New views of parenting

Frank Bates

There is nothing more inscribed nor thought nor felt
And this must comfort the heart's core against
Its false disasters – these fathers standing round,
These mothers touching, speaking, being near,
These lovers waiting in the soft dry grass.
[Wallace Stevens, "Credences of Summer"]

"I have come to regard the law courts not as a cathedral but rather as a casino".
[Richard Ingrams, former Editor of Private Eye.]

Before entering into discussion of the substantive topic, it should be said that Australian Family Law is, in one sense at least, always new. It is without question one of the most scrutinised areas of Australian Law: the *Family Law Act* 1975 has been amended no less than thirty four times since its coming into force in February 1976, sometimes extensively; it has been the subject of two reports of Joint Select Committees of the Australian Parliament, in 1980 (Bates, 1980) and 1992 (below). In addition, its operation and administration is under continual scrutiny from two statutory bodies – the Family Law Council (*Family Law Act* 1975 s115) and the Australian Institute of Family Studies (*Family Law Act* 1975 Part XIVB).

These bodies are important because a central thrust of this paper is a report *Patterns of Parenting After Separation* which was prepared by the Family Law Council and which appeared in April 1992. The Committee (of which this writer was a member) which prepared the original draft, was given the following six terms of reference:

- to evaluate relevant research studies to identify patterns of parenting both within pre-separation and post-separation families in Australia.
- to examine relevant research studies and literature relating to the effects of children of current practices in Family Law in Australia relating to custody and access, and to indicate the extent, if any, that these practices affect parenting practices carried out prior to separation.
- to study literature described in overseas family practice.
- to develop models of co-operative parenting to identify their relevance, if any, to Australian children and their families.
- to develop models for instituting co-operative parenting after separation with a view to relating them to the various models of dispute resolution.
- to indicate the legislative, and as far as possible, other changes, necessary to ensure that pre-existing patterns of parenting prior to separation of the parents.

In the event, the first three terms of reference followed the basis for the conclusions and the last three the basis for the ultimate recommendations. Hence the purpose of this article is to analyse and especially to contextualise the recommendations which are contained in the Report in the light of reformative process.

The study of the literature caused the Council [para 2.39 (a)] to conclude that:

> Most children want and need contact with both parents. Their long term development, education and capacity to adjust and self esteem can be detrimentally affected by the long term or permanent absence of a parent from their maintaining links with both parents as much as possible.

The Council was reinforced in this view by an Australian Institute of Family Studies Report (Amato, 1987). Unfortunately, other research suggests that many separated parents who are not the primary caregivers to their children, have less and less contact with their children over time; for example, one Scottish study (Mitchell, 1985) found that one quarter to one third of children lost contact with their fathers shortly after the parents' separation, and that, overtime, only half maintained contact on a regular basis. This is doubly and trebly unfortunate when it is clearly established that children want to have contact with both parents (Walczak & Burns, 1984; Ochiltree & Amato, 1985) and that there is a strong link between single parenting and poverty. This may have long-term implications for children, including disadvantages in education and, ultimately in employment (Kilmartin & Wulff, 1984) It may also influence a child's decision to leave home prematurely (Burdekin, 1989).

At the same time, it would be utterly misleading of us to ignore the Report's conclusion that there are some situations where contact with a particular parent would be less than desirable. One situation, which is canvassed in the Report (para 2.35), but to which too little attention has been paid to date, in this writer's view, is the exposure of children to family violence amongst other family members. Although this does not appear to have been directly dealt with by Australian Courts, it has so been in Australia's nearest juridical analogue, which is Canada. The Canadian cases which are now discussed, can tell readers from outside that jurisdiction of particular difficulties which do not, as yet,

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seem to have been discussed in detail in Australian reported case law. However, in recent Canadian case law, there is little unanimity : first in *M (B.P.) v M (B.L.D.E.)* (1992) 42 R.F.L. (3d) 349, a strong Ontario Court of Appeal (Tarnopolsky, Finlayson and Abella JJ.A.), terminated a father's access where the father had been found to have harassed the mother after their separation and had threatened to kill her. In the majority (there was a strong dissent by Finlayson J.A.), Abella J.A. stated (at 360) that:

> This child is in needless pain and has been in this stressful situation throughout her relationship with her father Nor is there any countervailing benefit to her or any evidence of a subsiding trend. [The trial judge] rightly concluded that there was no reason for this ongoing, relentless, unhealthy and unconstructive stress to continue. The biological link cannot be permitted to trump the child's welfare and best interests.

