CHAPTER 9: CONCLUSION

In this thesis, I have critiqued the two major changes to the Australian family law system that have been introduced in the latest reforms, namely a rebuttable presumption of shared parenting[1] and compulsory family dispute resolution. In light of the previous chapters, and as a result of my assessment of the suitability of the reform provisions to the stated aims, I confidently conclude that the reforms are not constructive and that the Federal Government has the power to implement changes differently.

In response to the Government's alleged desire to improve the way parenting arrangements are dealt with after separation and to encourage both parents to have a meaningful involvement in their children's life, I have suggested an alternative path. I recommend intervening much earlier in the life of the family, and in view of the discussion in this thesis, I strongly propose that it is the only way to achieve the Government's stated goals.

I have demonstrated why the new amendments are problematic. Above all, they erroneously simplify a complex set of issues in an attempt to endorse a philosophy of the ideal family in which parenting is equally shared and disputes are resolved amicably in the event of a separation. I have argued that before this ideal family can realistically be promoted, there is a need for both a body of law that reflects social reality and a culture that facilitates the implementation of such a change. In doing so, I have not completely rejected the role of law in legitimising certain ideas and setting norms. However, I have stressed that this function of the law would be better used when other institutions that affect the family

[1] As explained in this thesis, shared parenting does not mean shared residence in the legislation.

are geared towards facilitating the desired changes. I have stated that in principle, joint parenting is a good idea in order to foster equal involvement of both parents in their children's life and consequently the possibility of equal involvement of both parents in the labour force. However, I have argued that the methods used, and the time when such expectations surface in the current reforms, are flawed.

Both shared parenting and compulsory counselling should be introduced to couples before their children are born. I believe my proposal to intervene in the intact family would use the role of the law to legitimise certain ideas and set norms in a much more productive way than the current amendments do. This is because the said goals, specifically that of shared parenting, will not be achieved by changing the legal regime or creating a formal equality model of shared parenting alone. Instead, it will take significant social and economic restructuring, developments in industrial laws and changes in the attitudes of parents, specifically fathers, towards parenting. Until these changes are made, laws should not be used as tools for creating social change, but as a means of recognising current social facts, such as women's primary care-giving.

I have demonstrated the dangers in simplifying these issues into a problem that is remedied through legislative change alone. In particular, the danger in introducing a presumption of shared parenting is the curtailment of judicial discretion and consequent shift in focus from the best interests of the child to the rights of the parents. The major critics of the system – fathers' rights groups – have turned the issue into a battle of the sexes and as a result the Government has stepped in to pacify their rights claims with the introduction of a formal equality model of parenting. I can confidently conclude that this is

no remedy. In fact, by replacing the priority of the best interests of the child with a focus on equal parental rights to children, the whole system loses its *raison d'etre*.

If these critics of the system could see that the gender divide exists in the day-to-day care of children and the effect it has on the determination of outcomes in children's matters, then maybe they would realise that a change of practices rather than laws alone is a more realistic solution. In any case, the sharing of parental responsibility and equal devotion of parenting time during the intact family would demonstrate a genuine desire amongst both parents for an ongoing relationship with their children.

I have suggested that a change in parenting practices during the intact family would be significantly assisted by a culture that promotes a mentality of shared parenting in the general community, not just for a minority of the population requiring the assistance of the system. I assert that such a culture would incorporate equal parental leave laws, easy access to child care and a program that would guide parents to structure their united family life with an equal division of domestic labour and parenting from before the birth of any child.

The second major change introduced by the current reforms – mandatory mediation – could also assist in this culture change, and is therefore linked to the objective of shared parenting. However, I reiterate that the point at which it should be imposed on the family is not at separation, but before the birth of the children. I have therefore demonstrated that although these two major changes stand apart in the current reforms, they have the potential to work together to achieve the goal of a less adversarial culture in which both parents are given an opportunity to equally share parenting.

The question is whether or not the desire to create such a culture is in fact sincere. If women have increasingly managed to balance work and family life and maintain an ongoing relationship with their children in the event of separation, despite existing in a society that continues to define the female responsibility as care-giving and private, then why can't men?

Finally, I wish to return to the issue at the heart of this thesis – the best interests of the child. On paper, the recent amendments have not changed the fact that when the FCA makes parenting orders affecting a child, the best interests of the child are the paramount principle that the court must consider.[2] In fact, the Act stipulates that the court must consider the best interests of the child even if orders are sought with the consent of all parties.[3]

What has substantially changed is the definition of the best interests of the child. I have pointed out that previously, section 68F of the FLA specified that in considering what are the best interests of the child, the court must factor in the wishes expressed by the child, the nature of the relationship between the child and the parents, the child's needs and characteristics, and the need to protect the child from harm. I have also explained that under the amended Act, the definition of the best interests of the child is a two-tiered test consisting of a range of "primary" and "additional" considerations, the primary ones being: the benefit to the child of having a relationship with both of the child's parents; and that the child is to be protected from physical or psychological harm resulting from abuse, neglect or family violence.

[2] Section 68CA *Family Law Act 1975* (Cth).
[3] Ibid, s. 60CC(5).

I would like to reiterate that these primary factors are symbolic of the legislature's stated desire to strengthen the importance of both parents continuing to share responsibility after separation, and to protect children from abuse and neglect.[4] It is the former stated desire that I find most questionable and problematic given that, as I have demonstrated, many parents do not share responsibility in the first place. It is for this reason that I argue that assistance must be provided to families much earlier than at separation, preferably before the children are born, to properly permit the existence of this normative standard, and changes must be made accordingly to external structures that would indirectly affect its realisation.

Changing the definition of the best interests of the child in the legislation is not sufficient to promote a mentality of shared parental responsibility. Furthermore, with the new amendments all channelling towards shared parenting in a culture that does not facilitate it in practice, there is an impending need for more practical measures to be adopted.

[4] Note 4, at p 7.