



Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access

Strategy for Reform

May 1999

FOREWORD

Canadians agree that when families break down the needs and best interests of children must be the highest priority. Even after divorce or separation, parents do not cease to be parents, and continue to have responsibilities to their children. The role of the justice system is to ensure that children are given priority during this traumatic period in their lives. Concerns have been raised, however, that the current system is not doing a good enough job and that it must be improved.

The Special Joint Committee on Child Custody and Access was struck to examine and analyze custody and access issues and to look for better ways to ensure positive outcomes for children whose parents divorce. Members from all political parties, from both the House and the Senate, undertook the very difficult task of studying a complex and emotionally charged issue.

The Committee provided a useful forum for Canadians to speak to an issue that affects them personally. It heard testimony from hundreds of witnesses – both experts in various fields and ordinary citizens – who offered a wide spectrum of perspectives and opinions. The Committee also studied briefs and letters, examined legislation and practices in other jurisdictions, and reviewed the extensive literature on the subject. As Minister of Justice, I commend the dedication of the Committee members and the many people who helped them.

For the Sake of the Children, the Report of the Special Joint Committee on Child Custody and Access, represents an important step towards addressing the problems children face when their parents divorce. The report provides valuable insight into the family law system and its effect on increasingly complex and globalized families. For example, testimony demonstrated that the custody and access terminology has become burdened with negative connotations. I believe the Committee's recommendation to adopt the new term "shared parenting" has promise. Of course, simply substituting new terms for old is not sufficient. We must ensure that we understand the impact such a change would have on the family law system and that its meaning is clear to both the courts and the public.

The report provides undeniable evidence of the lack of public consensus both on what is wrong with the system and on how to fix it. It recognizes the fact that the law cannot solve all the problems. The Committee emphasizes that finding solutions will require a firm commitment from the federal, provincial and territorial governments and all other parties involved. I agree that all governments, family law professionals and parents and other family members must work towards a common goal and be willing to explore innovative ideas and alternatives that meet the best interests of children.

This document outlines the Government's strategy for reform. It includes fundamental principles for reform, and emphasizes the need for a cooperative, holistic and flexible approach based on the needs of the child. Our response also emphasizes the need for further research before proceeding with reforms that will have a major impact on children's lives.

Although the focus of this document is on the Government of Canada's strategy and on what can be accomplished within the federal mandate and priorities, it is clear that partnerships with the provincial and territorial governments will be essential. The recent federal-provincial-territorial agreement establishing a Framework to Improve the Social Union has already laid much of the groundwork for this cooperation. A major concern of the Social Union ministers is the National Children's Agenda, a collective strategy to improve the well-being of Canadian children. Improvement to the law in matters of custody and access will be an important part of a larger effort to ensure that all parts of our society focus on children's needs.

The extensive public interest in the Committee's proceedings clearly reflected the significance of this issue and its impact on the lives of many Canadian families. I wish to express my sincere thanks to all of the witnesses who appeared before the Committee or who sent in briefs sharing their experiences during a difficult and painful stage of their lives and the lives of their children.

As well, I would like to thank the Committee members once again, and particularly the co-chairs, Senator Landon Pearson and Roger Gallaway, M.P, for taking on such a challenging task and guiding it to a successful conclusion.

A. Anne McLellan
Minister of Justice and Attorney General of Canada

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GOVERNMENT OF CANADA STRATEGY FOR REFORM

INTRODUCTION

Separation and divorce are stressful transitions that can have a profound effect on the health and well-being of children and their families. Many Canadians are concerned about the approach and adequacy of the current family law system and worried that, as a society, we are not adequately meeting the needs of children in these difficult circumstances. There is clearly a need to improve the framework within which child custody and access determinations are made.

To that end, the Special Joint Committee on Child Custody and Access undertook the difficult task of reviewing these issues, which affect the lives of a large number of Canadian families. The Committee held 55 meetings and heard from over 520 witnesses across the country, including individual parents and children, women's groups, fathers' organizations, lawyers, judges, social workers, psychologists and physicians. The hearings highlighted the difficult, emotional and contentious nature of custody and access issues and confirmed that very different, often conflicting, views continue to be held both about the problems and about the reforms that are required.

The Special Joint Committee Report

The results of the Committee's work were summed up in its Report, *For the Sake of the Children*, released in December 1998. The Report includes recommendations on a number of critical and complex issues relating to determining custody and access, such as:

- the rights and best interests of the child;
- the terminology used in legislation;
- parent education and mediation programs;
- shared parenting and parenting plans;
- the role of immediate and extended family members;
- child support guidelines;
- parenting orders;
- unified family courts;
- enforcement of access;
- parental child abduction;
- high-conflict families; and
- false allegations of abuse.