In dissent, Finlayson J.A. (at 376) admitted that there could be no doubt that the husband had been an 'unremitting nuisance' to his wife and had considerably disrupted her life in the past. Nevertheless, he considered that that was all in the past and that the court ought not to be too willing to give up on what had become a protracted mediation exercise.

One Canadian commentator (McLeod, 1993) is concerned, not so much by the eventual adjudication, but by the judicial processes which led to it. He is especially concerned that, lurking just below the surface, is a politicisation of custody and access disputes. This is an obvious risk: as McLeod himself describes the matter:

> If a father is involved in a father's rights movement and a mother is sensitised to the broad nature of abuse and the creation of a negative environment, stress is inevitable. If the stress adversely affects the child, as seems likely, the easiest way to protect the child is to remove the stress; in other words terminate the access. Access then becomes very much a non-judicial issue.

By that he means, if the custodial parent is in favour, then access will occur – if that parent is not, then it will not. That commentator then inquires as to whether the courts should promote that position.

One doubts if anyone's position is made any easier by a contemporaneous decision of the Prince Edward Island Supreme Court in *Saridant v McLeod* (1992) 40 R.F.L. (3d) 443. At their simplest, the facts were that the mother and father had not married. They had carried on a relationship, but had never genuinely lived together. During the period of the relationship, the father had habitually physically and emotionally abused the mother and was ultimately imprisoned in respect of the assaults. Following his release, he applied for and was granted access, and the mother's appeal to the Supreme Court was unsuccessful. It is unfortunate that Carruthers C.J. P.E.I gave no reasons for his decision except to say (at 450) that it was clear that the trial judge was fully aware of the legal principles to be applied and had given considerable attention to the domestic violence aspect of the case. All that this case really seems to be saying, is that a trial judge's initial findings cannot be disturbed except in most exceptional circumstances. Inevitably, the decision has troubled the commentator to whom reference has already been made (McLeod, 1992) as well as troubling the present writer. The issue of the effect on the child of the violence suffered by the wife, was not touched on at all.

These rather contrary decisions apart, the Australian writer Moloney and his colleagues (1986) noted some ten factors where the Family Court has refused to grant or make access orders. The *Patterns of Parenting* Report (para 2.39), however, notes that there is evidence which suggests that, even where one party opposes access, the courts *can* succeed in promoting ongoing parenting to the benefit of the child. In legal terms, though, that view may well have been pre-empted by the decision of the Full Court of the Family Court in *In the Marriage of Brown and Pedersen* (1992) 15 Fam. L.R. 173. There the Court (Ellis, Nygh and Bell JJ) refused (at 184):

> ...to accept the proposition that the onus of establishing good or compelling reasons for denying access lay on the wife, or for that matter, any onus lay on the husband to the contrary ... [P]roceedings for custody or access are not to be viewed as adversary proceedings in the ordinary sense but as an investigation of what orders will best promote the welfare of the child.

The Court, likewise, declined to accept a further argument that a child's wish not to have access to his father should only be taken into account if it was based on some objectively ascertainable fault or defect on the part of the father. So although the position of the child may be more unclear, any notion of parent-based right seems dead in Australian Courts for the present at least. The decision may or may not be at odds with what the *Patterns of Parenting* Report seeks to achieve (Chisholm, 1992).

