



ALRC Report 135: Family Law for the Future—An Inquiry into the Family Law System

Recommendations in relation to Shared Parental Responsibility

During the ALRC’s family law inquiry, the current legislative framework that provides for judicial determination of parenting arrangements post-separation was criticised repeatedly for being too complex and confusing to understand.

In response to these concerns, Report 135 makes several recommendations (Recommendations 4–10) to amend the relevant provisions of the *Family Law Act 1975* (Cth).

At the heart of those recommendations is the principle that the primary consideration in respect of all children, when determining living arrangements and time with parents, should be what is in the best interests of the children.

Complex provisions and lengthy lists of factors can obscure the need to focus on the best interests of the child. That should necessarily be the focus of parents when negotiating living arrangements as well as the focus of courts when making parenting orders. Given that 80% of families resolve parenting disputes without assistance from mediation, counselling, family dispute resolution or the courts, it is particularly important that the law be clear in assisting parents to prioritise the best living arrangements for their children post separation.

These recommendations work as a package and should be read together, rather than in isolation. The recommendations affirm the clear legal position that spending time with both parents and other significant persons is extremely important for children. Nevertheless, for some children, spending time with one parent can involve risk, particularly where family violence or abuse is a factor.

In addition to simplifying and clarifying the legislation regarding the best interests of the child, the ALRC recommends an amendment to s 61DA(2), which currently provides a presumption for ‘shared parental responsibility’. Stakeholders indicated that many people mistook the presumption to be one of equal shared time. ‘Parental responsibility’ under the Act refers to the important role parents play in childhood development, through decisions regarding education, health, religion, culture and

association, rather than the quantity of time that they spend with the child. The ALRC's proposed amendment would make it clear that the presumption relates to joint decision making on long-term issues affecting the child, rather than a presumption of equal shared time with the child. There is not, and has never been, a presumption of equal shared time. The Act already makes this clear, by stating that the presumption for equal shared parental responsibility 'does not provide for a presumption about the amount of time the child spends with each of the parents.' (*Family Law Act 1975* (Cth) note to s 61DA(2)). However, given community misunderstanding, the ALRC considers it necessary to adopt new terminology.

The ALRC also recommends repealing s 65DAA, which requires courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time, with each parent. Father absence remains a critical problem in Australia. The introduction of s 65DAA in 2006 has not remedied this, and at the same time the provision has created confusion and added complexity.

Stakeholders indicated that this requirement to *consider* equal time has been misinterpreted and conflated with a *presumption* of equal time. This interpretation is inconsistent with the legislative framework that requires as the paramount consideration the best interests of the child — that assessment must necessarily be an individualised one. The recommendation to repeal s 65DAA must be read in conjunction with other recommendations that highlight the importance of a child having a meaningful relationship with both parents and significant persons in their lives, such as grandparents, as part of determining living arrangements that are in the best interests of the child.

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