FAMILY LAW COUNCIL

National Alternative Dispute Resolution Advisory Council

LETTER OF ADVICE TO THE ATTORNEY-GENERAL

ON

PARENTING PLANS

16 MARCH 2000

ISBN 0 642 20996 0

CONTENTS

The Family Law Council and NADRAC Secretariats' mailing addresses are both at:
Robert Garran Offices
National Circuit
BARTON ACT 2600
Australia
Other contact details are:

		Family Law Council	NADRAC
Telephones:	within Australia	(02) 6250 6375	(02) 6250 6897
	International	+61 2 6250 6375	+61 2 6250 6897
Facsimiles:	within Australia	(02) 6250 5917	(02) 6250 5911
	International	+61 2 6250 5917	+61 2 6250 5911
Email:		flc@ag.gov.au	nadrac@ag.gov.au

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 Council are set out in sub-section 115(3) of the Act which states:
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 first Council was appointed in November 1976. Funding for the Council is provided through the Commonwealth Attorney-General's Department, and the Council is supported by a Secretariat located within the Family Law and Legal Assistance Division of the Department.

[Table of Contents]

THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.
The issues on which NADRAC advises include the following:

- minimum standards for the provision of alternative dispute resolution services;
- minimum training and qualification requirements for alternative dispute resolution practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations;
- appropriate professional disciplinary mechanisms;
- the suitability of alternative dispute resolution processes for particular client groups and for particular types of disputes;
- the quality, effectiveness and accountability of Commonwealth alternative dispute resolution programs;
- ongoing evaluation of the quality, integrity, accountability and accessibility of alternative dispute resolution services and programs;
- programs to enhance community and business awareness of the availability, and benefits, of alternative dispute resolution services;
- the need for data collection and research concerning alternative dispute resolution and the most cost-effective methods of meeting that need; and
- the desirability and implications of the use of alternative dispute resolution processes to manage case flows within courts and tribunals.

NADRAC was formed in October 1995. It is a non-statutory body appointed by the Attorney-General. Funding for NADRAC is provided through the Commonwealth Attorney-General's Department, and is supported by a Secretariat located within the Civil Justice Division of the Department.

[Table of Contents]

THE PARENTING PLANS COMMITTEE

Members of the Councils' Parenting Plans Committee were:
The Hon Justice Richard Chisholm *Convenor*
Dr Carole Brown *
Mr Fabian Dixon
Ms Susan Gribben
Ms Bernadette Rogers
Mr Joe Piotrowski *
Mr Brendan MacDowell (Secretariat)
* Dr Brown replaced Mr Piotrowski on the Committee in October 1999.

The Committee also wishes to thank Ms Allison Wood, formerly of NADRAC's Secretariat, for her assistance to the Committee.

[Table of Contents]

RECOMMENDATIONS

Recommendation 1 Amendment of the *Family Law Act 1975*
Division 4 of Part VII of the Act be amended to:
- encourage the use of parenting plans, and the use of consent orders where a party requires an element or elements of the plan to be enforceable; and
- repeal the registration provisions.
Recommendation 2 Encouragement of an integrated package
The use of an integrated parenting plans/consent orders package be encouraged through information and education through existing funded services, such as counselling and mediation services, legal aid bodies and community legal services and through other appropriate means, for example, clinical legal education.
Recommendation 3 Review of existing kits
To assist parties to develop parenting plans (and obtain consent orders, if required), the existing kits and information be reviewed and modified to reflect the above recommended approach.

FAMILY LAW COUNCIL
Mr Des Semple
Chairperson

National Alternative Dispute Resolution Advisory Council
Professor Laurence Boulle
Chairperson

16 March 2000

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

[Table of Contents]

PARENTING PLANS

Dear Attorney-General

1. REFERENCE

1.1 In August 1998, you asked that the Family Law Council ("Council"), in cooperation with the National Alternative Dispute Resolution Advisory Council ("NADRAC"), look into issues arising from parenting plans made under the *Family Law Act 1975* ("the Act") including the continued need for section 63E of the Act.
1.2 Council established a committee onto which members of NADRAC were coopted. The committee prepared the advice given in this letter and it has been endorsed by both Council and NADRAC.
1.3 The advice given in this letter is substantially similar to that given in Council's letter of advice to you dated 31 January 1997 (Appendix 1). Your response dated 16 May 1997 indicated that you had concerns about removing the provisions in the Act concerning registration of parenting plans at that time, but that the issues raised should be fully considered when reviewing the changes made by the *Family Law Reform Act 1995* ("the Reform Act").
1.4 Having regard to your request to consider these issues again, Council is not embarrassed to repeat much of its earlier advice. Council remains of the view that parenting plans are a valuable means for some parents to set out their agreement on their responsibilities as parents, but that the registration provisions in the Act are unnecessary. In essence, Council advises repeal of the registration provisions.

