the economic, emotional and educational opportunities afforded by the move
- the negative impact which will result due to continued hostility between the parents, and
- the possibility and feasibility of a parallel move by the non-primary carer as an alternative to restricting the primary carer's mobility.

5.16 The list is not exhaustive and the court may add to the factors that are or are not to be considered to ensure each relocation case is decided on its own merits. As the court focuses on a case by case approach, there is no guidance or stringent requirements placed on the weight of each factor the court takes into consideration.¹⁷¹ The emphasis of the court is on "minimising the parents' discomfort and maximising the child's prospect of a stable, comfortable and happy life".¹⁷²

Canada

5.17 Canada is another jurisdiction that adopts a neutral stance on relocation. The courts' approach is again based on the best interests of the child. Section 16 of the *Divorce Act 1985* (Divorce Act) lists a number of factors the court considers when making an order.

5.18 The leading relocation case is *Goertz v Gordon: Women's Legal Education and Action Fund*.¹⁷³ This case involved a successful application for a residence mother to relocate from Canada to Australia. The Supreme Court held that presumptions are not relevant to making relocation decisions. McLachlin J, for the majority, wrote that a "presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary".¹⁷⁴

5.19 The court must make a fresh inquiry as to the best interests of the child and not base its decision on the findings of the preliminary custody hearing to ensure that all material changes in the circumstances are taken into account.¹⁷⁵ Usually motives for moving will not be an issue considered by the courts, but occasionally the motive will reflect adversely on the parent's ability to fulfil the child's best interests. For example, when the sole motive of a parent to relocate is to prevent the other parent from having contact with the child, the primary carer is not showing an ability to meet the needs and interests of the child.¹⁷⁶

¹⁶⁹ *Tropea v Tropea* 87 NY 2d 727.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Goertz v Gordon: Women's Legal Education and Action Fund* [1996] SCR 27.

¹⁷⁴ *Ibid* at 340.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

5.20 The court must weigh up the benefit of the child staying with the primary carer in a new location against the advantage of having continuous contact with the non-primary carer, extended family and the community. The interests and rights of the parents are to be respected, but are not the focus of the inquiry.¹⁷⁷ The ultimate decision of the court in each case is what is the best interests of the child taking into account all the relevant circumstances.¹⁷⁸

“Anti-relocation” jurisdictions

Louisiana, United States of America

5.21 Louisiana has passed legislation based on the American Academy of Matrimonial Lawyers’ Model Relocation Act. The Model Relocation Act was not intended to be a uniform Act and it offers alternative options that each state may adopt to maintain their own jurisdictional policies.¹⁷⁹ The three alternatives concern the burden of proof in relocation cases.¹⁸⁰

[Alternative A]

The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child.

[Alternative B]

The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that relocation is not in the best interest of the child.

[Alternative C]

The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the non-relocating person to show that the proposed relocation is not in the best interest of the child.

5.22 The Louisiana legislature has chosen to adopt “Alternative A” from the Model Relocation Act and placed the burden of proof on the relocating parent to prove that the relocation is being made in good faith and in the best interests of the child.¹⁸¹

5.23 The Louisiana statute only applies where the relocation is out of the state or more than 150 miles (241.5km) from the previous residence.¹⁸² The court may not consider whether the person proposing relocation will move without the child if their application is refused,

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ M. Kisthardt, ‘Perspectives on the relocation of children’ (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 1 at 1.

¹⁸⁰ American Academy of Matrimonial Lawyers, *Model Relocation Act*, as adopted by the board of Governors of the AAML, Cancun, Mexico, March 9, 1997, § 407.

¹⁸¹ Louisiana Revised Statutes § 9:355.13.

¹⁸² E. Terry et al. ‘Relocation: moving forward or backward?’ (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 1 at 225–226.

or whether the person opposing relocation will also relocate if the relocation application is allowed.¹⁸³

5.24 In making a decision regarding relocation, the statute requires the court to consider a long list of factors,¹⁸⁴ including the child's age and needs, and the nature, quality, extent of involvement and duration of the child's relationship with both the parent proposing to relocate and with the non-relocating parent, siblings and other significant persons in the child's life.

New Zealand

5.25 The law in New Zealand is in somewhat of a state of flux, as the new *Care of Children Act 2004* (Care of Children Act) replaced the *Guardianship Act 1968* on 1 July 2005.

5.26 The approach of the New Zealand courts to relocation cases prior to the Care of Children Act had been that the courts would not start with any presupposed assumptions, as in *D v S* it was held that a "presumptive or a priori weighing is inconsistent with the wide all-factor child-centred approach required under New Zealand law".¹⁸⁵ The best interests of the child was the paramount consideration under the Guardianship Act. In *Stadniczenko* the Court of Appeal stated that "the only principle which governs is that of the best interests of the child. That test cannot be implemented by the devising of a code of substantive rules or of procedural or evidential rules embodying presumptions and onuses".¹⁸⁶

5.27 The welfare of the child is also the paramount consideration pursuant to section 4 of the Care of Children Act. Section 5 of that Act provides some principles relevant to the child's welfare and best interests as follows:

- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
- (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents);
- (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child;
- (d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing;
- (e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons);

¹⁸³ *Ibid.*

¹⁸⁴ Louisiana Revised Statutes § 9:355.12.

¹⁸⁵ *D v S* (2001) NZCA 374 at [47].

¹⁸⁶ *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500.

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

5.28 It is not known how, exactly, these principles will influence relocation decisions. For example, paragraph (b) could be a factor that works in favour of, or against, relocation. Judge Boshier, Principal Judge of the Family Court of New Zealand, has observed that "the move might bring the child closer to their family...or put the child in an environment more conducive to matters such as cultural participation".¹⁸⁷

5.29 Judge Boshier outlines some reasons why the Care of Children Act may not lead to a new approach to relocation cases and reasons why it might. In concluding, he states:

The new Act clearly intends that having a relationship with both parents be considered as generally in the best interests of children. As parenting orders include this principle as a fundamental constituent, it may become difficult for a parent to convince the Court that it is in the welfare of the child to be removed from the parameters of the order...In general, where both parents can provide for the welfare of the child, the Act suggests that the Court should conclude that this is in the child's best interests, and therefore not allow relocation.¹⁸⁸

5.30 If Judge Boshier's predictions about the potential impact of the Care of Children Act are correct, it might be possible to describe New Zealand law as generally *not* favouring relocation. However, it is too soon to draw any conclusions about this.

European approaches to relocation

5.31 In the recent Family Court judgment, *W and R*,¹⁸⁹ Carmody J provided a succinct summary of the different European approaches to relocation. His analysis was informed by two articles on international relocation by Anna Worwood.¹⁹⁰ Carmody J noted:

Separated or divorced parents who wish to relocate from France with their child(ren) require leave of the Court as do the English counterparts. The criteria is welfare-based and similar to the welfare factors taken into account in England.

