Suggested Reform to Family Law

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Family Law at the present time is a target rich environment for reform. It has been a very controversial issue since changes introduced in the Whitlam years. The main issues causing angst relates to divorce proceedings and have been: child custody, child support, spouse support, toleration of perjury in court proceedings, and suicide of fathers post proceedings. Any political party talking specifics about reform, it would place us head and shoulders above the Liberal Party speaking in woolly generalities and counting on being the least worse option on offer.

### Domestic Violence Order / AVO / Intervention Order

At a custody hearing no such order to be recognised if based solely on uncorroborated testimony.

### Perjury

Allow anyone to approach the DPP with evidence to launch a perjury prosecution. To prevent time wasters, applicants must deposit a bond of $5,000, guaranteeing the good faith integrity of the evidence. The DPP must proceed unless giving written reasons why a prosecution would probably fail. Would **not** have the discretion to refuse to prosecute. If guilty verdict, judge would not have authority to declare a ‘conviction not recorded’. Publication of the convicts’ name and crime made public, though not any association with F.C. hearings.

### Custody #1- Shared Parenting the Rebuttable Default Position

The best interests of the child should be the prominent principle in custody decisions.

Supported by clinical evidence, an upbringing including both a mother and father gives children the best chance of a stable, happy and successful life.

This dual parent benefit transcends:

* the ‘Tender Years Doctrine’ when children up to a certain age should always live with the mother
* living in a safer suburb
* not having to change living arrangements
* having a larger extended family.

### Custody #2- Make the Parents Regularly Move Instead

Rather than have the children pack up and move every two weeks in a 50/50 custody arrangement, let them be, and instead each parent moves out for fortnight.

### Custody #3- Decisions Taken out of Hands of the Judiciary

Child custody hearings held before a judge and a grand jury of 23 members of the public. At end of statements and evidence presented, the judge will give his/her recommendations, but the decision will be solely that of the majority of the jury. If there is an appeal, it can only be, again, before a grand jury.

### Abolition of Spouse Support

A marriage should be recognised as between two equal parties, neither of whom considered to be, by nature, a dependent person. After equal division of matrimonial assets in a divorce there should no longer be any obligations of either party to the other.

### Decriminalise ‘for payment’ Birth Surrogacy

1. Allow women to sell the use of their womb to give children to barren couples.
2. Govt. to regulate applicant parents for character and ability to offer a safe home, but no regulation on price.

### Recognition of Prenups

Self-contracting between parties on property and children’s matters should be recognized by the courts and promoted, not discouraged.

**Introduction**

Complaints about Family Law range from the toleration of perjury, unequal treatment of contestants, and characters maligned on minimal evidence to suicide rates of non-custodial parents, as well as legal obstructions to adoption for childless couples. This party believes there are simple solutions to these problems, in abiding by certain principles.

* Hearings based on truth where perjury is not tolerated
* Both parties to be recognised as independent and equal
* Premarital contracts, like any contract, to be recognized
* Criminal characterisations based only upon the laws of evidence
* Where no victim, no government interference.

# Policies

1. DVO/AVOs Not Recognised on Unsubstantiated Testimony
2. Citizen’s Right to Request a Perjury Prosecution
3. Child Custody – Shared Parenting the Rebuttable Default
4. Child Custody – Parents Move Weekly Instead of Children
5. Child Custody – Decisions Taken out of Hands of Judiciary
6. Abolition of Spouse Support
7. Decriminalise ‘for payment’ Birth Surrogacy.
8. Recognition of Contracts Between Married or Cohabitating Couples.

# Discussion

[*suggested reform in italics*]

## 

## Apprehended Violence Order (AVO) / Intervention Order /Domestic Violence Order?

“In the [Magistrates Court] the focus is on protecting the victim in the immediacy of a family breakdown and its associated aftermath ... But I think it is important to see the two issues as being different, that is the making of a protective order which is for the immediate protection of parties and children, and limited in time, and then the long-term issue dealt with by family courts of what order should be made in the best interest of the children having regard to the need for their protection from risk of harm. Naturally there is a need for a court dealing with parenting matters to have knowledge of protective orders in the proceedings and to take them into account, **but they will not always be definitive, particularly as some orders are made by consent without any admission of the facts alleged**. Family courts must have the ability to independently examine the facts when the opportunity arises*.”* - The Hon. Diana Bryant AO, QC, Submission 847, p. 4 (interim report 2020 FC inquiry)

*If an AVO has been issued to a person against their spouse when they were cohabiting, this cannot, per se, be treated as evidence in a custody hearing when the parties have separated.*

*Any AVO to be considered evidence must first have been issued on more substantive evidence than uncorroborated testimony, and subject to the laws of Evidence.*

## Perjury

“Justice Derrington said she was ‘quite shocked’ to see the extent of perjury and a failure to disclose documents in family court cases.” -- as reported The Advertiser, June 15th 2019, in reference to Judge Sarah Derrington, then president of the Australian Law Reform Commission.