[Table of Contents]

2. BACKGROUND TO THE CURRENT LEGISLATION

The law prior to the Reform Act

2.1 Under the Act as it was before the Reform Act amendments, there were provisions relating to "child agreements". These were defined as agreements in writing made between the parents of a child that provided for "child welfare matters" in relation to a child and/or the maintenance of the child.[1] The term "child welfare matters" was defined as matters relating to the custody, guardianship, welfare of, or access to, a child. Thus, apart from the change in terminology by which "custody" and "access" were replaced, the definition of a child agreement was essentially the same as that of a parenting plan under the Reform Act.
2.2 There was provision for the registration of child agreements.[2] As with parenting plans, the terms of a registered child agreement were legally enforceable.[3] There were provisions for the variation of agreements, and provisions for the agreements not to be enforced contrary to the interests of the child, corresponding to those now relating to parenting plans.[4] Child agreements could be set aside where: they had been obtained by fraud or undue influence; the parties wished them set aside; and, the child's welfare required they be set aside.[5]

2.3 Putting aside changes in terminology, therefore, it can be seen that the critical difference relates to regulation and parental rights. While under the former law child agreements could be registered by the parties with no judicial scrutiny, the Reform Act required judicial scrutiny before parenting plans could be registered. Under the old law, child agreements could be registered as of right by parents; under the new law, parenting plans can be registered only if sanctioned by the court, on the basis of the provision of detailed information and a certificate by a lawyer or a family and child counsellor. The change reflects a move away from parental rights, towards greater state regulation.

[Table of Contents]

Previous Family Law Council Reports

2.4 In its report, *Access - Some options for reform* (1987), Council gave some support to the view that the custody/access system created a mentality in which parents were encouraged to think of themselves as winners or losers in the custody battle. This led to Council's study of cooperative approaches to parenting which resulted in Council's Report, *Patterns of Parenting After Separation* ("the POPAS Report") (April 1992). The proposals in the POPAS Report were further developed in Council's Letter of Advice on The Operation of the (UK) *Children Act 1989* ("the UK Children Act Advice") (March 1994).
2.5 The POPAS Report encouraged the idea of parenting plans and envisaged that they would reflect topics covered by the Court's standard forms, particularly arrangements for the care of the children. They would itemise factors such as accommodation, supervision, education, health, maintenance and other factors, but would not necessarily be confined to these.[6] Council referred to provisions of the *Parenting Act 1987* in the State of Washington, United States of America, which

required that a parenting plan be submitted with any application for dissolution or legal separation and that the following issues be addressed in each parenting plan:
(i) allocation of decision making authority;
(ii) residential provisions for the children;
(iii) financial support for the children; and
(iv) dispute resolution processes.
Council noted that these requirements seemed appropriate for Australia,[7] and promoted these four issues as the "basic elements of a parenting plan".[8]
2.6 The POPAS Report noted that, if parents wished to formalise the provisions of a parenting plan, they could use the registration of child agreements provisions in the former section 66ZC.[9] However, the UK Children Act Advice noted specifically that a parenting plan is simply an option which may assist parents to reach agreement and that it should not be elevated above that level of utility. As such, Council recommended that it did "not see a need for the legislation to contain any special provisions in relation to parenting plans".[10]

[Table of Contents]

The Reform Act

2.7 Parenting plans were given legislative recognition in the Reform Act, which came into full effect from 11 June 1996. The Reform Act, which inserted a new Part VII in the Act, arose out of a number of reports to government, including the POPAS Report and the UK Children Act Advice.
2.8 The Reform Act as enacted was substantially different to the Bill first introduced in draft form as the *Family Law Reform Bill 1994* on 30 June 1994. The draft Bill provided for two different kinds of agreements: parenting agreements, which could be registered and become legally enforceable; and unregistrable, unenforceable parenting plans. After consultation (including with the Family Law Council) which raised concerns about the complexity of the proposed provisions, the then Government amended the draft Bill to provide only for parenting plans, which could be registrable, and upon registration, enforceable. The draft Bill also did not have any scrutiny provisions in relation to either parenting agreements or plans. After extensive debate in the Senate, provisions were included requiring differing forms of scrutiny.

[Table of Contents]