Shared residence orders are commonplace in France with the role of each parent generally being considered to be of equal importance. However, like England, the emerging trend is for leave to be granted more often than not where it is sought by the primary carer.

German courts determine relocation applications on the basis of the best interests of the child being the first and paramount consideration. The outcome depends on whether the proposed change has a net benefit for the child. There is no general rule or presumption in favour or against the relocating parent.

¹⁸⁷ P. Boshier, 'Relocation cases: an international view from the bench' (2005) *New Zealand Family Law Journal* 77 (Lexisnexis electronic version – no page references).

¹⁸⁸ *Ibid.*

¹⁸⁹ *W and R* [2006] FamCA 25.

¹⁹⁰ A. Worwood, 'International relocation – the debate' [2005] *Family Law* 62; A. Worwood, 'International relocation of children – are our courts too mother-focussed?' (2005) *The Review* 9.

In Spain the child's interests are usually separately represented and the wishes of children aged 12 or over are highly influential. Both parents, whether married or not, have joint parental authority and responsibility over and for their children under the Spanish civil code. The Courts act on best interests considerations and apparently normally "...authorise a reasonable proposal by the mother provided that there will be generous contact between the child and the father".

Swedish judges are prone to refuse permission to relocate a child in favour of maintaining a stable living environment and existing levels of contact with the absent parent [footnotes omitted].¹⁹¹

5.32 So to summarise, France and Spain could be described as "pro-relocation", Germany could be described as "neutral" and Sweden could be described as "anti-relocation". It appears, therefore, that a uniform approach to relocation is not discernible amongst the civil law countries either.

¹⁹¹ *W and R* [2006] FamCA 25 at [342]–[346].

6. Recommended changes to the law on relocation

6.1 So far, this report has considered what relocation is, what its effect is on children, parents and others, what form current relocation law takes and what approaches to relocation are adopted overseas. The report now concludes with a discussion of whether the law on relocation in Australia should be changed and, if so, three possible ways the law might be amended. These are by introducing a legal presumption, by using the House of Representatives Standing Committee on Legal and Constitutional Affairs' (the LACA Committee) recommendation or by inserting guidelines in some other form.

6.2 The Family Law Council's discussion paper invited respondents to consider the following questions about possible amendments to the Family Law Act.

Consultation questions

It is clear that a full understanding of the law on relocation cannot be gained from reading the Family Law Act alone. In your submission, please **consider whether the Family Law Act should be amended to provide specific criteria for making relocation decisions.** In considering this broad question, please also consider commenting on the following consequential questions:

- Whether relocation cases should become a special category of cases that require separate treatment (contrary to the approach that has been adopted by the High Court and the Full Court of the Family Court), and if so, why?
- Which of the criteria should be mandatory and which should be relevant considerations? Are there any factors that should not be taken into account?
- If some guidelines were to be inserted in the Family Law Act, should they be based on the principles from case law outlined above?

In answering these questions, you may wish to take into account the material in the rest of the discussion paper, in particular the proposed reforms outlined in part 4.

6.3 A number of submissions expressed the view that it was premature to be considering changes to the Family Law Act in relation to relocation, given the amendments in the Shared Parental Responsibility Act. For example, the Chief Justice of the Family Court of Australia stated that:

arguably the legislative environment in which relocation cases are determined will be significantly altered once the Family Law Amendment (Shared Parental Responsibility) Bill 2006 comes into effect. It may be prudent to assess the changes to Part VII of the *Family Law Act 1975* before a decision is made

whether or not there should be specific provisions inserted in the Act to govern relocation cases.¹⁹²

6.4 The Queensland Law Society believes the amendments to the law “will significantly impact on the approach taken to relocation matters which may be different to the approach suggested in the High Court cases on relocation issues. It may be more prudent to adopt a wait and see attitude until the new Shared Parental Responsibility Act has had time to be assimilated into law”. Far North Fathers believes that the amendments contained in the Shared Parental Responsibility Act are sufficient to deal with relocation cases.

6.5 The Castan Centre for Human Rights Law suggested that changes at this stage would be premature. Their submission supports the adoption of a “wait and see approach”.¹⁹³ The Law Society of New South Wales also said there was no need for legislative amendment at this time, but “depending upon the effect of the current amendments on decisions in this area, this issue may need to be revisited”.¹⁹⁴

6.6 There were a number of submissions that expressed concern about treating relocation as a special category of cases. For example, Relationships Australia worried that “an amendment or restatement of the law to deal specifically with relocation cases might distract the court from having proper regard to the paramount principle of the best interests of the child”.¹⁹⁵ National Legal Aid is also concerned about treating relocation cases separately. It believes that the common law is the most appropriate mechanism for providing judicial guidance due to its flexibility, and that attempting to adapt the Act would be like trying to “pin jelly to a wall”.¹⁹⁶ The Department of Family and Community Services and Indigenous Affairs, the ACT Department of Education and Training and the Association of Children’s Welfare Agencies are also opposed to treating relocation cases as a special category.

6.7 Other respondents believed that relocation cases should form a special category and have specific legislative treatment. For example, Ms Donna Cooper argues that “relocation is a distinct legal issue in family law and has not been recognised as such in the legislation”.¹⁹⁷ Mr John Bottoms agrees that relocation cases should become a special category requiring separate treatment.¹⁹⁸

6.8 The Murray Mallee Community Legal Service is of the opinion that “it is easier for our clients to both access and understand the law if it is contained in legislation rather than case law. It is unrealistic to expect many lay people to have the skills to find and extract the principles developed in the case law and to understand them”.¹⁹⁹ Similarly, Women’s Legal Services Australia believes that legislative guidelines would be helpful, especially as

¹⁹² Submission from the Chief Justice, Family Court of Australia at 1.

¹⁹³ Submission from Castan Centre for Human Rights Law at 2.

¹⁹⁴ Submission from the Law Society of New South Wales at 3.

¹⁹⁵ Submission from Relationships Australia at 1.

¹⁹⁶ Submission from National Legal Aid at 3.

¹⁹⁷ Submission from Ms Donna Cooper at 1.

¹⁹⁸ As did the Dawn House Women and Children’s Shelter and a confidential submission.

¹⁹⁹ Submission from Murray Mallee Community Legal Service at 4.

guidelines assist people negotiating ‘in the shadow of the law’ to determine the relevant principles.²⁰⁰

Council’s view

6.9 Council is persuaded that relocation cases do form a special category of cases and at the moment it is very difficult for users of the family law system to understand the law. Therefore it would be helpful if the Family Law Act provided further guidance. The question then becomes what type of legislative provision should be inserted?

6.10 Before considering this question, the report will discuss whether Indigenous relocation should form a separate special category of relocation cases.