The Report represents an important contribution to the ongoing discussion in this area, both for its broad survey of these complex and controversial issues and for its many specific recommendations.

For the Sake of the Children underscores the difficult, emotional and often painful issues that face separating and divorcing parents, and recommends possible legislative reforms. The

Committee also recognizes that many of the difficulties people face are not in fact the result of inadequate laws, and cannot be solved simply by changing the law. Legislative provisions alone cannot ensure that parents will be cooperative and reasonable; education and social services play an essential role as well. Some parents and children also require support to help them cope with the intense emotions associated with family breakdown and to make decisions that will minimize the problems.

Moreover, even where changes to the law are called for, family law in Canada, as the Committee notes, is an area of shared constitutional jurisdiction. Both the Government of Canada and the provinces and territories have authority to legislate respecting child custody and access, and effective initiatives will require federal-provincial-territorial coordination.

There are no simple solutions to these problems. Nonetheless, the concerns raised by the Committee present an important challenge that needs to be met.

The Government of Canada's Response: An Overview

The Government of Canada is committed to responding to the issues identified by the Committee Report. The Special Joint Committee Report's key themes, concerns and recommendations provide a foundation for developing a strategy for reforming the policy and legislative framework that deals with the impact of divorce on Canadian children.

This Strategy for Reform is rooted in a number of framework principles.

Principle 1: The child's perspective

A key theme of the Government of Canada's response is the desire to promote child-centered reforms that focus on minimizing the negative impacts of divorce on children. The Special Joint Committee is to be strongly commended for bringing the perspective of children to the forefront.

Principle 2: Governments must work together

The Government of Canada fully endorses the Committee's emphasis on promoting coordinated multi-jurisdictional efforts while respecting the constitutional division of powers and responsibilities. While *For the Sake of the Children* makes recommendations that are directed to all levels of government as well as to professionals in relevant fields, this response focuses on what can be accomplished within the mandate and priorities of the Government of Canada. At the same time, we remain committed to working closely with the provinces and territories to pursue the type of coordinated multi-jurisdictional efforts that the Committee recommends.

Since 1984, the Federal-Provincial-Territorial (FPT) Family Law Committee has provided a forum to assist in the development of coordinated, multi-level family law policies and initiatives. Recently, the FPT Task Force on Implementation of the Child Support Reform was created to implement a comprehensive reform package including Federal Child Support Guidelines. By working closely with the provinces and territories through the FPT committees, the Government

of Canada was able to develop a child support initiative that included not just legislative amendments but also coordinated projects that provide public legal information, parent education, mediation and improved enforcement measures throughout the country.

Principle 3: A holistic approach

Similarly, the Government of Canada is committed to a holistic approach to family law reforms. We believe it is critical to explore a broad range of measures to support families going through separation and divorce, because statutory amendments alone cannot address many of the problems that are, in reality, only partly legal in nature. The Government of Canada fully endorses the Committee's key objective to reduce parental conflict. However, conflict-free, cooperative parenting is not something that can be effectively forced or enforced by *Divorce Act* amendments alone. Improving educational and social service activities to foster healthier interpersonal relationships is an equally important component, and the Government is committed to encouraging these efforts wherever possible.

Principle 4: One size does not fit all

The strategy outlined in this response is based on the principle that while the laws governing divorce and custody and access need to apply uniformly to all parties, the unique characteristics of families and family members mean that couples' separating and divorcing experiences will be very different. Conflict levels of separating parents vary widely, as do individual children's needs. As well, children undergo developmental changes over time, and adjustments may be needed to allow for changing relationships and circumstances. For these reasons, a fundamental aspect of the Government of Canada's reform strategy is to support improvements that will allow for flexibility to meet the best interests of children. It is essential to recognize that no one model of post-separation parenting will be ideal for all children.

A STRATEGY FOR REFORM

In responding to the Second Report of the Special Joint Committee on Child Custody and Access, the Government of Canada has developed a Strategy for Reform to address issues relating to parenting arrangements after divorce. Drawing on the Committee's report and recommendations, it sets out the principal directions to be explored over the next few years. The Government of Canada hopes this Strategy for Reform will promote further public dialogue on these difficult and complex issues in order to refine the approach and define the detailed reforms that will be required.