3. THE PRESENT LEGISLATION

3.1 The provisions relating to parenting plans, contained in Division 4 of Part VII of the Act, may be summarised as follows.
3.2 Parents of a child are encouraged to agree about matters concerning the child rather than seeking an order from a court, and in reaching their agreement, to regard the best interests of the child as the paramount consideration.[11]
3.3 A parenting plan is defined as an agreement in writing, made between the parents of a child, dealing with one or more of the following: the person or persons with whom a child is to live; contact between a child and another person or persons; maintenance of a child; and any other aspect of parental responsibility for a child.[12] Those matters, apart from maintenance of a child, are called "child welfare

provisions".[13] These matters correspond to the provisions in the Act dealing with a court's power to make orders for residence, contact and specific issues.
3.4 Section 63F(3) provides that the child welfare provisions of a registered parenting plan have effect as if they were orders for residence, contact or specific issues. In other words, it makes the provisions of the plan legally enforceable once the parenting plan is registered. The provisions are therefore enforceable as if they were court orders. From this point of view, therefore, perhaps with some marginal technical differences, the legal effect of an order that a child live with a person is the same as the legal effect of a provision in a registered parenting plan that the child live with the person. An unregistered parenting plan has no such effect.
3.5 Exceptionally, a provision in a registered parenting plan that the child is to live with a person who is not a parent of the child is not legally enforceable.[14] The court may vary the child welfare provisions of a registered parenting plan if it considers the variation is required in the best interests of the child,[15] and must not enforce a child welfare provision of a registered parenting plan if it considers that to do so would be contrary to the best interests of the child.[16]
3.6 A parenting plan becomes registered in a court, after scrutiny by that court. To be registered, an application is made to the court accompanied by a copy of the plan together with either a certificate (or certificates, where there is more than one applicant) of independent legal advice or a certificate that the plan was developed after consultation with a child and family counsellor (section 63E of the Act).[17] The court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to which the plan relates.[18] In considering this issue the court (normally in practice a registrar) must have regard to the information accompanying the registration application and may, but is not required to, have regard to any or all of the matters in subsection 68F(2) (which sets out a list of matters to be taken into account in considering the best interests of a child).[19] Rules of Court make detailed provision for information which must be provided, and there is a form prescribed.[20] A parenting plan may be set aside where: it has been obtained by fraud, duress or undue influence; the parties wish it to be set aside; or it is in the child's best interests for it to be set aside.[21]

[Table of Contents]

4. THE RATIONALE FOR PARENTING PLANS

4.1 Much of this section reiterates matters set out in our earlier advice dated 31 January 1997, but Council considers that it bears repeating.

The intention of parenting plans

4.2 Parenting plans in Australia were first suggested by Council in the POPAS Report, in which Council said:
Parenting plans form an ideal basis for discussion in a mediation or conciliation setting by focussing on the details of parenting rather than on legal concepts such as custody and access.[22]
4.3 ***Dispute prevention and early resolution.*** Arguments for promotion of the use of parenting plans are based on the assumption that the process of developing a parenting plan, preferably in a structured way assisted by a kit, will encourage joint

parental responsibility and prevent future disputes arising by ensuring that all potentially contentious issues have been identified and dealt with in as positive a way as possible.
4.4 Where conflict over some issues is anticipated, the assistance of a skilled neutral third person/mediator to facilitate the development of the parenting plan may ensure that such issues are identified and dealt with before there is opportunity for them to escalate into a legal dispute. The aim is to prevent unnecessary involvement in the Court system and its adversarial process. The mediator can: assist the parties to decide which key elements may need to be legally enforceable; focus the parents on the best interests of the children; and, ensure that the parenting plan incorporates a dispute resolution process, such as mediation, for any future problems.
4.5 ***Cooperation between parents.*** Parenting plans were intended to "give each parent the opportunity to consider the nature of their parenting responsibilities"[23] and to "increase the likelihood of shared parenting".[24] They were intended to be "flexible and capable of easy alteration to meet the changing needs of the child".[25] The proposal for parenting plans was consistent with the overall aim of the POPAS Report to maximise the opportunity for both parents to take full responsibility for decision making about the ongoing care of their children after separation.
4.6 The capacity of the separating parents to cooperate in relation to their ongoing parenting responsibilities was seen by Council as having pivotal significance. This matter is further discussed below.[26]
4.7 ***Flexibility.*** Parenting plans were an important aspect of Council's proposals. Council's original intention, as set out in the POPAS Report,[27] was that parenting plans would be flexible arrangements which would vary widely in scope, detail and content. Such plans were considered to be workable where there was an appropriate degree of cooperation between the parents involved.
4.8 It was Council's intent that parenting plans would enable the parties, if they wished, to commit their arrangements to writing so that both would understand their responsibilities and the children could have a reasonable degree of certainty about arrangements affecting them. However, the aim was not inflexibility or finality. Parenting plans would acknowledge the realities of changing needs over time: changes which occur in education, personal needs, health needs, living arrangements and financial support between birth and 18 years of age.
4.9 ***Alternative to court action.*** Parenting plans were seen as offering an alternative to the processes of the Family Court. It was not Council's intention that parenting plans would become formal agreements, capable of registration in a court. In fact, parenting plans contrasted with court orders and agreements in several respects, especially in relation to:
(i) the process by which the plans were to be drawn up;
(ii) flexibility of arrangements;
(iii) the costs to the parties; and,
(iv) the resolution of disputes about what had been agreed to between the parties.
4.10 The costs to the parties of taking a matter to a fully defended court hearing were considered to be high, from both financial and emotional viewpoints, whereas parenting plans would involve minimal financial and emotional costs to the parties.
4.11 ***Dispute resolution.*** One of the major advantages which Council envisaged was that parenting plans would allow the parties to decide how they would resolve disputes over the detail of arrangements. They could thus avoid the winner/loser or loser/loser results of other options. Arrangements would be capable of meaning different things to different people or be capable of requiring elaboration as specific

situations arose. Disputes about such matters, particularly those relating to children, were seen as an ongoing feature of the family law system. When such disagreements arose, a dispute resolution mechanism in a parenting plan would enable the parties to get together and try to find a solution which would be acceptable to them both.