But with *Brown and Pedersen* can be compared the still more recent decision of *Stevenson v Hughes* (1993) F.L.C. 92-363, where a rather differently constituted Full Court (Fogarty, Nygh and Gun JJ) addressed a related matter. In that case, Nygh J (at 79, 813) emphatically stated that:

> ...an access order imposes an obligation which goes beyond passive non-interference and it imposes upon the party who is obliged to give access a positive obligation to encourage that access ...

Similarly, Fogarty J. (at 79,816) took up the same point when he said that:

> It is important in cases of this sort custodians appreciate that they are not entitled to treat the other party as an enemy who are to be thwarted whenever possible either by active steps or passive resistance...but I am afraid that the contrary attitude still appears to permeate the jurisdiction and the sooner that that misunderstanding is removed the better for everybody.

The significant facts in *Stevenson v Hughes* were that, in connection with an order that the five year old

daughter of the marriage, *inter alia*, telephone the husband each Monday, the custodial wife had pinned the husband's telephone number near the telephone and told the child that she could telephone the husband whenever she wished. The child refused to do so or to visit the husband.

The issue, of course, was the provision contained in s112AB (i) (a) (ii) of the *Family Law Act* which states that an order will have been deemed to have been contravened if the relevant party has '...made no reasonable attempt to comply with the order.' On the facts of the case, Nygh J. (at 79,814) said that:

> It is not open to the custodial parent to do no more than bring the child to the front entrance and invite it to walk of its own accord to the access parent at the garden gate, and to argue that if the child refuses, all her obligations are satisfied by merely standing, as I put it, with folded arms bearing the child, doing nothing either to encourage the child to walk to the father or to discourage the child from remaining on the doorstep and, indeed, this situation is directly comparable to it.'

It followed that the wife was in breach of her obligations under the order.

'Whenever law is dealing with family relationships it is at best a clumsy instrument. Law cannot make people be wise or responsible or happy or good.' ... but law may ... go some way towards preventing people from being unwise, irresponsible, unhappy or bad!

Stevenson v Hughes graphically illustrates the situation where parents have been unable to find a solution themselves. The *Patterns of Parenting* Report (para 3.05) notes that, in general, post-separation parenting decisions are most likely to be in the interests of children if, first, parents feel in control of their own futures. Second, when parents are guided in their discussions by consideration of their ongoing responsibilities as parents and, third, when they are encouraged to conduct those discussions within relatively informal settings. Once again, it seems automatically to follow that the influence of lawyers, who are not, by reason of training or tradition, informal beings, is important. However, as McClean (1978) has written:

> Whenever law is dealing with family relationships it is at best a clumsy instrument. Law cannot make people be wise or responsible or happy or good.

(This, of course, is quite correct, but law may, and this is often ignored, go some way towards preventing people from being unwise, irresponsible, unhappy or bad!)

The fact (para 3.36) that only a very small proportion of separating parents who have sought legal advice find themselves in a contested hearing over children, does suggest that lawyers do have a significant role to play, notwithstanding any tensions there may be with other involved disciplines, or prejudice against them. In this general context, it is valuable to note and endorse, as does the *Patterns of Parenting* Report (para 3.37), the *Code of Practice of the Law Institute of Victoria* (1986). This code, *inter alia*, states (para 1.2) that:

> The solicitor should encourage the client to see the advantage to the family of a conciliatory rather than a litigious approach as a way of resolving the dispute. The solicitor should explain to the client that in nearly every case where there are children, the attitude of the client to the other party in any negotiations will affect the family as a whole and may affect the relationship of the children with each parent.

More particularly, the Code (para 5.2) emphasises that:

> The solicitor should aim to promote co-operation between parents in decisions concerning the child, both by formal arrangements (such as an order for joint custody), by practical arrangements (such as shared involvement in school events) and by consultation on important questions.

The very existence of such a code does suggest that the legal profession is seeking to get to grips with its paradoxical role. As the *Patterns of Parenting* Report (para 3.38) points out:

> ...the duty of the lawyer is to serve and promote the interests of his or her client, whereas the *Family Law Act* directs that the welfare of the child is to be the paramount consideration. The lawyer faces a dilemma where the desires of a client and the welfare of the child do not coincide.