Indigenous children and relocation

6.11 The impact of relocation on Indigenous children was discussed in chapter 3 of the report. Some submissions took the view that specific provisions should be added to deal with Indigenous relocation. The National Network of Indigenous Women’s Legal Services, for example, would like to see “separate treatment” criteria for Indigenous children introduced into Australia’s family law, similar to the approach outlined in section 5 of New Zealand’s *Care of Children Act 2004*,²⁰¹ so that Indigenous values, principles and family connections are protected. Paragraph (b) provides for continuity in the child’s care and in his or her relationships with their family, family group, whanau, hapu or iwi. Paragraph (d) provides that relationships between a child and his/her family, family group, whanau, hapu or iwi should be preserved and strengthened, with members encouraged to participate in the child’s care, development and upbringing. Paragraph (f) provides that the child’s identity (including his or her culture, language and religion) should be preserved and strengthened.

6.12 A number of submissions made reference to section 5 of the New Zealand Act.²⁰² The Aboriginal and Torres Strait Islander Legal Service (Qld South) Limited also advocated specific criteria for Indigenous relocation. It suggested that the “placement principles” used by child safety authorities in Queensland in relation to safeguarding Aboriginal and Torres Strait Islander children’s contact with their communities should be incorporated into the Family Law Act.

6.13 The Aboriginal Legal Service of Western Australia submit that there should be “a presumption that an Aboriginal or Torres Strait Islander child should maintain a connection with his or her culture” and that this is “not the same as a presumption in favour of residence going to the parent who shares that culture”.²⁰³

6.14 In December 2004 the Family Law Council prepared a report to the Attorney-General titled *Recognition of traditional Aboriginal and Torres Strait Islander child-rearing*

²⁰⁰ Submission from Women’s Legal Services Australia at 8. Guidelines are also supported by Mavis MacLean and Becky Batagol who made a submission to Council’s 2004 discussion paper on *The ‘Child Paramountcy Principle’ in the Family Law Act*.

²⁰¹ This provision is extracted in full at paragraph 5.27 of this report.

²⁰² Including the ACT Department of Education and Training, and the Aboriginal and Torres Strait Islander Legal Service (Qld South) Ltd.

²⁰³ Submission from the Aboriginal Legal Service of Western Australia (Inc) at 10.

*practices. Response to Recommendation 22: Pathways Report, Out of the Maze.*²⁰⁴ In that report, Council made a number of recommendations to improve the way family law takes into account the rights of Aboriginal and Torres Strait Islander children to enjoy their Aboriginal or Torres Strait Islander culture.

6.15 As a result of the Council’s recommendations, there are a number of amendments contained in the Shared Parental Responsibility Act towards this end. The amendments to Part VII of the Family Law Act direct the court to consider the kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander culture, including by making this a principle of Part VII and an additional factor that the court must consider when determining what is in a child’s best interests. There is also an amendment introducing an evidence provision to assist the court in being informed about culture and kinship systems.

6.16 In light of these proposals (which apply in relocation cases), Council does not think any further amendments to the Family Law Act are required for the particular circumstances of Indigenous children to be taken into account in relocation matters.

Should Australia have a legal presumption for or against relocation?

6.17 Considering the varying approaches to presumptions adopted in overseas jurisdictions, as highlighted in the previous chapter, the discussion paper posed the following consultation question in relation to introducing a legal presumption in Australia.

Consultation question

Do you think that the Family Law Act should provide presumptions either for or against relocation of children with a residence parent, creating a legal onus on the other party to displace the presumption?

6.18 A spectrum of opinions were received in response to this question, ranging from those who believe there should be a presumption *in favour of* the residence parent relocating with the child, to those who believe there should be a presumption *against* the residence parent relocating, to those who believe there should be *no* presumptions at all so that each matter is treated on a case by case basis.

Submissions in favour of a presumption

6.19 The Shared Parenting Council of Australia believes a presumption against relocation of the residence parent would ensure children maintain a meaningful relationship with both parents. They advocate placing a legal onus on the residence parent to displace the presumption, but for mediation to be attempted first, with the aim of formulating a “relocation plan within the parenting plan that considers the child’s interest in maintaining the existing level of contact with both parents whilst treating the parents’ interests equally”.²⁰⁵

²⁰⁴ The report is available on the Council’s website <www.law.gov.au/flc>.

²⁰⁵ Submission from Shared Parenting Council of Australia at 24–25.

6.20 Other submissions which preferred a presumption against relocation were Ms Donna Cooper (who thinks there should be a presumption against relocation by either the contact or residence parent),²⁰⁶ Mr John Bottoms, Mrs Kay Hull MP (who argues for a presumption against relocation of very young children, based on attachment theory reasoning), and Mr Colin Anderson (who believes the party wishing to relocate should “shoulder the burden of proof in the matter”).

6.21 Whilst not advocating a presumption as such, Lone Fathers’ Association NT Inc recommend that “relocation of children to distant places that separates them from well established surroundings that are not solely or primarily for the reasons of the children should meet strong and strict justification criteria”.²⁰⁷

6.22 Finally, Family Services Australia believes there should be a presumption in favour of children, rather than either parent. This is because such a presumption “would focus on the child’s needs and interests rather than those of either parent, clarifying that relocation issues must consider what will be best for the child in deciding whether relocation might or might not occur”.²⁰⁸

Submissions opposing presumptions

6.23 National Legal Aid does not support having a presumption. Whilst the greater certainty that may result from a presumption would be attractive, National Legal Aid believes that a case by case approach delivers the most appropriate outcomes because it allows the court to properly assess the unique circumstances of each family.

6.24 Other submissions which agreed that there should be no presumptions at all included the Department of Family and Community Services and Indigenous Affairs, the Department of Immigration and Multicultural Affairs, the Castan Centre for Human Rights Law, the Association of Children’s Welfare Agencies (which perceives presumptions as “dangerous”), the Human Rights and Equal Opportunity Commission and Relationships Australia (both of which caution that presumptions may shift the focus away from the paramountcy principle), the ACT Department of Education and Training, Relationships Australia, Women’s Legal Services Australia, the Murray Mallee Community Legal Service and the Law Society of New South Wales.

6.25 These submissions emphasised the need for relocation cases to be considered on a case by case basis, to take into account the individual circumstances of the parties and children involved. As the Castan Centre for Human Rights Law put it, “it is the nature of families and familial relationships which demand that a one size fits all solution for relocation cases is inappropriate and if imposed is unlikely to resolve the issues they raise”.²⁰⁹ National Legal Aid commented that “even though this [case-by-case] approach may result in less certainty for our clients, we believe it delivers the most appropriate outcomes”.²¹⁰

²⁰⁶ Submission from Ms Donna Cooper at 7.

²⁰⁷ Submission from Lone Fathers Association NT Inc at 9.

²⁰⁸ Submission from Family Services Australia at 6.

²⁰⁹ Submission from Castan Centre for Human Rights Law at 12–13. Family Services Australia also recommend a case-by-case approach in their submission, at 8.

²¹⁰ Submission from National Legal Aid at 3.