4.12 This contrasted with the dispute resolution options of a court order or agreement under which either the problem remained unresolved and added to the gathering list of grievances between the parties, or an externally determined and enforceable solution was imposed on the couple. That solution may not have been acceptable to either party or may have been acceptable to one of them only.

[Table of Contents]

Who were parenting plans designed to assist?

4.13 The POPAS Report recognised that not all parents were either able or willing to cooperate or communicate to the degree necessary to enable them to draw up their own parenting plan. In those cases where cooperation between the separating parents was not possible, the report said that it would be necessary for the court to draw up a parenting order.[28] This would especially be the case where, for instance, there was fear for the safety of the child or the former spouse. A parenting order in such circumstances, the report said, "will, in effect, be similar to current orders, where contact between parent and child is kept to a minimum, and may have restrictions placed on it".[29] However, the POPAS Report drew a distinction between this latter group and those who would be capable of handling their own affairs.
4.14 Council intended that parenting plans would mainly assist parents who were able to communicate and to resolve their problems rationally or would be able to do so with the assistance of a mediator or counsellor. The POPAS Report said:
Council is aware that a parenting plan will not be appropriate in every situation. Not all parents are capable of or willing to cooperate or communicate to the extent necessary.[30]
4.15 This view was repeated in the UK Children Act Advice in which Council referred to three categories of separating parents:
• *Separating parents who are able to make arrangements for the ongoing care of their children;*
• *Separating parents who will need the assistance of mediation, conciliation and other support services in making arrangements for the ongoing care of their children; and*
• *Separating parents who are unable to cooperate to the extent where they can agree on arrangements for the ongoing care of their children.*[31]

4.16 Council considered that the first of these categories might draw up a parenting plan, but might prefer a more flexible and oral arrangement. Council noted that some of the second category might be assisted by the parenting plan approach. However, a parenting plan was considered by Council to be "clearly irrelevant in relation to the third category of separating parents".[32] Broadly speaking, parenting plans were aimed at the category of persons who would not approach the Family Court to resolve their differences and not at the smaller category of people who would approach the Family Court for resolution.

[Table of Contents]

5. SOME ISSUES CONSIDERED

5.1 Council considers that the following questions, at least, require some thought:-[33]
(i) Is it appropriate that there be some form of public scrutiny before parents can make enforceable arrangements for their children by agreement? If so, what form should such scrutiny take?
(ii) If parenting plans are not to be legally enforceable, should the law or government encourage parents to resolve or prevent disputes relating to their children by the use of parenting plans? If so, what steps should be taken in this regard?

[Table of Contents]

Scrutiny

5.2 As noted earlier, the Reform Act inserted detailed provisions relating to parenting plans into the Act. They provide for the registration of parenting plans, which then become legally enforceable. The provisions may be summarised as follows:-
(i) Parenting plans are enforceable only if registered;
(ii) In order to be registered, the following basic requirements must be satisfied:-

- There must be a certificate by a family and child counsellor (to the effect that the parenting plan has been developed after counselling) or by legal practitioners (to the effect that independent legal advice as to the legal consequences of the plan has been provided to the parties);
- The court (in practice normally a registrar) must be satisfied that it is appropriate to register the parenting plan having regard to the interests of the children concerned.

5.3 It is convenient to refer to these requirements as a form of public scrutiny.[34] Their effect is that it is not left to the parties to determine for themselves whether the terms of the parenting plan are suitable for the children. To put it in terms adapted from other areas, the law imposes a regulatory framework, rather than adopting a self-regulation model, for parenting plans which are to have legal effect.
5.4 This approach has a number of practical implications. The parties must make arrangements for a counsellor or legal representatives to do what is necessary for the appropriate certificate/s to be provided. More importantly, because the court itself must be satisfied that the parenting plan is in the children's interests, it is necessary for the parties to provide information with which the court can be so satisfied. These requirements impose private and public costs.
5.5 In the debates in the Senate about the Reform Act's provisions about registered parenting plans, there were obvious concerns that before entering into legally binding arrangements there should be either:
(i) an opportunity for parents to have some professional advice from a suitably qualified person about the needs of their children and the sorts of arrangements which would benefit them and meet their children's needs, encouraging them to focus on the needs of their children, rather than just their own; or
(ii) independent legal advice for each of the parents about the legal consequences and implications of registering their parenting plan.