A close-up of a hand

Description automatically generated with low confidence“The Commonwealth Director of Public Prosecutions (CDPP) has advised the department that, from 1January 2014 to 31 December 2019, no briefs of evidence were referred to the CDPP by the AFP or any other investigative agency with respect to family law related perjury offences. Accordingly, no prosecutions were conducted by the CDPP during this period for family law related perjury matters.” 2020 govt FL inquiry [see also](#_Perjury)

*Allow anyone to approach the DPP with evidence to launch a perjury prosecution. To prevent time wasters, applicants must deposit a bond of $5,000, guaranteeing the good faith integrity of the evidence as well as sufficient weight such that it could affect a court ruling. The DPP must proceed unless giving written reasons as to why a prosecution would probably fail. If a guilty verdict resulted from a subsequent prosecution, the judge would not have the authority to declare a ‘conviction not recorded’. Publication of the perjurer’s name and crime would be made public, although not any association with the original F.C. hearings.*

## Child Custody #1: Shared Parenting the Rebuttable Default Position

<https://www.youtube.com/watch?v=ZozcLmyVaqI>

Dr Linda Nielsen is a professor of adolescent and educational psychology in the Dept. of Education at Wake Forest University, North Carolina, founded 1834. Nielsen is an internationally recognised expert on the effects of shared parenting. She refers to 52 empirical studies on the subject confirming that shared parenting undoubtedly offers the most beneficial effects on most of the measures of child well-being. https://nielsen.sites.wfu.edu/divorce-shared-parenting/research.

“research on post-divorce outcomes for children and families have now established which living arrangements are most likely to support healthy child development. The conclusion overwhelmingly points to shared parenting as the best scenario for children and society after divorce or separation.” -Professor Augusto Zimmermann, Professor of Law, Univ of Notre Dame, Sydney; Commissioner, Law Reform Commission of WA (2012 – 2017)

**The best interests of the child**

The LDP believe ‘the best interests of the child’ to be the prominent principle in deciding who shall have custody of children in divorce cases.

As research has shown, the biggest positive influence in upbringing, leading to their best interests, is when children are in the custody of both a mother and a father in roughly equal proportions.

This benefits children better than:

* abiding by the ‘Tender Years Doctrine’ when children up to a certain age should always live with the mother
* not having to change living arrangements
* living in a safer suburb
* having a larger extended family
* being sent to more resourced schools.

*Exceptions to 50/50 shared parenting would be, apart from where parents consent, where there was a substantial possibility of physical or psychological harm to be suffered by a child when the parent possessed characteristics, or had a history, similar to a person who would never be allowed, under Australian law, to adopt children.*

## Child Custody #2: Make the Parents Regularly Move Instead

“Just think about a child at school being shunted three days, two days or a week about, and they never have the right kit, the books that they need are always at the other parent’s house.’’ -Judge Sarah Derrington

In theory the law treats the mother and father equally with regards to custody. However in most cases it is the father who has to move out of the matrimonial home and then find and pay for accommodation for himself, as well as children for when they visit. The accommodation also has to be local so as not to cause problems for the children with their regular activities. This constant change of address, with attendant change of transport logistics, transportation of clothes, sporting or other activity equipment, computers, pets, etc., can naturally cause difficulties and anxiety for the children, not to mention the occasional difficulties of hand-over days. This is a problem not only in itself, but also something that could be used by the custodial parent to request the court that “in the best interests of the child” custody should instead remain with them apart from occasional fortnightly weekend visits.

*Rather than have the children pack up and move every two weeks, let them be and instead have each parent move out for a fortnight.*

The stability of the children would be greatly enhanced, and the parents, being adults, would both psychologically and logistically find it much easier to regularly move abode.