Six distinct but related elements are proposed in this proposed Strategy for Reform, based on the framework principles that were identified earlier.

Element 1: Focussing on the child

Identify the legal rules, principles and processes that will better structure the decision-making process in a child-focused way and shift the current focus of the family law system from parental rights to parental responsibility.

Element 2: Maintaining meaningful relationships

Formulate policy that will recognize that children and youths benefit from the opportunity to develop and maintain meaningful relationships with both mothers and fathers, as well as grandparents and other extended family members, but will also recognize that no one model of post-separation parenting will be ideal for all children.

Element 3: Managing conflict

Include reforms to identify the different levels of conflict that separating parents experience, and develop specific responses designed with these levels in mind. This reform will include formulating specialized policies to deal with high-conflict disputes and violent situations.

Element 4: Financial responsibility

Recognize that parents who separate do not deal with issues concerning their children in isolation and that the impact of child support is an important element of the framework within which custody and access determinations are made.

Element 5: Collaboration and partnerships

Promote collaborative efforts to support families involved in separation and divorce, including the contributions of a wide variety of disciplines and sectors, but recognize the need to respect jurisdictional responsibilities.

Element 6: Building a better understanding

Identify areas that require further research.

Implementing the Strategy for Reform

The process to implement this Strategy for Reform will involve working closely with the provinces and territories to integrate the review and consultation process with the Government of Canada's review of the Federal Child Support Guidelines. The Department of Justice is required to provide Parliament with the results of a comprehensive review of the provisions and operations of the Guidelines and the determination of child support by May 1, 2002. This Strategy for Reform will integrate the development of reforms to custody and access issues into that process. Further study and research will be carried out jointly with the provinces leading to public consultations on specific reform proposals in 2001. In this way, the report to Parliament on the Guidelines can include the necessary reforms regarding both custody and access and child support.

Element 1: Focussing on the Child

This element responds to the major concern identified by the Committee that the current family law system creates an environment that leaves children vulnerable to being pawns in their parents' power struggles.

There is a need to explore changes that can be made to the legal rules, principles and processes to better structure the decision-making process in a child-focused way and shift the current focus of the family law system from parental rights to parental responsibility.

The Government of Canada's focus, as a primary principle, will be that the individual needs, best interests and well-being of children and youths are paramount. This will involve:

Recommendation 15

This Committee recommends that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the “best interests of the child”.

- insisting that when there is potential conflict, the interests of the parents should be secondary to those of their children;
- acknowledging that parental arrangements should be organized to meet the needs of children; and
- retaining the best interest of the child principle as the basis for the Government’s child-centred strategy.

Best Interests of the Child

The “best interests of the child” principle is already the cornerstone of the current *Divorce Act*, which provides in subsections 16(8) and 17(5) that in making or varying a custody order, a court shall take into consideration only the best interests of the child as determined by reference to the conditions, means, needs and other circumstances of the child.

In retaining this principle as the basis for a child-centred strategy, the Government of Canada recognizes that clear and accepted principles can help guide both parents and judges to determine best interests and also provide a general framework within which parenting arrangements can be developed. The Government of Canada therefore agrees with the Committee’s recommendation that the *Divorce Act* should include a list of criteria to assist in determining the best interests of the child. It will be equally important to ensure that decision making remains tailored to each particular child and situation. Both parents and judges should be directed to assess the general principles contained in the identified legislative criteria on the basis of their relevance to the circumstances of the individual case and the particular child.

The Government of Canada proposes to consult with experts and study further the Committee’s recommended list of 14 criteria. We also intend to look at other possible criteria to include in the list and examine whether some specific legislative guiding principles would also be useful to clarify the best interests of the child, such as the following:

- The best interests of the child are served by parenting arrangements that best foster the child’s emotional growth, health, stability, and physical care, taking into account the age and the stage of development of the child.

- Children and youths must be protected from violence, threats of violence and continued exposure to conflict.
- Children and youths benefit from the opportunity to develop and maintain meaningful relationships with both mothers and fathers.
- Children and youths benefit from the opportunity to develop and maintain meaningful relationships with extended family members and others.
- Children and youths benefit from consistency and continuity of caregiving.
- Cooperative parenting can promote healthy child adjustment, but is not practical or appropriate in some cases.

Parental Responsibilities

As noted in *For the Sake of the Children*, one of the key problems associated with the current legislative framework is its focus on custody orders. This has been criticized for emphasizing parental rights and promoting court deliberation as to who is the “better” parent. To respond to this problem, an important aspect of the federal Strategy will be to explore means to shift the current focus of the family law system from parental rights to parental responsibilities.