5.6 However it is not clear:
(i) why the registration of a parenting plan was considered more perilous for children or parents than consent orders so as to require one or other of these two protections to be a pre-requisite for the registration; nor
(ii) why each protection on its own should be regarded as sufficient when they address quite different needs.
5.7 It is understandable that there might be reasons put forward for requiring one, none, or both, forms of protection but requiring either does not appear to make a great deal of sense.
5.8 The emphasis on the need to consult a family and child counsellor about the needs of children during the development of a parenting plan would appear to ignore the fact that many agreed parenting arrangements are developed with the assistance of family and child mediators, but those plans cannot be registered unless the parents consult a family and child counsellor at some stage during the process or get independent legal advice on the meaning and effect of the plan.[35] If there is to be professional scrutiny, it would appear sensible to include family and child mediators in addition to family and child counsellors and legal practitioners. Council notes that the *Family Law Amendment Bill 1999* proposes to remedy this omission in the current Act.
5.9 Council understands that the experience of family and child mediators, who routinely help separating couples work out their parenting plans, is that many couples are able to work out their plans for themselves without the assistance or with minimal assistance from mediators (usually just in committing the agreement to writing) and seldom need any of their agreements made enforceable. If they do, consent orders in relation to a few key issues is sufficient.
5.10 On the other hand, other couples may need considerable help from a mediator to structure their negotiations concerning their children, write up interim and then more final agreements and help them decide which parts may need to be made legally binding.
5.11 Council recognises that obtaining independent legal advice is routinely recommended by mediators in relation to deciding which, if any, parts of the agreement should be made legally binding and the legal consequences of doing so. It would appear however that lawyers rarely recommend registering a parenting plan but prefer to file consent orders if it is necessary to make some or all of an agreement legally binding.

[Table of Contents]

Flexibility

5.12 Council understands that many mediators do not see it to be in the children's best interests for final, legally binding agreements in relation to parenting issues to be made and encourage parents to view their parenting agreements as provisional, even if they are made legally binding. This is different from final property agreements, because the children's needs and the parents' own circumstances change regularly and flexibility is necessary.[36] Council appreciates that it is part of the negotiation process to discuss how needs will be regularly reviewed, future changes will be negotiated, and which dispute resolution process, including mediation, will be tried if need arises.
5.13 The process of separation and divorce usually starts before the physical separation. The couple often live fairly separately under the one roof for a time and

need to arrange how they will share the care of the children, often when they are not able to talk to each other without fighting. These arrangements have to change when the couple first separate, often with one going into temporary accommodation, and then again when their more permanent living and working arrangements are in place, and then, in many cases, yet again when either or both of them re-partners. Mediators are often involved at all stages of negotiations/decision making. The issues discussed usually include residence arrangements, time with each parent/grandparents, baby-sitting/child care, child support, choice of kindergarten/school, names, extra-curricular activities, holidays, special needs, clothes, homework supervision, contact with school, medical care, children's furniture, books and toys, changeover arrangements and so on.

5.14 Council considers that registering most of these agreements as parenting plans would usually be totally inappropriate because:

(i) much of what is agreed would be unsuitable for or incapable of legal enforcement. For instance, it is not unusual for a set of general principles governing behaviour to be included, setting out such matters as agreement not to denigrate the other parent and to be "fair to each other";

(ii) the mechanism necessary to change a plan involves a revocation of the whole plan (Section 63D). This promotes rigidity in the operation of the plan and deprives the parties of flexibility to meet changing circumstances quickly and easily; and

(iii) in order to be registered, the plans often require that matters be set out in unnecessary detail, when agreement about those details may need to evolve with experience.

However, if they are to be legally enforceable as a consequence of registration, there seem to be no grounds for making the registration requirements any different from consent orders.

5.15 Whilst a parenting plan should set out the whole agreement, if unregistered the agreement will effectively be one of honour. The commitment to keeping such agreements has a tendency to erode over time, as circumstances change. It is therefore often desirable or necessary for certain key aspects of an agreement to be legally binding, but they must also be capable of being quickly and easily changed, if review and renegotiation of any part of the agreement takes place. It is Council's view that this is best done by consent orders.