Technically it would mean that three accommodations would have to be paid for instead of the previous two (family home and non-custodial parents’ accommodation), but in practice the housing for each parent would only have to be single, such as a one bedroom flat or a shared house, and furthermore, it might even be cheaper still if occasional accommodation was found at a grandparents’ home or a friend’s garage, either of which would now **not** have to be a short distance from where the children lived. [see also](#_Custody_#2_Parents)

## Child Custody #3: Decisions Taken Out of the Hands of the Judiciary

A picture containing chart

Description automatically generatedCurrently, in an adversarial custody hearing the ultimate decision is made by an individual judge, where, although he/she may take time deliberating, there is no proof that all the evidence and issues of both sides have been thoroughly considered. This would be however, quite different to decisions made by a criminal trial jury where, at the beginning of deliberations, there are obviously going to be differing points of view to be discussed and hammered out. One must bear in mind that our Constitution allows a person prosecuted for a serious crime to be judged by his peers, so as to not only ensure more deliberation, but also to prevent the possible bigotry, corruption or stupidity of just one person contaminating justice. Taking that into account, it would seem only fair to grant the same right to the parties in a hearing where the welfare and happiness of both children and adults are at stake.

Grand juries existed in Australia until 1883 (WA) and technically 2009 (Vic). They still exist in the US and are used in various states to commit someone to trial for a serious crime, or otherwise for investigative functions with the power to subpoena documents and testimony. [see also](#_Custody_#3_Who)

*Child custody hearings to be held before a judge and a grand jury of 23 randomly chosen members of the public. If need be, jury members would be allowed to ask questions of either party, as well as the judge with regard to the law. At end of arguments presented, the judge will give his/her recommendations, but the decision will be solely that of the majority of the jury. If there is an appeal, it can only be, again, before a grand jury.*

## Abolition of Spousal Support

‘With the disappearance of fault, an explanation of spousal support as an innocent wife's expectation damages for her husband's breach of his marital obligations was no longer sustainable. To the extent that spousal support was understood as simply giving a spouse what he or she would have gotten had the marriage continued, the imposition of the obligation was rendered illegitimate. Absent a finding of wrongful breach of promise, why was one spouse required to use his or her "means" to meet the "needs" of the other post-divorce? Logically, either a new explanation had to be found to justify the obligation, or the obligation had to be eliminated.’2002 family law study by a Professor Carol Rogerson for the Canadian Department of Justice. [see also](#_Abolition_of_Spousal)

*A marriage should be recognised as between two equal parties, neither of whom considered to be, by nature, a dependent person. Divorce, recognised as no fault, is to divide the matrimonial assets equally, unless subject to a prenup, arrange for custody of children if there are such, and then to declare that the relationship between the two parties is completely at an end, with no party having rights, commitments, or obligations upon the other.*

## A picture containing text Description automatically generatedDecriminalise ‘For Payment’ Birth Surrogacy

“The head of the Family Court of Australia is leading a push to legalise commercial surrogacy.

The change would help avoid complex court cases in Australia and prevent unethical decisions by couples overseas, Chief Justice Diana Bryant said during a lecture at the University of Queensland.”- AAP, The Australian, 18th April, 2015.

Over the last 50 years adoption figures have decreased dramatically due to the approach taken by governments that more must be done to help each child born stay with his/her birth mother. This has unfortunately created the situation where barren couples in Australia find it exceedingly difficult to adopt. For-payment surrogacy is a win/win situation for both donor and beneficiaries, but is unfortunately resisted due to anachronistic attitudes that certain legal and safe procedures become a sin if engaged in for money. It is currently legal in the Ukraine, Russia, California, Texas, Florida, Arkansas, Wisconsin, New Hampshire and Vermont.

A 2016 [study](https://www.abc.net.au/news/2016-12-01/commercial-surrogacy-legislation-push-the-price-of-life/8077862) published in the Australian and New Zealand Journal of Obstetrics and Gynaecology found almost 60 per cent of the people who had a view of mercenary surrogacy thought the current ban against it unjustified. Of those, some thought the price should be determined through negotiation, while others thought $15,000 a reasonable figure.

* *Allow women to sell the use of their womb to give children to barren couples.*
* *Government to regulate applicant parents for character and ability to offer a safe home, but no regulation of price.*
* *Contract between parties to cover all reasonable eventualities of birth.*

## Recognition of Contracts Between Married or Cohabitating Couples

A picture containing weapon

Description automatically generatedSo called prenups, legally known as ‘financial agreements’, are contracts between married or cohabitating couples. Although technically valid in law, Family Court judges often accept exceptional and bizarre reasons to invalidate them and, in their place, impose their own opinions on how matrimonial assets should be divided or other arrangements settled.

There are legitimate reasons why any contract could be invalidated, such as:

* being under the influence of alcohol when signing,
* having a good faith misunderstanding of the terms,
* under duress when threatened with criminal or tortious action, or
* not having legal representation.

However, prenups have been invalidated, not because of any behaviour associated with arranging the contract, but simply because of the values mentioned and terms of the contract itself.