Council's view

6.26 Council has reached the view that a presumption is not an appropriate way for the law to deal with relocation cases. A presumption would be a very blunt legal instrument for dealing with the complexities involved in such cases. These complexities are well illustrated by the relocation cases summarised in chapter 4 of this report. As National Legal Aid put it, “the case law from the past decade demonstrates that relocation cases are too complex for a ‘one size fits all’ approach”.²¹¹

6.27 Council is persuaded by the submissions that prefer a case by case analysis of relocation matters, as this is the only way to ensure the best interests of the child remain paramount. As Justice McLachlin wrote in *Goertz v Gordon*:²¹²

A presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary.

6.28 There are three further arguments against the introduction of a presumption. Firstly, if a presumption was introduced into the Family Law Act, it would have to be either in favour of or against relocation. Respondents to the discussion paper who want a presumption one way are unlikely to prefer a presumption going the other way to no presumptions at all. For example, the Shared Parenting Council submits that there should be a presumption against relocation. They also specifically state that the “law should not provide a presumption for relocation with a residence parent”.²¹³

6.29 Secondly, Council considers that if a presumption were to be introduced, it would have to apply to both residence and non-resident parents.

6.30 Thirdly, maintaining a case by case approach to relocation decisions will mean that Australian law is in line with the majority of common law countries, namely, the United Kingdom, Canada, New Zealand and some States of the United States of America. The Australian courts have also so far “eschewed” the use of presumptions in relocation cases.²¹⁴

Recommendation 3

Council recommends against inserting a presumption in the Family Law Act to deal with relocation cases.

²¹¹ Submission from National Legal Aid at 6.

²¹² *Goertz v Gordon: Women's Legal Education and Action Fund* [1996] SCR27 at [44].

²¹³ Submission from the Shared Parenting Council at 12.

²¹⁴ Submission from the Chief Justice, Family Court of Australia at 16.

Recommendation of the LACA Committee

6.31 In August 2005 the LACA Committee made the following recommendation in response to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

Recommendation 8

The Committee recommends an additional provision be included in the *Family Law Act 1975* (the Act) that should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either:

- reside regularly with the other parent and extended family; or
 - spend time regularly with the other parent and other relatives,
- the court must be satisfied on reasonable grounds that such relocation is in the best interests of the child.²¹⁵

6.32 The Government response to recommendation 8 requested that the Family Law Council give particular consideration to this recommendation as part of the inquiry into relocation. The Government intends to consider recommendation 8 further in light of Council's advice.²¹⁶

6.33 Respondents to the discussion paper were invited to comment on this proposed provision.

Consultation question

Do you have any comments on the Committee's recommendation?

6.34 Responses to this question were mixed. The ACT Department of Education and Training and Centacare Sydney supported the recommendation, although Centacare thought the words "of a child" should be deleted so that the provision would encompass cases where the non-resident parent is wishing to relocate. Dawn House Women and Children's Shelter supported the recommendation.

6.35 The Murray Mallee Community Legal Service was somewhat supportive of the recommendation. It agreed that there is a need for a specific relocation provision in the Family Law Act but it does not agree with the LACA Committee's formulation.

6.36 The Castan Centre for Human Rights Law does not believe the LACA Committee's recommended provision should be included in the Act. It believes that "reasonable grounds" equates to "compelling reasons", which the court has rejected. Women's Legal

²¹⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs Report on the Family Law Amendment (Shared Parental Responsibility) Bill 2005 at 24.

²¹⁶ Government Response to the Recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005, tabled in the House of Representatives on 8 December 2005, at 3–4. The response is available online at <www.ag.gov.au/family>.

Services Australia are also opposed to this provision, as it is unclear what “on reasonable grounds” means.²¹⁷

6.37 The ACT Law Society opposes the provision on the basis that it would go against the High Court’s approach of treating the best interests of the child as “the paramount consideration, but not the sole consideration”.²¹⁸

6.38 Other submissions queried whether the inclusion of the provision would add anything to the current law and thought it was unnecessary.²¹⁹ The Chief Justice of the Family Court of Australia noted that it appears that the proposal would not “necessarily direct the Court’s inquiry in a way that is markedly different from its present approach”.²²⁰

Council’s view

6.39 Council agrees with the LACA Committee that there should be specific provisions in the Family Law Act to assist the court in making relocation decisions. Council is persuaded by the arguments in the submissions that suggest that the LACA recommendation does not give sufficient guidance. Council’s preferred alternative to the LACA recommendation is suggested below.

Legislative guidelines

6.40 As noted above, Council has reached the conclusion that specific relocation provisions should be inserted into the Family Law Act. This is supported by many of the submissions. However, there was no agreement about what form any legislative guidelines for making relocation decisions should take. In addition to submissions in favour of a presumption or the LACA Committee’s recommendation, approaches ranged from enacting the guidelines in *A v A*,²²¹ to using section 5 of New Zealand’s *Care of Children Act 2004* as a model,²²² to having principles from the UN Convention on the Rights of the Child guide decision-making.²²³

²¹⁷ Submission from Women’s Legal Services Australia at 12; a confidential submission also opposed the recommendation.

²¹⁸ Submission by ACT Law Society at 3.

²¹⁹ For example, National Legal Aid and the Law Society of New South Wales.

²²⁰ Submission from the Chief Justice, Family Court of Australia at 12.

²²¹ Submission from Ms Lisa Young at 7. This may be contrasted to the submission from Ms Donna Cooper, who considers that the principles in *A v A* will now have to be reinterpreted in light of the amendments contained in the Shared Parental Responsibility Act.

²²² Submission from the ACT Department of Education and Training at 1.

²²³ Submission from Ms Donna Cooper at 5.

6.41 Some submissions suggested using the English guidelines set out in *Payne v Payne*,²²⁴ including the Women’s Legal Services Australia, the ACT Law Society and a confidential submission.

6.42 Women’s Legal Services Australia argue in favour of extra guidelines in cases involving family violence, as follows.

In our view, the guidelines should emphasise that, in cases where there has been family violence, it is likely to be in the best interests of the child for the resident parent to be able to relocate a safe distance from the perpetrator. The United States National Council of Juvenile and Family Court Judges’ *Family Violence Model State Code* provides a model that could be *adapted* for this purpose. The Code provides for a rebuttable presumption that it is in the best interests of the child to reside with the parent who is not the perpetrator of violence in a location of that person’s choice, within or outside the state.

6.43 The ACT Women’s Legal Service supported the Women’s Legal Services Australia submission and provided Council with some statistics about relocation matters they have dealt with. A survey of cases they dealt with in 2005 found that 20% of clients moved to Canberra because of domestic violence issues. In two examples provided, the women had fled to Canberra with their two children after a history of family violence.

Council’s view

6.44 Council has come to the conclusion that the principles in the *Family Law Act 1975* (as amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*) should continue to apply in relocation cases. That is, the best interests of the child should remain the paramount consideration. The factors in section 60CC will then be considered by the court in determining what is in a child’s best interests. There was almost universal agreement in the submissions that the best interests of the child must remain the paramount consideration in relocation decision-making.²²⁵

6.45 This does not mean that there is no scope for providing further legislative guidance for relocation decision-making. Council considers that there is merit in outlining some additional considerations that may have specific relevance to relocation cases. Such a framework would assist practitioners to advise their clients about what factors the court will consider, as well as being of assistance to unrepresented litigants.