[Table of Contents]

Parenting plans and consent orders

5.16 Alternatively, parents who wish to make their arrangements for the children legally enforceable may seek consent orders. The Act provides no guidance regarding the relationship between consent orders and parenting plans, or whether one method is more appropriate than the other. In practice, most parents who wish to have their agreement made legally binding do so by having consent orders made, without any apparent disadvantage in their doing so. It may well be that the making of consent orders involves less elaborate public scrutiny than is required for the registration of parenting plans, as there is not the prerequisite of legal advice or consultation with a counsellor. As such, it may be that consent orders are obtained more easily and more cheaply than registered parenting plans. The court's scrutiny is similar whether the application is for registration of a parenting plan or for consent orders. In this regard,

Council notes that the information required for an application for consent orders (Form 12A) is almost identical to the information required for an application for registration of a parenting plan (Form 26A).[37]

5.17 Statistics kept by the Family Court of Australia[38] indicate that there is limited use of the registration provisions of the Act. For example, in 1998-99 there was a total of 395 applications to register parenting plans in the Family Court of Australia. In the same period 320 plans were registered and there were 5 revocations of previously registered parenting plans. The number of applications has declined year by year. By contrast, there were 15,553 consent orders sought during 1998-99 (14, 216 in the Family Court of Australia; 1,337 in the Family Court of Western Australia). Council recognises that these relate to all types of orders, not just those relating to children. Nevertheless, Council interprets this data as indicating that the provision for registration of parenting plans (Section 63E) is not widely supported and is likely to be used less and less in the future.

5.18 Council suggests that a major reason for the diminishing use of the provision relating to registration of parenting plans is that lawyers and the court are not encouraging parents to register their parenting plans because of (a) the costs involved, (b) the complexities associated with amending registered parenting plans (revocation by further agreement) and (c) an appreciation that the registration of parenting plans is contrary to the intention that they should be a flexible alternative to court adjudication.

5.19 The clear anecdotal evidence is that it is easier to use consent orders to put enforceable agreements on parenting matters on the record. Council understands that the result of most mediated arrangements is an agreed but unregistered parenting plan, together with consent orders in relation to the particular matters the parents want to be enforceable.

5.20 Council considers that consent orders are the most appropriate way in which parents can make agreed parenting arrangements enforceable.

[Table of Contents]

Encouragement

5.21 Of course, it is open to parents to draw up a parenting plan themselves and not register it,[39] but the legislation is effectively silent on such an arrangement. There is little in the Act to encourage parties to do this, although Council notes the terms of Section 63B which encourages parents to agree about matters concerning their children rather than seek court orders, and in doing so, to regard the best interests of their children as the paramount consideration.

5.22 Council considers that parents should be encouraged to develop parenting plans which are dynamic and flexible, taking into account children's and parents' changing needs and circumstances. Parents should also be encouraged to seek professional advice when necessary about those needs, and to avail themselves of counselling and mediation services if they are finding it difficult to work through the issues and make decisions or resolve issues. If any matters are then required to be enforceable, consent orders may be used.

5.23 Council's view is that it is appropriate for the legislation specifically to encourage parenting plans, even if there are no registration provisions. Section 63B could be more persuasive in seeking to keep parents away from the court. However,

Council notes that Section 63B does not sit well with the general tenor of Division 4 of Part VII, which largely focuses on the registration of parenting plans, which of course requires an application to the court.

[Table of Contents]

Primary dispute resolution

5.24 As set out above, Council considers that there is a definite need for parenting plans and they should be encouraged as much as possible, including strengthening the legislative provisions to do so. In particular, it may be appropriate for the legislation also to encourage specifically the use of counselling and mediation services to assist parents develop and reach agreement on parenting issues. Clearly, the aim of Section 63B is to discourage parents from seeking court orders and to encourage them to reach their own agreement. This would be reinforced if the rest of Division 4 set out more clearly the process whereby parents could do so, rather than largely focus on registered plans which necessarily involve an application to the court.
5.25 In general, the trend in policy terms is to encourage the use of alternatives to court resolution, with court proceedings being a last resort. This was one of the aims of the Reform Act. The part of the legislation relating to parenting plans is one of the most obvious and appropriate parts in which to encourage those alternatives. Registration provisions send a contrary message, particularly when consent orders are available (and most commonly used).

5.26 Parents considering parenting plans may not be in any actual dispute or serious dispute, but may need assistance to work through decisions about parenting arrangements. Counselling and mediation services are ideal means by which to achieve agreement on the issues and can assist in dispute prevention as well as dispute resolution.

[Table of Contents]

The unrepresented party

5.27 Council is aware that many parents, having negotiated a parenting plan, will want some matters agreed to be legally enforceable. As discussed, the current options are to register the plan or seek consent orders. Parties who do not wish (for whatever reason) to consult a lawyer, are required to consult a counsellor in order to obtain the necessary certificate if they prefer to register the plan. The lack of a similar requirement for an application for consent orders would suggest that consent orders may be preferable for many such parties. Whilst the application for consent orders is not dissimilar to the application to register a plan, Council considers that drafting the proposed minute of orders could pose a problem for the unrepresented party. As with other areas of family law, the issue of the unrepresented party in these circumstances requires consideration. Parties should not be compelled to seek legal advice or representation merely because the procedures effectively force many of them to do so. Council considers that options to ease the problem need to be addressed, including the availability of self help material and information.