...existing terminology which describes relationships between separated parents and their children [custody, access and guardianship] is derived from criminal law and the law of property.

A particular difficulty noted in the Report (para 3.39) is that advice is couched, as it is in the *Family Law Act*, in terms of custody, access and guardianship, language which is familiar to lawyers, but less so to the parties themselves – at least in any genuinely objective sense. The issue of language was regarded in the *Patterns of Parenting* Report (para 4.01 *ff*) as being of especial importance. One Canadian study (Ryan, 1989) has pointed out that existing terminology which describes relationships between separated parents and their children, is derived from criminal law and the law of property. It is perhaps not without significance that, in 1988, there were two articles – one from a socio-historical standpoint (Bates, 1988) and one from the standpoint of legal philosophy (Montgomery, 1988) – on children as property. The term *custody*, the Report notes (para 4.11):

> ...can be synonymous with incarceration and is also used to describe conversion of property or goods. When used to describe the status of children of divorce, the term inevitably carries overtones of ownership. Moreover, we speak of winning, gaining or being awarded custody. We speak of a custody battle as if 'it' were a prize only one partner can win.

Likewise, *access* may also have connotations of ownership as, for instance, the term describes the right to enter or pass over adjoining land without hindrance.

The Canadian study has been confirmed by various other research and can probably be best summed up in Parkinson's phrase (1988), '...legal labels matter'. Of course, there is nothing really new in that as, as early as 1927, the Scandinavian writer, Hagerstrom (1927) had

expressed the opinion that, in Kelly's words, (1992):

> ...for early peoples, including the ancient Romans, the use of what we would call legal forms was in reality the activation of magic, and the relationship between parties to a conveyance or a contract was in reality one in which one party believed he was exerting a magical or supernatural leverage or hold on the other.

This point about the nature of legal language has been taken up by modern theoreticians such as Goodrich (1986) and White (1973) and it would be foolish indeed to ignore the practical contribution that these writers have made. Most graphically, change has been brought about in the United Kingdom *Children Act* 1989, which has been described by the present Lord Chancellor, Lord Mackay, (1989) as:

> The most comprehensive and far reaching reform of child law which has come before Parliament in living memory.

The *Children Act* has introduced new concepts and notions. First, s2 of the Act introduces the concept of *parental responsibility*, which is later defined in s3 (1) as meaning:

> ...all the rights, duties, powers, responsibilities and authority which by the law a parent of a child has in relation to a child and his property.

Although this definition might appear circular, it must be read in connection with the House of Lords decision in *Gillick v Wisbech and West Norfolk Area Health Authority* [1986] A.C. 112, which a majority (Mason C.J., Dawson, Toohey and Gaudron JJ) of the High Court of Australia, in the case of *Secretary, Department of Health and Social Security v J.W.B. and Anor* (1992) 106 A.L.R. 386 at 394, considered a strongly persuasive authority. Whatever *Gillick* did or did not decide (Eekelaar, 1986), it clearly limited the powers of parents to make decisions on behalf of their mature and competent children. In addition, 'custody' and 'access' have disappeared by reason of s8 (1) which speaks of 'residence' and 'contract' orders. A 'residence' order means:

> *...a order setting the arrangements to be made as to the person with whom the child is to live...*;

while a 'contract' order means:

> *...an order requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person to have and the child otherwise to have contact with each other...*

These new concepts are reinforced by, first, a 'prohibited steps order' which refers to an order that:

> ...no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court...

(It should be said that the scope of the operation of the provision is not wholly clear; it certainly only applies to actions within the power of a parent, so that in the United Kingdom, and probably Australia, it would mean that a parent could not prevent, say, a mature seventeen year old from electing for cosmetic surgery or playing dangerous sport.) Finally, s8 (1) refers to 'specific issue orders' which means:

> ...an order giving directions for the purpose of determining a specific question which has arisen or which may arise, in connection with any aspect of parental responsibility for a child.