6.46 This would not be inconsistent with a case by case analysis according to the best interests of the child. As Yaeger observes, “although relocation issues need to be determined case by case, specific factors for determining the standard will at least give

²²⁴ This case is discussed in paragraph 5.7 of this report.

²²⁵ For example, the submission from Murray Mallee Community Legal Service at 7; submission from Ms Donna Cooper; submission from Ms Joan Hopkins; submission from OzyDads; submission from Centacare Sydney; submission from Women’s Legal Services Australia; submission from the ACT Law Society; submission from Relationships Australia.

some predictability and allow for preparation”.²²⁶ The Chief Justice of the Family Court of Australia notes that “both Canada and New Zealand favour the use of guidelines in combination with a pure ‘best interests’ test”.²²⁷

6.47 Therefore, Council recommends that a provision along the following lines be inserted in the Family Law Act.

A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child’s ability to live with or spend time with a parent or other person who is significant to the child’s care, welfare and development, the court must:

(1) Consider the different proposals and details of where and with whom a child should live, including:

- (a) What alternatives there are to the proposed relocation;
- (b) Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
- (c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.

(2) Consider which parenting orders are in the child’s best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:

- (a) Whether given the age and developmental level of the child, the child’s relocation would interfere with the child’s ability to form strong attachments with both parents;
- (b) If a party were to relocate:
 - (i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child’s care, welfare and development as is possible in the circumstances;
 - (ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child’s care, welfare and development should be allocated;
- (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

²²⁶ K. Yaeger, ‘An examination of relocation law in Massachusetts, Connecticut and Rhode Island: successful trends toward determining the best interests of the child’ (2005) 10 *Suffolk Journal of Trial & Appellate Advocacy* 153 at 172.

²²⁷ Submission from the Chief Justice, Family Court of Australia at 10.

6.48 Council’s proposed provision is in addition to the provisions in the Shared Parental Responsibility Act dealing with parenting orders. Council has attempted to ensure the provision will be consistent with the intention of the government’s reforms. Whilst drawing on the objects and wording in the Shared Parental Responsibility Act, the Council has not departed from the principles expressed in the decided cases on relocation. The common law has evolved over time as the courts have grappled with the complex issues raised by the different cases that have come before them. The common law will now develop in light of the amendments in the Shared Parental Responsibility Act.

6.49 The intention of Council’s provision is to ensure that in relocation cases, the Court has the extra information it needs. This will also help parties and their lawyers (if they are represented) to prepare for reaching agreement, or going to court to litigate a relocation matter.

Explanation of the provision

6.50 The preamble to this provision explains the types of cases to which it applies. This takes into account that most submissions agreed with Council’s proposed definition of relocation which was centred upon a change to existing arrangements (this was discussed in chapter 2). That is, a change that impacts on the child’s ability to live with or spend time with a parent or other person. However, because a trigger for the application of the proposed provision is described in the preamble, a separate definition of the term “relocation” is not required.

6.51 The preamble does not limit the provision to cases where a move substantially affects the child’s continuing to reside with or to spend time frequently with a parent or other person who is significant to the child’s care, welfare and development. Rather, the provision will apply even if the child is not currently spending time with one parent, but may have the *ability* to. If, for example, a very young baby lives with his or her mother and has never seen the father, then if the mother proposes to move, the father could still rely on the provisions in bringing an application for a parenting order. This is because the proposed move may impact upon his ability to spend time with his child. This is consistent with the provisions in the Shared Parental Responsibility Act which aim to ensure children have a meaningful relationship with both parents.

6.52 Subsection (1) of the provision is consistent with the process currently applied to deciding relocation cases, because the parties will have to present their proposals. It is easier for people to understand the law if it is spelt out in legislation, rather than complex judicial decisions which build on previous decisions as described in chapter 4 of this report.

6.53 Presentation of the proposals is a logical starting point for relocation decision-making. There are generally four possible proposals, which were outlined in paragraph 4.47. These are:

1. child relocates with residence parent
2. child does not move and there is a change of residence parent
3. the child does not move and the residence parent also stays
4. the child relocates with the residence parent and the contact parent also moves.²²⁸

²²⁸ Watts, above n 8 at 67–68.

6.54 Not every proposal is likely to be put forward in every case. For example, if the person opposing the application has children from a later relationship it may not be possible for them to move to where the other parent is proposing to relocate. Therefore, this proposal would not be presented. Some relocations to lower cost housing areas, for example, could be avoided by more generous financial provision from the parent with greater financial resources. In appropriate cases, one proposal might be along these lines.

6.55 Council does not believe that the legislation should limit the type of proposals parties may present to the court, as the parties will know what is most likely to work in their circumstances and should be encouraged to come up with creative proposals. However, subsection (1) requires the parties to turn their minds to all possibilities that may suit their individual circumstances, including whether the person opposing the relocation is willing and able to be primary carer if the other parent chooses to relocate in any event. This gives the court a better appreciation of the available options without imposing a presumption one way or the other.

6.56 The provision maintains the best interests of the child as the paramount consideration. Those best interests are to be determined by reference to the factors listed in section 60CC and the objects contained in section 60B as for any other parenting order case and subsection (2) refers specifically to these sections. The factors listed in Council's proposed subsection (2) are additional considerations that apply particularly to relocation cases, but are only looked at once the factors in section 60CC have been addressed.

6.57 Paragraph (2)(a) reflects the concern expressed in the submission by Mrs Kay Hull MP that there should be a presumption against relocation of very young children, based on attachment theory reasoning. This is consistent with social science research by Kelly and Lamb,²²⁹ who identify four stages of attachment in children aged under three.

6.58 Infants in the first stage, between birth and two months, have "very primitive memories and cognitive processes...During this phase...parents quickly become strangers to their infants if regular contact and caregiving are not possible".²³⁰

6.59 During the next phase, between two and seven months, infants begin to recognise their parents. Kelly and Lamb write that "infants in this phase will not generally protest separations from their parents, but require frequent enough contact with their parents for attachment formation to continue".²³¹

6.60 The third phase, from around 7 to 24 months, is known as the "attachment phase". Infants "seek to be near and to interact with their preferred caregivers".²³² Extended separations during this phase cause the child anxiety. In addition, Kelly and Lamb write that "the inability to refresh memory and the absence of regular contact slowly erode relationships, such that, over time, non-moving parents become strangers".²³³

²²⁹ J. Kelly & M. Lamb, 'Developmental issues in relocation cases involving young children: when, whether and how?' (2003) 17(2) *Journal of Family Psychology* 193.

²³⁰ *Ibid* at 194.

²³¹ *Ibid* at 194.

²³² *Ibid* at 194.

²³³ *Ibid* at 195.