‘Director of Cudmore Family Lawyers Luke Cudmore says a “watertight agreement, one that can’t be challenged, simply isn’t possible. We’ve known that since the High Court decided to have a look at the issue in 2017 [Thorne v Kennedy].’- ‘Lifting the Veil on the Peril of Prenups’, *The Australian*, 19th July, 2020. [see also](#_Prenups)

*No court may invalidate a financial agreement between an existing, or to be, married or cohabiting couple, using evidence of the contract’s stated terms, or benefits promised to pay or receive, unless such terms or amounts are contrary to statute law at the time of the contract signing.*

# Appendix

## Common responses in relation to:

### Perjury

Some arguments used to defend perjury:

* **It is not just sometimes the mother who lies but also the father when trying to hide his assets. So they balance each other out and prosecutions are not needed*.*** 
  + It is true that the breadwinner sometimes dishonestly tries to hide his property and thus he also should be punished for perjury committed, but two wrongs don’t make a right. Also:
    - Every mother would have motive to create false narratives so as to enhance her situation to gain custody, but only wealthy fathers would have motive to lie, as lower income fathers would be struggling to pay off the family home and have no other assets to hide.
    - A wealthy father being able to hide $500,000 still does not compare with being denied custody and companionship of his children for the formative years of their upbringing.
* **In practically all cases where people in court tell untruths, the reality is that they just are exaggerating the truth or they are simply confused about what really happened**.
  + Down at the pub, exaggeration is tolerated, but in the sober and serious atmosphere of a courtroom, it is simply lying. Given time to think, no one should be confused about whether they have $300,000 stashed away in a secret bank account, or whether their spouse regularly beats them.
  + “practically all” does not mean all. There is no justification to give a pass to perjurers who may cause serious harm to young children in negatively influencing what shall be the best environment of their upbringing.

### Abolition of Spousal Support

* **When a woman marries she is very often taken out of the work force to have children and be a homemaker. Thus at the time of a divorce when she might wish to re-enter the job market, she would be at a great disadvantage in earning ability to others of her age, because of her lack of experience and acquired skills. Therefore, spouse support should be paid to her to keep her in a manner to which she has become accustomed.**
  + Whatever the justification for spousal support over the decades, it has not been this. For the simple reason that of all people who receive it (some men but mostly women), many definitely do not fit the category of lost career opportunities, as per below.
  + Not all people who work are engaged in climbing the corporate ladder. What if, at the time of marriage, the wife was employed at the very low end of the job market, and of all her aspirations none was to rise in her career but simply to maintain her less than challenging job so as to give her attention to other pursuits such as amateur theatrical or sporting? A supermarket checkout operator who leaves her job for 15 years should not have that much trouble regaining it. Alternatively, the nature of some jobs is that the talent involved does not appreciate with age or experience. For example, being a model, airline hostess, driver or sports coach.
  + If a childless marriage and the wife was not involved in her husband’s business, then not engaging in a career was strictly her choice. If she did work in the family business then her input would have increased the value of it, half of which she would receive in matrimonial assets division.
  + Where the wife had the potential for a meaningful career, it must be remembered that facilities for women in the workforce have greatly increase since the last century. After spending perhaps two years per child for early nurturing, subsidized childcare and flexible hours might allow a woman, albeit a few years later than others, to get her foot in the corporate door and begin a career.

### Custody #2 Parents Share House

* **Won’t it be dangerous to have two warring parties with identical house keys**?

Warring parties divide into two categories:

An ex-spouse with a potential for violence

An ex-spouse too willing to cause aggravation, but not violence.

With the former, there would already be an AVO issued and in all probability different arrangements would, or should, be made to accommodate the safety of children and other spouse.

With the latter, it is obvious that this is not a perfect result but looking at the situation in full context, it must be noted that the children, whose interests should come first, would benefit greatly both logistically and psychologically, and probably at no added total cost to all parties. A parent arriving and leaving with ones’ clothes and linen in a suitcase, carrying a laptop instead of a desktop wherever he went, and keeping a locker in the garage for other possessions, should accommodate most concerns. Closed circuit TV monitors could also be set up at house entrances to record all visitors. Also, there would be the minutia of the legislation to accommodate those who prima facie might be antagonistic to the concept. These include:

The week a parent was not resident, the family home would not be his/her official residence and thus:

Being found on the property (not necessarily in the house) when not resident without invitation would be the crime of trespass and would be enforced.

Invitation would have to be substantiated by email, SMS or other visible evidence.

Non-resident would not have the right to appear to collect mail, thus advised to use an alternative postal address.

An officer would be appointed by the Family Court to investigate claims of intentional annoyance / dislocation/ destruction etc by a party during the time he or she had residence.