[Table of Contents]

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 In Council's view, the history of parenting plans indicates that it is appropriate to reconsider the utility of the legislative provisions. However, it sees no reason to depart from the general aspirations which led to the inclusion of parenting plans in the legislation. Parenting plans give effect to two of the main objects/principles in the Act:
(i) Shared parental responsibility; and
(ii) The encouragement of primary dispute resolution.
However, experience to date suggests that the provisions of the legislation, for a system of public scrutiny, registration and potentially enforcement, have not achieved their objectives.
6.2 In Council's view, the law in relation to parenting plans should have the following two main objectives:
1. To encourage and assist parents to reach agreement and to record that agreement in appropriate ways; and
2. To provide for parents who wish to make legally enforceable decisions about their children to obtain appropriate consent orders.
6.3 In relation to Objective 1, Council believes that it is appropriate for the government to educate and encourage parents to make use of a range of tools, including written agreements, in resolving matters relating to their children, and recording the resolution they have reached.
6.4 Education and encouragement would make the point that parents should consider the question whether some agreed matters should be embodied in consent orders. It would provide guidance and assistance for them in determining what kinds of matters can usefully be made the subject of orders, and what matters (because they are inherently difficult to enforce, or to formulate with precision) are best left recorded in a parenting plan, but not legally enforceable. It would point out that in any later proceedings, evidence could be given of the fact that parents reached agreement on particular matters dealt with in the parenting plan, and that such evidence may well be relevant to the court in determining how the matter before it should be determined.
6.5 The concept of a parenting plan provides a framework for discussions which allows parents to jointly identify and address the issues which need to be resolved for successfully sharing their parenting responsibilities, including mechanisms to prevent or resolve future disputes.
6.6 This process would benefit from the intervention of a neutral third person such as a mediator, who would not make decisions for the parents, but would assist parents to communicate at a potentially difficult time. This assistance is likely to be particularly helpful when parents are required to address a level of detail necessary to develop concrete and specific plans.
6.7 Council considers that parents would also benefit from the support of a mediator who would be able to exercise the skills needed to make parents feel heard and supported, to develop the confidence necessary to change any potentially destructive pattern of communication and to undertake the difficult task of joint parenting whilst separated.
6.8 While Council considers that many parents may be able to develop a plan by themselves, especially with the help of some of the kits which are available, attending meetings with a mediator and working through a structured process may assist the parents to develop the commitment necessary for the implementation of the plan.

6.9 In relation to Objective 2, Council has no reason to believe that the existing practice relating to consent orders needs fundamental change. It is important to keep in mind that if any subsequent dispute arises, it will be resolved by a court determining what is then in the interests of the children, rather than enforcing previous consent orders, although it will normally require the applicant to show that there has been some development since the making of the orders which justifies changing them.[40] In practice, the court will usually make orders by consent unless there is some reason for believing that they are not likely to promote the children's best interests. Normally, it will make the sensible assumption that if parents reach agreement and ask the court for orders implementing their agreement, and if there is nothing obviously unsuitable about the proposed arrangements, it is likely to be in the children's interests to make the orders. Council does not see any reason to depart from this long-established practice. Council does not see the need to retain the registration provisions relating to parenting plans.
6.10 Council also considers that unrepresented parties should be able to approach the court for consent orders without any great difficulty. In this regard, Council considers that a kit could be prepared to assist unrepresented parents to formalise in consent orders those parts of their agreement they wish to be enforceable. This would be likely to require a review of the information and kits presently available in relation to parenting plans and consent orders.
6.11 In summary, Council's conclusions are:
(i) Separating parents should be encouraged to develop parenting plans in order to:

- ensure that the children's best interests are addressed;
- minimise the possibility of present and future conflict; and
- encourage parents to take responsibility for their parenting arrangements and parental conflict and use the legal system as a last rather than first resort.

(ii) Parents should also be encouraged to develop their parenting plans with the help of a mediator if there are concerns about existing or future conflict and to consider the issue of how they will handle any conflict which arises in future as part of their plan.
(iii) Parents should be encouraged to focus on the best interests of their children and to seek advice from a child counsellor if they need help to determine the best interests of the children.
(iv) In the process of developing their parenting plan, parents should be encouraged to think about whether it is desirable, necessary or possible for any aspect of their parenting plans to be made legally binding and if necessary to seek advice from a family lawyer about this and their legal rights and responsibilities in respect of their children.
(v) Council does not support the registration of parenting plans because:

- it makes them too inflexible and difficult to change. Parenting plans are intended to be informal, flexible, easily changed documents for use primarily by parents who have reasonable communication and want to ensure that it stays that way - they want their arrangements at any given time to be clear for everyone's sake to prevent confusion and disagreement;
- it is confusing to have in effect parts of a document legally binding and other parts not legally binding and for this to remain unclear;
- family lawyers seem not to support the registration of parenting plans and their use to date has been minimal; and

- the current system for registration of parenting plans and subsequent modifications is cumbersome and expensive.