The effect of this order is to enable the court to give directions rather than giving one person a right to take decisions or veto them. The court might take the disputed decision itself but, at the same time, it could direct that others make the decision. In the context of the *Gillick* case, for example, in a situation involving medical treatment, the court might direct that the child be treated as a specified medical practitioner thought appropriate. It should also be said that s9 (5) (a) precludes the court from making a specific issue order or a prohibited steps order with a view to achieving a result which could be achieved by making a residence or contact order.

The *Children Act* 1989 is a very significant piece of legislation as it is a comprehensive code dealing with both public and private aspects of the care of children. There are three issues which arise from any consideration of the Act: first, it exemplifies the rather sad truth that the law tends to be reactive rather than proactive. There can be little doubt that the *Children Act* was a reaction to the Cleveland child sexual abuse affair (Campbell, 1988, cf. Bell, 1988). Second, it is unlikely that a similar code will come into effect in Australia, as the public care of children is a State matter and likely to remain so (Blackmore, 1989). Third, the present writer does have anecdotal evidence that the change in terminology has had an effect on the way in which the legal profession, at any rate, deals with the issues.

Given that background, what did the *Patterns of Parenting* Report conclude and recommend? In essence (para 4.51), the Report concludes that co-operative parenting after separation is a desirable goal and that goal will be enhanced by the use of terminology which discourages ideas of ownership of children. In addition, the Report considers that, in the end result, the decision of post separation parental roles into custody and access reinforces a win/lose attitude and discourages ongoing parental responsibility. The Report also rejects the joint custody presumption (Bates, 1993), which presently exists under s63F (1) of the *Family Law Act*, on the grounds that it retains ownership language and is frequently perceived to mean equal time, which is often unworkable. It was also not without significance that the American State of

California repealed its joint custody presumption in 1988 which, like analogous provisions elsewhere, had been far from popular with commentators (Weitzman, 1985; Bruch, 1988). On the basis of those conclusions, the Report recommended (para 4.52) that the custody/access terminology, which is now contained in s64 (1), be replaced with the word 'care' to describe shared parenting responsibilities. The notion of guardianship, the Council considered should be retained. Indeed, in the recent case of *In the Marriage of Forck and Thomas* (1993) F.L.C. 92-372 at 79, 869, Nicholson C.J. seemed to regret having to make an order in the terms in which the *Family Law Act* is presently couched.

It follows that, if those changes are to be made, it will also be necessary to ensure that ongoing and shared parenting is effectively implemented. At this stage, it should be said that there are some situations which are not susceptible to any kind of legislative reform. Once example can suffice: in the Canadian case of *Plesh v Plesh* (1992) 41 R.F.L. (3d) 102, which took five days to determine whether access by the father should be supervised or unsupervised, the wife, out of spite and a desire for revenge stemming from the husband's advances to other women, had groundlessly alleged that he had sexually abused the male child of the marriage. Carr J. (at 104) expressed the concern that, in view of the conduct of her and her mother in the hearing, she had not discontinued her activities in respect of the father.

The approach that the Family Law Council in its *Patterns of Parenting* Report took (para 5.01 *ff*) was to suggest the adoption of **Parenting Plans**, especially as represented in the *Parenting Act* 1987 of the US State of Washington. This jurisdiction requires the submission of a parenting plan where an application for dissolution (or legal separation) is made. These plans, as they exist in Washington (and Florida and Maine), arose out of attempts to resolve the sole custody/joint custody dilemma. The Washington legislation, which the Report regards as being appropriate for Australia (para 5.06) is aimed at ensuring that parents have a well considered working document with which to address their children's future needs (para 5.05). It seeks to provide for changing needs in a way that minimises the need for future modification to a permanent parenting plan (the Act does provide for temporary parenting plans). The plans are to set out the authority and responsibility of each parent and to seek to minimise the child's exposure to harmful parental conflict – a matter which is of considerable moment in the light of the Canadian cases discussed earlier. The Act is also aimed at encouraging the use of the parenting plan as an alternative to reliance on judicial intervention and, finally and inevitably, otherwise to protect the best interests of the child. One might, perhaps, be forgiven for thinking that the last two are in contradistinction, as the child's best interests (or 'welfare') as the term is used in s64 (1) (a) of the *Family Law Act*), is what the courts say they are!