The Government of Canada will explore legislative reform options that will reinforce the fundamental importance of the parent-child relationship and emphasize the fact that both parents maintain their parental status and continue to have duties and responsibilities for their children, post-divorce.

However, while both parents would have equal statutory responsibilities to continue to guide, nurture and financially support each of their children, in keeping with the child-focused approach, we do not propose that there be any built-in presumptions about how these responsibilities should be practically exercised in any given household. The specific parenting arrangements should ideally be developed by the parents, and these arrangements should include reviews and renegotiation provisions to account for the changing needs of the child over time.

Recommendation 11

This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans.

Recommendation 13

This Committee recommends that the Minister of Justice seek to amend the *Divorce Act* to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court.

Recommendation 3

This Committee recommends that it is in the best interests of children that

- they have the opportunity to be heard when parenting decisions affecting them are being made;
- those whose parents divorce

Parenting Plans

The Government of Canada supports the Committee's recommendation that divorcing parents be encouraged to develop a parenting plan that would set out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with a dispute-resolution process to be used by the parents.

Parenting plans fit in well with an emphasis on parental responsibilities. They provide a child-centred tool that moves the discussions away from the archaic concept of "ownership" of the child to the concrete task of working out the child's residential schedule and activities and the guidelines concerning decision making. Some proponents of a parenting plan approach support it on the assumption that parenting plans presuppose equal time-sharing and the maximum involvement of both parents. Our view is that a parenting plan must be flexible enough to provide for a wide variety of parenting arrangements. Parents can share responsibilities equally when it is workable and appropriate to do so. Parental responsibilities might also be divided in some other way between the parents or assigned exclusively to one parent if that best meets the needs of the particular child or particular family situation.

While the Government of Canada supports the idea of encouraging parents to develop a parenting plan, there are issues that need to be studied further to determine how best to incorporate parenting plans into the family law system. In particular, further study is needed on whether, as the Committee recommends, parties should be required to file a proposed parenting plan with the court and courts should be required to make all custody and access orders in the form of parenting plans.

Voice of the Child

For the Sake of the Children emphasizes that the Committee felt strongly that children should have the opportunity to be heard when parenting decisions affecting them are being made. It specifically proposes giving children the opportunity to express their views to a skilled professional whose duty it would be to make those views known to the judge or mediator working out a shared-parenting determination. The Committee also

have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;

- a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;
- the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and
- we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.

recommends that, when necessary to protect a child's best interests, judges should have the power to appoint state-funded legal counsel for the child.

The Government of Canada agrees with the objective of these recommendations. Implementing these types of measures, though, will require close consultation with the provinces and territories and a significant allocation of resources.

We recognize the need to improve the treatment of children in the family law system, and are already working closely with the provinces and territories to determine how it can be done. This work includes the following:

- considering how legislative provisions can improve family law proceedings to provide the appropriate involvement of children;
- examining ways in which children of divorced and separated parents can be given the opportunity to be heard in relevant judicial and administrative proceedings, including ways in which children's views and interests can be presented to the court;
- examining different models for separate legal representation for children in the legal system; and
- considering the scope for the development of independent support and advocacy services for children and young people.

All work in this area is premised on the view that there is a critical distinction between hearing children's views and placing the onus of decision making upon them. Children must not be put in the position of having to choose between their parents.

Element 2: Maintaining Meaningful Relationships

The Government of Canada endorses the view of the Joint Committee that the family law system must discourage the estrangement of parents from their children. A great deal of the literature in this area concludes that children's well-being and development can be detrimentally affected by a long-term or permanent absence of a parent from their lives. Most children want and need contact with both their parents even after those parents divorce.

Recommendation 2

This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the *Divorce Act* be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another.

For this reason, the Government of Canada supports a child-centred policy that will encourage parents to share the responsibilities of child rearing in a way that will allow both parents to have the opportunity to guide and nurture their children.

Continuous Involvement of Both Parents

To respond to the concerns raised in the Report, the Government of Canada will review the concepts, terminology and language used in family law with a view to identifying the most appropriate way to emphasize the continuing responsibilities of parents to their children and the ongoing parental status of both mothers and fathers post-divorce.