(vi) The current system with regard to obtaining consent orders is preferable because it:

- allows sufficient opportunity to change the arrangements where necessary;
- is used only for the essential elements of a parenting agreement;
- is relatively easily put in place (with sufficient scrutiny); and
- has the support of the legal profession.

(vii) There are advantages to promoting/encouraging one system and having an educational kit to assist in that promotion which links the explanation of how to develop a parenting plan with the explanation of how to make key aspects of the plan binding through the use of consent orders.

[Table of Contents]

Recommendations

6.12 Council recommends that:
(i) Division 4 of Part VII of the Act be amended to:
- encourage the use of parenting plans, and the use of consent orders where a party requires an element or elements of the plan to be enforceable; and
- repeal the registration provisions.
(ii) The use of an integrated parenting plans/consent orders package be encouraged through information and education through existing funded services, such as counselling and mediation services, legal aid bodies and community legal services and through other appropriate means, for example, clinical legal education.
(iii) To assist parties to develop parenting plans (and obtain consent orders, if required), the existing kits and information be reviewed and modified to reflect the above recommended approach.
Yours sincerely

Des Semple
Chairperson
Family Law Council

Laurence Boulle
Chairperson
National Alternative Dispute Resolution Advisory Council

[Table of Contents]

Endnotes

[1] Former Section 60.
[2] Former Section 66ZC.
[3] Former Section 66ZD(3).
[4] Former Section 66ZD(2),(4).
[5] Former Section 66ZE.
[6] Family Law Council, *Patterns of Parenting After Separation*, April 1992, para 5.10, page 39.
[7] ibid., para 5.06, page 39.
[8] ibid., para 6.07, page 46.
[9] ibid., para 6.11, pages 46-47.
[10] Family Law Council, *The Operation of the UK Children Act 1989*, March 1994, para 61, page 14.
[11] Family Law Act Section 63B.
[12] Family Law Act Section 63C.
[13] Family Law Act Section 63C(4).
[14] Family Law Act Section 63F(5).
[15] Family Law Act Section 63F(2).
[16] Family Law Act Section 63F(6).
[17] There is a mistaken belief that the original Family Law Reform Bill 1994 (that is, the Bill introduced after consultation on the draft Bill) did not contain a provision for the registration of parenting plans. This is incorrect. The original Bill contained, in clause 31, a new section 63D which provided for the registration of parenting plans. However, the original Bill did not provide for independent legal advice nor development after consultation with a counsellor and such provisions were inserted in the Bill by the Parliament. The background to this requirement for legal scrutiny is sometimes confused with that of the option of registering parenting plans.
[18] Family Law Act Section 63E.
[19] Family Law Act Section 63E(3).
[20] Family Law Rules, Order 26A; Form 26A.
[21] Family Law Act Section 63H.
[22] Family Law Council, *Patterns of Parenting After Separation*, April 1992, para 5.09, page 39.
[23] ibid., para 5.08, page 39.
[24] ibid., para 5.02, page 38.
[25] ibid., para 5.23, page 42.
[26] See under “Who were parenting plans designed to assist?”, 4.13-4.16 below.
[27] ibid., Chapter 5, pages 38-44.
[28] ibid., para 5.18, page 41.
[29] ibid., para 5.19, page 41.
[30] ibid., para 5.18, page 41.
[31] Family Law Council, *The Operation of the UK Children Act 1989*, March 1994, para 55, pages 13-14.
[32] ibid., para 56, page 14.
[33] From this point, reference to Council should also be taken to include NADRAC, which joins in giving the advice.
[34] There are analogous provisions relating to financial matters. Section 87 requires scrutiny if the parties wish to make an agreement which finally determines financial matters: the court must consider the agreement and declare that it is “proper”. By

contrast section 86 allows parties to register any financial agreement, with no scrutiny: but such agreements do not prevent the court from exercising jurisdiction and making financial orders different from those contained in the agreement.
[35] Council notes that there are a number of people who are qualified as both a family and child mediator and as a family and child counsellor. The current provisions allow them to certify for the purposes of Section 63E in one professional capacity, but not the other.
[36] This difference between property agreements and parenting arrangements is a reflection of the legislation itself, which requires the court, as far as is practicable, to make orders which will finally determine financial relationships (Section 81) whilst there is no such duty on the court in relation to parenting orders.
[37] Form 26A is at Appendix 2. The detail required in this form may help explain why consent orders may be preferred.
[38] Family Court of Western Australia figures not available in relation to parenting plans, but Council understands that the registration provisions are used very rarely. All figures mentioned in this paragraph were drawn from the Family Court of Australia's 1998-99 Annual Report.
[39] Informal parenting plans have been used for many years and pro forma plans are readily available. For example, see Fisher, Linda 1994, *Parenting Plan*, Relationships Australia (NSW), Sydney.

[40] For example, *Rice v Asplund* (1979) FLC 90-725.

[Table of Contents]