6.61 Finally, children between two and three years have increased cognitive and language abilities that allow them “to tolerate longer separations from their parents without undue stress. However, their very primitive sense of time...[inhibits] their ability to understand and cope with lengthy separations”.²³⁴ Kelly and Lamb argue that separating parents from children at this age may severely erode their relationship “unless there is broad and meaningful interaction at least once every month”.²³⁵

6.62 It is important to note, however, that children may reach particular attachment milestones at different rates and the focus of this paragraph is the child’s attachments (rather than drawing lines based on particular ages). Council believes any inquiry into the age and developmental level of the child must depend on the particular child in question.

6.63 Paragraph (2)(b) directs the court to consider the arrangements in the event that a party is permitted to relocate. Again, this will mean that parties turn their minds to the consequences of their proposals when preparing to reach agreement or go to court. As this report shows, relocation can have an impact on a child’s relationship with a parent, grandparents and other relatives. There may be arrangements that the parties can present to the court to ensure the child continues to be able to spend as much time with parents and people significant to their care, welfare and development as is possible in the circumstances.

6.64 Proposed arrangements must be consistent with the object in section 60B of protecting the child from physical or psychological harm. Council believes that it is useful to specifically refer to this object here, in light of the submissions received about some relocations being motivated by the need to escape violence and/or abuse.

6.65 The cost of maintaining a meaningful relationship after a child’s move may be significant, particularly if the move is international. This is a matter on which the law is currently silent, but may be very important indeed to the parties. The child support legislation allows high costs of contact to justify a change of assessment of child support, but for many in the population the costs of contact given a proposed relocation may far exceed the child support liability, making this an inadequate remedy at best.

6.66 Whilst most courts would currently make orders about how these costs will be shared, under the government’s reforms more parties may reach agreement without going to court. Council’s provision is therefore aimed at making the cost element explicit so that the parties consider how the costs might be shared. They may be able to reach agreement about how airfares, bus tickets, petrol, phone calls, letters, email and so on will be paid for. If the matter does go to court, the parties’ evidence on the likely costs will be useful for the court.

6.67 Paragraph (2)(c) concerns the impact on the child of the emotional and mental state of either party if their proposals are not accepted. For example, a parent who wishes to move may be unhappy if the court prevents this move. Similarly, a parent who opposes the move may be unhappy if the child is allowed to move. Either parent’s feelings of anger and disappointment may have an impact on the child.

²³⁴ Ibid at 195.

²³⁵ Ibid at 195.

6.68 Council support's Kirby J's comments on the way a parent's welfare impacts on the welfare of the child. In *U v U* he observed that:

The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child.²³⁶

6.69 Finally, the reasons a parent wishes to move is a factor which *may* be relevant, but is not something Council considers the court must consider. Therefore, Council proposes that a separate paragraph B should state that the court *may* consider these reasons.

6.70 This is consistent with the current weighting given to freedom of movement. In interpreting the High Court's decision in *U v U*, the Full Court of the Family Court recently stated:

In *U v U* the High Court said that the proper approach to be adopted in a relocation case is a weighing of competing proposals, having regard to relevant s 68F(2) factors, and consideration of other relevant factors, including the right to freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child.²³⁷

6.71 Council has added the words "any other relevant considerations" so that the parties have an opportunity to raise concerns specific to their cases. This might include the interests of siblings, grandparents and other relatives, or their employment circumstances.

6.72 Council has reached this formulation following considerable thought and consultation on the issue of relocation. Council therefore commends it to the Government.

²³⁶ *U v U* (2002) 191 ALR 289 at 324 [159].

²³⁷ *Bolitho and Cohen* (2005) FLC ¶93-224 at [72].

Recommendation 4

Council recommends that the following provision be inserted in the Family Law Act.

A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:

- (1) Consider the different proposals and details of where and with whom a child should live, including:
 - (a) What alternatives there are to the proposed relocation;
 - (b) Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
 - (c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.
- (2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:
 - (a) Whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;
 - (b) If a party were to relocate:
 - (i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;
 - (ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;
 - (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

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Appendix A: Persons and organisations making submissions

Submissions were received from the following persons and organisations in response to the Family Law Council's discussion paper on relocation (in alphabetical order).

Aboriginal and Torres Strait Islander Legal Service (Qld South) Limited
Aboriginal Legal Service of Western Australia Inc
ACT Law Society
Andersen, Colin
Association of Children's Welfare Agencies
Australian Institute of Family Studies
Bottoms, John
Brough MP, The Hon Mal & Department of Family and Community Services and Indigenous Affairs
Castan Centre for Human Rights Law (Monash University)
Centacare Sydney
Chief Justice, Family Court of Australia
Confidential
Cooper, Donna (Queensland University of Technology)
Dawn House Women and Children's Shelter (NT)
Department of Education and Training (ACT)
Department of Human Services (Victoria)
Department of Immigration and Multicultural Affairs (Commonwealth)
Family Law Reform Association of NSW Inc
Family Services Australia
Far North Fathers
Himelfarb, Jerry
Hogan, Brian
Hopkins, Joan
Hull MP, Kay
Human Rights and Equal Opportunity Commission
Joint Parenting Association
Law Society of New South Wales (Family Issues Committee)
Law Society of Tasmania
Lone Fathers' Association NT Inc
MacLean, Mavis & Batagol, Becky (Oxford Centre for Family Law and Policy, UK)
Murray Mallee Community Legal Service
National Legal Aid
National Network of Indigenous Women's Legal Services
Non-custodial Parent's Party
OzyDads
Queensland Law Society
Relationships Australia
Shared Parenting Council
Steindl, Peter
Van Gorp, Sean
Women's Legal Centre (ACT)
Women's Legal Services Australia (formerly the 'National Network of Women's Legal Services')
Young, Lisa (Murdoch University)

Appendix B: Functions and members of the Family Law Council

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in subsection 115(3) of the Act as follows.

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (May 2006)

Professor Patrick Parkinson, *Chairperson*

Ms Nicola Davies

Mr Kym Duggan

Federal Magistrate Mead

The Hon Susan Morgan

Mr Clive Price

Ms Susan Purdon

Justice Garry Watts

The following six agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

Australian Institute of Family Studies – Dr Bruce Smyth

Australian Law Reform Commission – Ms Kate Connors

Child Support Agency – Ms Yvonne Marsh

Family Court of Australia – Ms Angela Filippello and Ms Dianne Gibson

Family Court of Western Australia – Principal Registrar David Monaghan

Federal Magistrates Court of Australia – Mr John Mathieson

Family Law Section of the Law Council of Australia – Ms Maurine Pyke

Membership of the Paramouncy Committee

The members of the committee who prepared this report are:

- The Hon Susan Morgan (convenor)
- Mr Kym Duggan
- Ms Susan Purdon
- Principal Registrar David Monaghan

- Ms Anita Mackay (secretariat)
- Ms Sarah Christensen (secretariat)

Consultants who are assisting the committee are:

- Professor Richard Chisholm
- Ms Tara Gupta
- Ms Susan Holmes

Appendix C: Letter of advice on the paramountcy principle

The following is the text of a letter of advice from the Family Law Council to the Attorney-General on 17 January 2006 after the Council's consideration of the paramountcy principle in the Family Law Act.