Some jurisdictions have used statutory provisions that refer to parental "authority" or "responsibility" to make it clear that both parents retain their parenting responsibilities after divorce as well as their fundamental parenting status as mother and father. These types of provisions will be examined further to see if and how they address the concerns that have been raised about the non-custodial parent being viewed only as a visitor. The objective would be to develop a *Divorce Act* provision that would reinforce parents' equal statutory responsibilities to continue to guide, nurture and financially support their children but would also ensure that this would not be seen as a presumption forcing parents to follow one specific type of parenting model.

No Presumptions

The Government of Canada endorses the approach of the Special Joint Committee which recognizes that no one model of post-separation parenting will be ideal for all children and rejects the use of legislative presumptions. *For the Sake of the Children* notes that the Committee did hear strong calls for legislative presumptions:

One of the most frequent recommendations was that the *Divorce Act* be amended to add a legal presumption.... Many women's groups and individual women advocated strongly that the Act should contain a presumption in favour of the primary caregiver of children, as this would best reflect the pattern whereby women perform most of

the functions associated with caring for children in intact families.... On the other hand, many witnesses, including individual fathers, fathers' groups and shared parenting advocates, recommended strongly that the act be amended to include a presumption in favour of joint physical custody, meaning an arrangement in which children would spend roughly equal amounts of time with each parent and where decision making would also be shared. Its proponents argued that such a presumption would be the best means of levelling the playing field or overcoming any unfair advantage women might have in disputes about parenting arrangements because of gender bias (pp. 41-42).

However, the Committee did not recommend amending the *Divorce Act* to add legal presumptions that favour a particular type of parenting arrangement. Instead, the Report notes:

Presumptions in favour of joint custody or the primary caregiver have been adopted in a number of U.S. jurisdictions, but in some cases legislatures have subsequently withdrawn them after finding that they were not having the intended desirable effects. Presumptions that any one form of parenting arrangement is going to be in the best interests of all children could obscure the significant differences between families.... Presumptions can also have the negative effect of compelling families who might otherwise have been able to make constructive, amicable arrangements to apply to a court if they want to avoid the application of the presumptive form of parenting arrangements (pp. 42-43).

Recommendation 5

This Committee recommends that the terms "custody and access" no longer be used in the *Divorce Act* and instead that the meaning of both terms be incorporated and received in the new term "shared parenting", which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations

New Terminology: Shared Parenting

One issue outlined in *For the Sake of the Children* concerns the language of divorce, notably the "corrosive impact" of the current terminology of custody and access. Committee members remarked that they found the testimony about the impact of these terms particularly compelling.

As a solution, the Committee proposes that the current *Divorce*

embodied previously in the terms “custody and access”.

Recommendation 6

This Committee recommends that the *Divorce Act* be amended to repeal the definition of “custody” and to add a definition of “shared parenting” that reflects the meaning ascribed to that term by this Committee.

Act terms “custody” and “access” should be replaced by the phrase – and the concept – “shared parenting.” The Report makes it clear that in choosing this term, the Committee

is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of children. The Committee recognizes that the details of time and residence arrangements for children will vary with the family involved (p. 27).

This recommendation is important, and further consideration of this proposal will be a high priority for the Government. We share the Committee’s concern that the current terms in the *Divorce Act* have the potential to escalate conflict between divorcing parents. In particular, we agree with the Committee’s conclusion that there is a need to rectify the unfairness and inequality that has come to be associated with the term “sole custody.” In some cases, this term is being interpreted as vesting the custodial parent with exclusive rights over the children and relegating the non-custodial parent to the status of “visitor.” This situation needs to be changed.

The Government of Canada accepts the Committee’s recommendation that the terms “custody” and “access” should be replaced in order to help all those involved to avoid the misleading and often provocative associations of the current terms. Moreover, the term “shared parenting” has the advantage of placing an emphasis on parental responsibilities rather than on various sets of “rights” that may conflict with one another. Obviously, the nature of these responsibilities would vary according to the situation; as the Committee points out:

in view of the diversity of families facing divorce in Canada today, it would be presumptuous and detrimental to many to establish a “one size fits all” formula for parenting arrangements after separation or divorce (p. 27).

“Shared parenting,” according to the Committee, would “be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms custody and access.” The challenge is to identify a term that would meet those requirements yet avoid the problems currently associated with the terms custody and access as well as

possible diverse connotations and understandings of the word “shared.” The term would need to be consistent with a child-centred approach and would have to be carefully defined to have a clear and accepted understanding and use by both the courts and the public.

It may be that new child-centred words and phrases will need to be identified to describe a variety of particular parenting responsibilities and arrangements for use in parenting plans and court orders. In any case, the Committee’s proposals regarding terminology clearly deserve further, careful consideration.