### Custody #3 Who Decides

* **Surely an experienced judge would be better than just members of the public.**
  + Experience only counts when you get to witness the end result of your decisions. Are judges made to do follow-ups by visiting the parents and children of a divorce ten years down the road?
  + As per the above introduction to the issue, like members of the jury, judges are also human, and can be bigoted, corrupt or just plain stupid. Eight or so members of the jury out of 23 who might fit into that category would still do less harm than one judge out of one.
* **Why an expensive grand jury of 23 instead of the standard jury of 12**?
  + With regards to the total cost of a custody hearing the difference would be negligible. An article in The Australian (12/4/2021) named some top Australian barristers earning $25,000 per day!
  + Jurors are paid $40 a day for first six days and then it increases to $80.00. Thus a two day custody trial would cost $40 x 2 x 23 = $1,840, which is about what one of the competing barristers would earn by 9.30 am on the first day.
  + <https://www.juriesvictoria.vic.gov.au/individuals/work-and-payment>
  + Grand Juries, which have existed for centuries being a decision-making body, have always had a complement of 23.
  + Traditionally a petit jury (12) **has** to be unanimous in deciding whether the accused goes to jail, and so it is easier for a smaller number to get together and hash out the issue. But when you just want a decision made, moderately quickly, where unanimity doesn’t matter , the more people, the greater pool of observations and experienced opinion, together with the lesser chance of a persuasive influencer swaying the group to align with his/her own prejudices.

### Prenups

* **What does that suggestion on prenups actually mean**?
  + As long as everything is above board in arranging and signing the contract, then when both parties agree to the terms and amounts by signing, any time afterwards the issue of how good or bad those terms or values are simply becomes moot. Both parties originally accepted the particulars of the contract and changing one’s mind after the fact is neither a legal nor moral cause for invalidation.
  + A contract is a contract. It is not necessarily an arrangement between two parties where the terms are “fair”, however that could be defined, but instead it is, as has historically been described, “a meeting of the minds” between the two parties, whatever the terms may happen to be.
    - <https://www.australiancontractlaw.com/law/formation.html>

### Extremist

* **The majority of the public could well be against some of these proposals, and see them as extremist**.
  + Family law for years has been a very controversial issue. The so called “disgruntled” men’s rights movement is quite often a target of the political left. Look at the response when American Cassie Jaye’s film *The Red Pill* was released in Australia.
    - * <https://www.theguardian.com/film/2016/oct/26/the-red-pill-melbourne-cinema-drops-mens-rights-film-after-feminist-backlash>
  + Those who have severely suffered, both adults and children, might still only make up a minority of the population, but they do need help.
  + “The probability that we may fall in the struggle ought not to deter us from the support of a cause we believe to be just; it shall not deter me.” Abraham Lincoln

## Worth Building Bridges due to?

Entities possibly sympathetic to Family Law reform either by their very name or the nature of submission presented to recent govt enquiry at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw/Submissions>

#### NGOs

* Adoptee Rights Australia
* Adoption Change
* Australia’s Right to Know
* Australians Against the Family Courts (Facebook group)
* Australian Brotherhood of Fathers
* Australian Family Association
* Australian Men’s Rights
* Australians Against The Family Law Courts
* Child Support Australia
* Eeny Meeny Miney Mo Foundation (Eli a member)
* Family Provision Reform
* Fathers for Equality
* Fathers for Justice
* Justice for Children
* Lone Fathers Association Australia
* Men’s Resources Tasmania
* Men’s Rights Agency
* National Fatherhood Initiative
* Non-Custodial Parents Party
* Single Parenting is Killing our Kids
* Surrogacy Australia
* Surrogacy Reform

#### Individuals

* Professor Augusto Zimmermann (I think CIS fellow)
* Dr Andrew Lancaster
* Professor Patrick Parkinson
* Ms Zoe Rathus, lecturer, Griffith Law School
* Stephen Goodwin (well researched submission)
* Peter O’Connor (qualifications & history of FC lawyers)
* Gerard Nicol
* Alan Crawford
* Cameron Smyth (well drafted submission & with political perspective)
* Lyndon Anlezark (lengthy piece on mental health and the F.C.)
* Phil Bachmann (Well structured and cited, lengthy piece addressing: legislation denying litigants representing themselves; family courts not enforcing their own orders; silencing of certain psychiatric witnesses, etc)
* Gary Johns – no submission to enquiry but apostate Labor Party federal cabinet minister who has written books on family issues amongst others. <https://en.wikipedia.org/wiki/Gary_Johns>