Dear Attorney-General

Family Law Council Advice on the 'Child Paramountcy Principle' in the Family Law Act

1. BACKGROUND AND TERMS OF REFERENCE

In May 2000 the Family Law Council discussed the amendments made to the *Family Law Act 1975* by the *Family Law Reform Act 1995* in relation to the paramountcy principle (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the *Family Law Act 1975*).

Council appointed a committee to develop draft terms of reference which were approved by the Attorney-General on 9 October 2000. On 3 June 2003 the Attorney-General agreed to extend the terms of reference to include an examination of relocation cases. The final terms of reference are:

1. To examine the nature and application of the legal principle that the child's best interests must be regarded as the paramount consideration in family law litigation concerning children and to consider whether the *Family Law Act 1975* should be amended in this respect.

The Council shall have particular regard to:

- the law before and after the *Family Law Reform Act 1995*; and
- the nature and scope of similar provisions in other jurisdictions.

2. To examine:

- (1) How the best interests of the child principle set out in section 65E of the *Family Law Act* operates in relation to other legitimate interests in a relocation case;
- (2) How best to take account of the interests of other children who may be affected by the relocation decision but are not the subject of proceedings;
- (3) How best to take account of the interests of other people affected by the relocation decision;
- (4) The significance of section 92 of the *Constitution* for the law of relocation;

- (5) Approaches to the problem of relocation in other jurisdictions; and
- (6) Whether the *Family Law Act* should be amended to provide specific criteria for making relocation decisions.

2. DISCUSSION PAPER

In December 2004 the Council released a discussion paper titled *The 'Child Paramountcy Principle' in the Family Law Act*. The scope of the discussion paper was limited to paragraph 1 of the terms of reference and did not examine the operation of the principle that the child's best interests should be the paramount consideration (hereafter referred to as the "paramountcy principle") in relocation cases. Council will release a separate discussion paper on this second aspect of the terms of reference.

The discussion paper was sent to 53 individuals and organisations and made available on Council's website. Submissions and comments on the discussion paper were initially sought by 6 May 2005, although the closing date was later extended to 30 June 2005. Council received 12 submissions by 30 June 2005. Seven of the submissions were from legal practitioner groups, including Law Societies. Two of the submissions were from academics, one was from a men's support group and two were from private citizens. A list of people and organisations who prepared submissions is provided in appendix A.

Council is very grateful for the time and effort individuals and organisations spent in the preparation of their submissions. It should be noted that some of the submissions went beyond the ambit of Council's inquiry and included comment on relocation, for example. Those which addressed relocation will be taken into account when Council considers this issue and will not need to make separate submissions on the discussion paper on relocation (but will of course be free to do so).

The purpose of the discussion paper was to explain the existing provisions of the *Family Law Act 1975* (the Family Law Act) and review how they have operated, having regard to the way they have been interpreted. The effect of the 1995 amendments to the Family Law Act was to restrict the application of the paramountcy principle to particular sections of Part VII.

The discussion paper spells out the paramountcy principle as applying when:¹

- revoking, varying or setting aside a parenting plan that was registered prior to the *Family Law Amendment Act 2003*: sections 63E, 63F, 63H
- making parenting orders: section 65E
- making an order that a counsellor is required to supervise or assist compliance with parenting orders: subsection 65L(2)
- making location and recovery orders: sections 67L and 67V
- making orders relating to the welfare of children: section 67ZC, and
- varying parenting orders following contravention: subsection 70NJ(5).

¹ Family Law Council, *The 'Child Paramountcy Principle' in the Family Law Act*, December 2004, pp11–14.

In the following instances the paramountcy principle does not apply, although the child's best interests will nevertheless be considered when the court exercises its discretion.²

- When considering whether to grant leave for proceedings to be commenced for the adoption of a child section 60G.
- When making an injunction: section 68B.
- When varying contact orders in family violence proceedings: subsection 68T(2).

In proceedings under the *Family Law (Child Abduction Convention) Regulations 1986* the principle does not apply. This is because such proceedings are not "proceedings for a parenting order" as required by section 65E of the Family Law Act.³

The next part of the discussion paper reviewed case law on the application of the paramountcy principle in specific contexts.⁴ The case law shows that there are a number of instances where the paramountcy principle does not expressly apply, but the courts regard the child's best interests as a relevant consideration. For example, in *CDJ v VAJ*⁵ the High Court held that even though the paramountcy principle does not apply expressly in statute, the child's best interests will remain a significant or "powerful" consideration in an order admitting or rejecting fresh evidence on appeal. In cases involving questions of jurisdiction, the child's interests are also relevant.⁶

There are also cases which have confirmed when the best interests of the child are not the paramount consideration, for example, when a parentage test is being ordered.⁷

The third part of the paper reviewed comparable legislation in the United Kingdom and New Zealand. The case law in these countries offers some examples of situations where the paramountcy principle has been invoked and where it would not have been applied in Australia.

The discussion paper then invited comment on 3 specific questions, which will be outlined in part 4 below, along with a detailed discussion of the responses in the submissions.

3. RECENT DEVELOPMENTS

Since the release of Council's discussion paper, the Government prepared an exposure draft Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) which was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) for inquiry. The Committee reported on 18 August 2005 and made 59 recommendations about the Bill. Two of the recommendations specifically relate to the paramountcy principle – recommendations 16 and 17 which are set out in full below:

² Discussion paper pp14–16.

³ Discussion paper p17.

⁴ Discussion paper pp18–22.

⁵ *CDJ v VAJ* (1998) FLC 92-828.

⁶ *B and B (Re Jurisdiction)* (2004) 31 Fam LR 31.13.

⁷ *Duroux v Martin* (1993) 17 Fam LR, 17.130.

The Committee recommends:

- (a) co-locating section 65E related to the best interests of the child as the paramount consideration in parenting orders and section 68F related to how the court determines what is in the best interests of the child at the start of subdivision 5 of Part VII about parenting orders; and
- (b) proposed Division 1A come later in the Act.

The Committee recommends that the objects set out in proposed subsection 60B(1) of Part VII be amended to:

- (a) make more explicit reference to the need for consistency and the paramountcy of the best interests of the child; and
- (b) to recognise as an object the safety of the child (as currently set out in proposed paragraph 60B(2)(b) of the Bill (as amended by recommendation 16).

The Government responded to the recommendations made by the Committee on 8 December 2005 (the same day as the Bill was introduced in the House of Representatives). The Government agreed with both of the above recommendations of the Committee and, if passed, the Bill will implement the recommendations. Therefore the proposed changes have been taken into account in preparing this advice.