Recommendation 19

This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders.

Enforcement

Responding to concerns about access enforcement is another important element of the Strategy for Reform. It is essential to reinforce the principle that both parents should be involved in their children’s lives unless it would not be in the child’s best interest to do so. The Government of Canada supports the Committee’s view that mechanisms need to be available to resolve access disputes quickly if conflict is to be avoided.

There are differing views about the nature and scope of the problem of access denial and also different philosophies about enforcement . One view stresses punishment – that the response to a failure to comply with the terms of an access order should be strong criminal sanctions. The other view, as expressed by the Committee, is that a range of measures is required to respond to what can often be, in reality, a complex problem. There may be many different, relevant reasons for non-compliance with an access order, and these reasons should be considered, particularly with respect to the use of penalties that may have effects on the children as well.

What is needed is an enforcement system that would enable non-custodial parents to enforce orders where there is unreasonable denial of access, but not impose punitive measures unfairly. Enforcement should include non-court processes that would allow for a proper investigation of the matter and promote constructive ongoing relationships between the child and both parents. Legal remedies for breaches of access must be available, but punitive measures should remain a last resort to respond to deliberate, unreasonable non-compliance cases.

The Government of Canada supports the approach recommended

by the Special Joint Committee:

In the Committee's opinion, the optimal solution to the problem of access denial would be one arrived at in a coordinated fashion by the Government of Canada and all the provinces/territories working together, so that the solution provides more than a punitive response and is put in place across the country for all kinds of parenting orders (p.55).

As the Committee recommended, the Government of Canada will work with the provinces and territories to develop a nationwide, coordinated response to failures to respect parenting orders, involving a range of both therapeutic and punitive elements that would include:

- early intervention;
- parenting education programs;
- a make-up time policy;
- counselling for families experiencing parenting disputes;
- mediation; and
- for persistently intractable cases, punitive solutions for parents who wrongfully disobey parenting orders.

Recommendation 38

This Committee recommends that the Attorney General of Canada work to develop a co-ordinated national response to the problem of child abduction within Canada.

Parental Child Abduction

There are potentially both international and domestic aspects to the problem of parental child abduction. In both cases the very serious danger is the total estrangement of the child from one of the parents. There are *Criminal Code* provisions (sections 282 - 286) on parental child abduction, as well as recently amended model parental child abduction charging guidelines to clarify what should be considered criminal behaviour. Civil enforcement measures, which are used either in addition to the criminal measures or in cases where criminal charges are not appropriate, appear to be more problematic. Parents must rely on the provinces' reciprocal enforcement legislation, and the process can be cumbersome, expensive and awkward for parents who do not live in the province to which the abducting parent has fled with the child. The Committee's recommendation that the Attorney General of Canada work to develop a coordinated national response to the problem of child abduction within Canada highlights the important federal coordination role that the Government of Canada can and must play to address this problem.

Recommendation 41

This Committee recommends that the federal government implement the recommendations of the Sub-committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled *International Child Abduction: Issues for Reform*.

The related problem of international child abduction – when the child is removed from Canada to a foreign jurisdiction – was studied recently by the Subcommittee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade. In November 1998, the Government’s Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade was released. That document provides the Government of Canada’s detailed response to international child-abduction issues. It includes responses to the Committee’s recommendations concerning *the Hague Convention on the Civil Aspects of International Child Abduction*, the RCMP Missing Children’s Registry, police intervention, training, extradition, border control, passport control and restrictions on international travel.

Recommendation 12

This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans.

Recognizing the Importance of Grandparents

Children benefit from the opportunity to develop and maintain meaningful relationships with grandparents and other extended-family members. The Government of Canada supports the idea of promoting specific family law policies that would recognize this principle. In this respect, further work with the provinces and territories will be undertaken to address the problems raised by grandparents. As the Committee has noted, an important step would be to specifically identify the importance of grandparent-grandchild relationships in lists of statutory criteria to help parents and judges determine the “best interests of the child.”

Element 3: Managing Conflict

This third element of the Strategy reflects the need to focus on minimizing the negative impacts of divorce on children. It responds directly to *For the Sake of the Children*, which states that: “The challenge... for governments is to design a system that can accommodate different types of divorce, without penalizing couples in one category through options meant for another type of divorce” (p.73).

The Government of Canada’s objective is to meet this challenge by attempting to identify the different levels of conflict that separating families experience and to develop specific responses designed with these levels in mind. This approach will include formulating specialized policies to deal with high-conflict

disputes, concerns about inadequate parenting, and violent situations.