Further, the Washington Act also required four other issues to be addressed in each parenting plan:

- the allocation of decision making authority;
- residential provisions for the children;
- financial support for the children;
- the plan must address the dispute resolution processes to be used in the event that any future conflict is unable to be directly resolved.

> *...these plans have the ability to move the focus of negotiations away from criticism of the other spouse's capabilities, based on past behaviour, to present and future issues as to how each former spouse intends to fulfil his or her parental role, and an opportunity for each to consider the nature of their parenting responsibilities.*

The Family Law Council, in its *Patterns of Parenting* Report, considers (para 5.07) that:

> ...use of a well-structured and clear parenting plan guide will assist parents in focussing on how to meet the needs of their children after separation. In time of emotional upheaval, the plans offer a structure on which the parents can rely, while, ideally, avoiding the formality of proceeding to litigation.

In addition the Report takes the view (para 5.08) that these plans have the ability to move the focus of negotiations away from criticism of the other spouse's capabilities, based on past behaviour, to present and future issues as to how each former spouse intends to fulfil his or her parental role, and an opportunity for each to consider the nature of their parenting responsibilities. Of course, given the existence of cases such as *Plesh* (above), problems may arise in the determination as to which parents are not susceptible to the use of parenting plans. This will usually become apparent both to the Court and to Court officials during the course of the proceedings. It is anticipated that for only a small number of parents would the plans be considered inappropriate.

The Report goes on (para 5.14) to note research (Mitchell, 1985) which suggests that patterns of behaviour established during the first eight weeks of separation are likely to continue. Hence, information about parenting plans should be given to separating spouses, and they be urged to consider them, as soon as possible. Thus, legal practitioners and other professionals working with separating couples should be required to provide information and material on parenting plans to them. If those procedures are followed, the Council argues (para 5.15) that:

> ...parents will have an identified and clear structure to work with from the outset of their negotiations over the children. Thus it is hoped that by adopting a forward-looking and constructive approach to the question of ongoing child care, parents will be able to reach an amicable arrangement for the children relatively quickly and thereby avoid causing undue distress. Furthermore, by establishing a conciliatory, rather than an adversarial attitude to matters relating to the children's welfare, future disagreements should be able to be settled without resorting to litigation and ideally a pattern will be established where both parents continue to play a meaningful role in their children's lives.

As already mentioned (above), it is not every situation which will be amenable to agreed parenting plans. In such a case, the Report states (para 5.19), it will be necessary for

the Court to devise a parenting plan for the parents. Any such plan is likely to be quite different from those created by parents who are able to co-operate, in that the plan would necessarily be more precise. In extreme cases, for example where the safety of the child is compromised, plans similar to orders which presently exist may have to be devised. On the other hand, the Report acknowledges (para 5.21) that there are some separating parents for whom parenting plans are inappropriate because they can co-operate without formalising their arrangements.

Finally, the Council suggests (paras 5.22, 5.23) that parenting plans should normally be set out in a manner which allows the parents freely to choose the level of responsibility they intend to adopt for their children after separation. They would also be flexible and capable of easy alteration to meet the needs of the child. Because the parents have been working in a co-operative framework since their separation, it is hoped and expected that they will continue to consult with one another and act with the best interests of the child continually in mind.