4. RESPONSES TO QUESTIONS FOR CONSULTATION

In part 4 of the discussion paper, Council expressed a tentative view and invited comment.⁸ This was that the restriction of the principle to an enumerated list of specific decisions was appropriate. Indeed Council's examination of the case law since 1995 suggested that the present legislation makes sense. In particular, when considering the decisions to which the paramountcy principle does not apply Council noted that those decisions involve balancing the child's interests against some other interests.

The New South Wales Bar Association, Family Law Section of the Law Council of Australia and the Law Society of Tasmania all stated in their submission that they support Council's tentative view.

There were three submissions which propose an alternative formulation of the paramountcy principle, beyond just extending or removing its application. These submissions were from the Family Issues Committee of the Law Society of New South Wales, National Legal Aid and MacLean and Batagol.

The Family Issues Committee of the Law Society of New South Wales submits that there should be a general statement of the paramountcy principle within the Family Law Act, with enumerated exceptions. MacLean and Batagol also submit that the paramountcy principle should be expressed in a single section, like subsection 1(1) of the UK *Children Act 1989*, which provides that:

- When a court determines any question with respect to –
- (a) the upbringing of a child; or
 - (b) the administration of a child's property or the application of any income arising from it,
- the child's welfare shall be the paramount consideration.

⁸ Paragraph 4.2 on page 30 of the discussion paper.

National Legal Aid submitted that the paramountcy principle should apply to all proceedings in relation to parenting orders, not just the making of parenting orders per se. National Legal Aid support enumerated exceptions, although did not recommend the same exceptions as the Family Issues Committee of the Law Society of New South Wales.

Council is of the view that the approach outlined by the Family Issues Committee of the Law Society of New South Wales, National Legal Aid and MacLean and Batagol have merit. The advantage of a general statement of the paramountcy principle with enumerated exceptions would be that people would not have to refer to case law to understand the application of the paramountcy principle. Increasing clarity of family law is a worthy objective. It has to be recognised that re-writing the sections of the Family Law Act that apply the paramountcy principle may not be sufficient to increase the clarity of the law, though, and the whole of Part VII may need to be re-drafted to ensure the provisions operate in a coherent way.

The Family Law Act is being amended at a rapid rate. If the amendments in the Bill are passed, this is likely to create some confusion amongst the community (at least initially). It will also take some time for judicial interpretation of the new provisions to clarify their operation. For this reason, Council is reluctant to recommend a major departure from the paramountcy principle, beyond the proposals in the Bill.

Council has concluded that if the whole of the Family Law Act is to be re-written in line with recommendation 49 made by the Committee, then a clear statement of the paramountcy principle should be included as part of this re-write. The exceptions to the paramountcy principle would need to be determined and be clearly stated. In general at least, in Council's view it would be appropriate to formulate those exceptions to incorporate the position expressed in case law. The Government's response to recommendation 49 was to agree in principle, but note that "this is a matter for the Parliamentary Business and Budget process".

As noted in part 2, the discussion paper posed 3 specific questions for comment. The responses to these questions will now be considered in turn.

1. Taking account of the observations of the High Court in *CDJ v VAJ*, and the differences of view in the High Court in *Northern Territory of Australia v GPAO* are there any decisions where the paramountcy principle:

- (a) does not currently apply to which it should be made applicable?**
- (b) currently applies to which it should be made inapplicable?**

Some submissions suggest the paramountcy principle should be made applicable in two areas where it does not currently apply. These are parentage testing and the situation which arose in *Northern Territory of Australia v GPAO*⁹ about production of documents and inconsistent Commonwealth and Territory laws.

⁹ *Northern Territory of Australia v GPAO* [1999] HCA 8 (11 March 1999).

Firstly, the National Network of Women’s Legal Services (NNWLS) submits that “the best interests of the child should be the paramount consideration in determining whether parentage testing is ordered. At the very least, it should be a significant consideration”. The NNWLS suggests that it is likely that different or additional factors would need to be specified in the legislation for determining the best interests for this purpose and submits that this requires further research and consideration.

If the Family Law Act was to be amended to make the best interests of the child a “significant consideration”, it would not change current practice. Therefore Council has concluded that there should be no change to the current parentage testing provisions in this regard.

Secondly, in *Northern Territory of Australia v GPAO*, the High Court was called upon to consider whether as the Full Court of the Family Court had held, the paramountcy principle overrode other inconsistent statutory provisions. The High Court was satisfied that both the paramountcy principle and the Territory immunity operated freely each in their proper sphere. This raises significant issues beyond the paramountcy principle, which concern Commonwealth/State relations.

In their submission the Family Law Section of the Law Council of Australia “strongly recommends” that the principle be extended to cover situations where state/territory provisions regarding the production of documents from welfare authorities are inconsistent with Part VII of the Family Law Act. Both National Legal Aid and the Family Issues Committee of the Law Society of New South Wales argue that a statement of the paramountcy principle alone would not be specific enough to address the difficulty highlighted in the *NT v GPAO* decision. They suggest a provision in the Family Law Act that requires production of evidence in the best interests of the child where that evidence would otherwise be protected by state legislation, subject to a number of safeguards. The safeguards could include, for example, that it can be demonstrated to the court that it is probable that the documents will be relevant to determining the best interests of the child and that it can be demonstrated that no alternate source can be identified for the material likely to be found in the documents.

Council is merely drawing the content of these three submissions to your attention and will not make any recommendations. To do so would be likely to go beyond the scope of Council’s terms of reference.

2. Should the law be amended to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances?

The majority of the submissions Council received do not support any amendment to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances and Council supports no change. If any change was necessary, it would be preferable to amend the Family Law Act, rather than the Commonwealth Evidence Act, as the Evidence Act does not apply to the Family Court of Western Australia.

Council notes that schedule 3 of the Bill (dealing with less adversarial procedures for children’s cases), if passed, is likely to reduce the need for any amendment.

3. Are there specific applications of the paramountcy principle where it would be appropriate to list other factors which should be considered while treating the best interests of the child as paramount?

Professor Henaghan submits that without qualifying principles, the paramountcy principle can mean whatever a judge wants it to mean. He favours a clear statement of what the paramountcy interests are and what they are not and submits that if other interests are to be taken into account, they should be made apparent through legislation. Professor Henaghan notes that New Zealand's *Care of Children Act 2004* sets out principles relevant to the welfare and best interests of the particular child. Sections 4 and 5 of that Act are provided in appendix B.

Council neither accepts nor rejects Professor Henaghan's view at this stage, but will take this proposal into account as part of our consideration of the operation of the paramountcy principle in relocation cases. The terms of reference require Council to consider other interests affected by relocation decisions.

5. CONCLUSION AND RECOMMENDATIONS

In light of the proposed amendments to the paramountcy principle in the Bill before Parliament, Council does not see any justification for recommending further changes to the paramountcy principle as currently drafted. However, if the whole Family Law Act is to be re-written at some time in the future, Council recommends that a clear statement of the paramountcy principle with enumerated exceptions should be incorporated in the Family Law Act as part of that re-write.

Yours sincerely



Professor Patrick Parkinson
Chairperson