As a first step, the Government of Canada will review the various aspects of the family law system to identify how it can be modified to better recognize the diverse requirements for dispute resolution. It is important to ensure that the system intervenes only when necessary and does not impose inappropriate solutions.

Identifying options for legislative amendments to the *Divorce Act* will be an important component of this review, but not the only task. There is an equally important need to work closely with the provinces and territories to examine how this approach affects broader service-delivery issues. Developing a spectrum of services to respond to the diverse needs of families is a significant challenge.

Cooperative Parental Agreements

For the Sake of the Children emphasizes the need to promote cooperative parental agreements. Child-development experts agree that children are best served by arrangements that are reached by genuinely mutual consent and in a timely fashion. Children also benefit from arrangements that maintain high-quality relationships with both their parents.

A central focus of the Strategy for Reform, therefore, is to identify reforms targeted specifically at parents who can work out individualized parenting arrangements for their children without intrusive legal interventions. Legislative provisions can authorize and promote the use of consensual agreements. Education about the advantages of cooperative parenting and information sessions about mediation and other non-adversarial mechanisms can encourage parents to agree to arrangements that maximize the involvement of both parents in the ongoing care of their children.

An equally important task will be to formulate approaches to deal with divorcing families who require more intervention to ensure that children are protected from violence, threats of violence, inadequate parenting or continued exposure to high levels of parental conflict.

Recommendation 32

This Committee recommends that

High Conflict

federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children.

As noted in *For the Sake of the Children*, “the Committee’s findings and recommendations reflect the desire to improve the legal system’s response to high-conflict divorces, without imposing any harmful restrictions on the cooperative majority” (p.73).

Experts agree that exposure to unresolved, high-conflict situations increases risk factors in children:

[Some divorcing parents] remain embittered and actively hostile for many years, and this places their children at a considerably higher risk of psychosocial problems. These high-conflict parents and couples are identified with multiple characteristics: high rates of litigation and relitigation, high degrees of anger and distrust, intermittent verbal and/or physical aggression, difficulty focusing on their children’s needs as distinct from their own, and chronic difficulty cooperating and communicating about their children after divorce. Their interparental struggle assumes center stage and, as a consequence, children’s personal circumstances and developmental needs are often given inadequate attention.¹

The Government of Canada believes that in order to provide protection for these children, who are at greater risk, it is important to develop mechanisms to identify high-conflict divorces and treat them in a different stream. Policy-development work is already under way and includes the following:

- consulting with appropriate experts from different disciplines to identify appropriate screening tools;
- reviewing the significant professional literature in this area that outlines the different conflict levels;
- summarizing the relevant empirical data and research and identifying the substantial areas of agreement as well as the areas of continuing uncertainty or disagreement;
- reviewing the legal responses adopted by other jurisdictions;

¹ Michael E. Lamb, Kathleen J. Sternberg, and Ross A. Thompson, “The Effects of Divorce and Custody arrangements on Children’s Behavior, Development, and Adjustment.” *Family and Conciliation Courts Review*, Vol. 35, No. 4, October 1997, p. 396

and

- identifying further research that would assist in developing specialized principles and criteria to guide appropriate parenting arrangements.

In particular, we propose to conduct further consultations with a view to identifying specific reform proposals concerning the following points:

- High-conflict family relationships can include: long-term, emotional disputes involving high degrees of anger and distrust; chronic disagreements over parenting issues; repeated use of unsubstantiated allegations of poor parenting; or a history of misuse of the legal system.
- Where there are concerns about ongoing high parental conflict, arrangements should allow parents to disengage from their conflict with each other and develop separate parenting relationships with their children.
- As a general principle, where there are long-term, emotional, high-conflict parental disputes, alternatives to co-parenting arrangements requiring cooperation and joint decision making may be in the child's best interests.
- Parenting plans should be required to be very specific and should identify both inclusive and exclusive elements. Court orders for high-conflict cases should contain specific prohibitions that will assist in enforcing the order (e.g. that a parent must not remove a child from the care of the person charged with the responsibility to provide residence; that neither parent should interfere with any of the duties or responsibilities that each person has according to the court order; and that a parent must not hinder or prevent contact that a child is supposed to have under this order).