> *... parenting plans should normally be set out in a manner which allows the parents freely to choose the level of responsibility they intend to adopt for their children after separation. They would also be flexible and capable of easy alteration to meet the needs of the child.*

It should also be said that the Report emphatically rejects (para 6.16) any idea that the existing law should not be changed simply because the vast majority of cases are not contested. Through inaction, we would be failing to take into account that the common law's attitude towards the basal relationship of parent and child has undergone considerable change (Bates, 1987). The law, as represented by *Gillick* and its application in *J.W.B.* (above), tells us that. The Report also rejects (para 6.10) the extension of child agreements which are presently found in ss60 and 66ZC and 66ZD. The Council's view was that these agreements, which are rarely used in fact, are limited by reason of their terminology, are not subject to scrutiny and tend to be concerned with specific issues rather than with ongoing parenting *per se*. As well as the idea of 'care', the report also notes (para 6.04) in some cases, a concept of 'residence' to be incorporated to enable time ratios to be allocated between parents for the residence of the child where necessary.

What effect has this radical report had? The second Joint Select Committee reported in November 1992 (Australia, Parliament, 1992) and thus had the opportunity to consider *Patterns of Parenting After Separation*. It should be pointed out that the Commonwealth Attorney-General, Mr Michael Lavarch, was a member of that Committee, so the Report may stand some chance of being implemented. Indeed, in various media outlets, Mr Lavarch has expressed his interest in the reform of family law at large. In the terms of reference of this Committee, it was required to investigate, '...the proper resolution of custody, guardianship, welfare and access disputes.'

After a brief analysis of the *Patterns of Parenting* Report, the Joint Select Committee (para 5.51) regarded it as crucial that children be able to maintain contact with both parents and, to that end:

> ...both parents need to understand what their roles as custodial/non-custodial parent, resident parent/ contact parent are and what rights and responsibilities they have to each other and their children.

The Joint Select Committee, however, then went on (para 5.52) to say, in regard to the changes in terminology which had been urged by the Family Law Council (above), that any such changes should be fully considered prior to legislative enactment. The Committee noted the potential for problems unless any amendment was undertaken jointly by the Commonwealth and States. The effect of the *Children Act* 1989 in the United Kingdom would also need to be monitored in detail. The Committee also noted that the *Hague Convention on Civil Aspects of Child Abduction* was in the more orthodox terminology.

On the other hand, the Family Law Council pointed out in a later report (*Comments on the Report of the Joint Select Committee on the Operation and Interpretation of the Family Law Act*, 1993 para 4.39) many submissions had been received by the Council from interested bodies (such as the Australian Institute of Family Studies, the Law Council of Australia and the National Catholic Association of Family Agencies) supporting the change. Given the development in the United Kingdom (above) the comment on the Hague Convention would seem something of a red herring. The United Kingdom is also a party to that Convention and little difficulty seems to have been caused as regards the Hague Convention there (Bromley & Lowe, 1992). In addition, there have been no equivalents in Australia of Cleveland (above), or the series of murders of children by parents and step-parents which began with that of Maria Colwell in 1973 (Howells, 1973; Bates, 1990), all of which were productive of substantial report and documentation. Without these stimuli, the Australian politicians who were responsible for the Joint Select Committee Report, could well have been tempted to put it in the, metaphorically, 'too-hard basket'.

From all of this, it is quite clear that something is going to change but it is not easy to see precisely what. All of the developments and reports which have been discussed in this paper represent, to a greater or lesser degree, new views of parenting. In the end, though, it all depends on the interrelationship of individual children, parents and the State and its agencies, as to how successful any new view may be. There are clearly fundamental issues involved : for instance, the English writer Bainham (1988) is critical even of the welfare principle which he suggests:

> ...cannot provide an adequate basis for establishing and protecting the interests of children as a class. Individualistic adjudications of what is best for particular children proved no answer to the complex issues of public policy which are raised...

It is also a truism to say that family law is full of uncertainties and, in conclusion, it might be worth rehearsing a view I expressed some years ago (Bates, 1987) that, in areas involving personal relationships, the law will never succeed in providing every individual with the solution which they consider appropriate or desirable. In many cases, neither competing party will receive

and that will be the case whatever form family law proceedings take. Paradoxically, awareness of that fact might well be helpful and might dissipate some of the anger and bitterness which are generated. On the issue of uncertainties, I would not be surprised to be offering a similarly structured paper in five, seven or ten years time. ♦

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