Concerns about Inadequate Parenting

There also appears to be a need to adapt the current legal framework to include specialized principles and criteria to guide appropriate parenting arrangements for children exposed to inadequate parenting behaviour. Work in this area will include identifying inappropriate or inadequate parenting behaviour that would put children at risk, such as:

- neglect or substantial non-performance of parenting functions;
- emotional impairment or personality disorders that interfere with the performance of parenting functions; and
- impairment resulting from drug, alcohol and other substance abuse that interferes with the performance of parenting functions.

The Government's objective is to ensure that parenting arrangements minimize children's harmful exposure to this kind of behaviour and provide necessary protections for the children. Parent-child contact in these cases should be limited and possibly made conditional on the parent getting the appropriate therapy, counselling or training. It will also be important to specify clearly what is to be done if that assistance is not obtained.

Violence

The Government of Canada strongly believes that it is important to send a message that all aspects of the family law system must take into account incidents of family violence involving the child or a member of the child's family. Ensuring the safety of all parties involved must be the guiding principle.

For the Sake of the Children stresses that witnesses at the Committee's public hearings expressed differing views about whether family violence is a gender-based problem and how it should be defined. However, it also notes that there is general agreement on several key factors:

Children who witness violence between their parents are affected negatively. Where there is violence between the parents, the risk of escalation at the time of separation is high and poses real safety concerns for both parent and child. The presence or risk of violence is unarguably relevant to decisions about parenting arrangements. This is a problem that affects a minority of divorcing couples and unmarried separating couples (p. 78).

Clearly, there is a need to formulate approaches to deal with family violence as a factor in custody and access cases. In order to develop the specific details of this policy, the following work will be undertaken:

- an evaluation of whether legislative provisions would help increase public and professional awareness and assist in the education of judges, lawyers and other individuals involved in the justice system as well as victims, perpetrators and the public;
- further review of the concerns raised at the public hearings about the definition of family violence, the usefulness of police assault statistics, the profiles of abusers and victims, and the validity of the key tools for measuring violence;
- further consideration of the Committee’s reference to “proven history” of family violence in its recommendations. The question of the standard of proof remains a difficult one. A requirement for proof of conviction would be a very high standard for family law, especially in spousal abuse cases, where the abusive conduct often occurs in private and where the victims, for a variety of reasons, tend to hide or deny the abuse;
- a review of legislative reforms and policies in other jurisdictions that deal with child custody and access disputes in which spousal violence is involved; and
- an evaluation of recent research on “models” of spousal violence to determine whether specialized principles and criteria could be developed that would better reflect the specific nature and context of the violence.

Recommendation 43

This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury.

Recommendation 44

False Allegations

The Committee rightly insists that the safety and well-being of children must always be the principal consideration. Since physical and sexual abuse of children does occur, unfortunately, it is critical that those with legitimate concerns about a child’s safety should be able to speak up without fear or needless restrictions. For that very reason, though, unwarranted allegations of abuse must be strongly condemned.

This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem.

The Government of Canada supports the Committee's position that such allegations must be discouraged (p. 89). It will be important to identify measures to prevent false allegations that do not restrict or limit the reporting of legitimate concerns about a child's safety.

For the Sake of the Children identifies the problem of intentional false allegations as a potentially serious complication associated with high-conflict cases. The Report notes that "individual fathers relating their personal experiences and men's groups from across Canada testified that a tactic used by some parents and their lawyers in an effort to deny parenting time to the non-residential parent (usually the father) is false allegations of physical or sexual abuse or neglect" (p. 85).

Making a false statement under oath or by affidavit in this or any other matter is perjury, which is already an indictable offence under the *Criminal Code*. Other Code provisions deal with public mischief and obstruction of justice. But that does not mean there is no room for improvement. As the Committee recommends, the Government of Canada will examine these provisions to see whether they are adequate to deal with the problems raised in the Committee's report.

A serious problem, though, is that the actual incidence of false allegations of child abuse in Canada is not known and it is an inherently difficult issue to research. No psychological test or profile can conclusively determine whether an accuser, an accused or a child is telling the truth about an allegation. Children are especially vulnerable and may have problems describing or even understanding incidents of abuse. Even the mental health professionals and social workers involved in a case may come to conflicting opinions and recommendations. As a result, it can be very difficult to prove conclusively either that abuse did or did not occur.

This issue, moreover, is one that crosses jurisdictions and will require the cooperation of numerous agencies and organizations if it is to be addressed properly. We therefore agree with the Committee's recommendation that the Government of Canada work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse in the context of parenting disputes in order to provide a statistical basis for a better understanding of this problem.

In addition, the Government will be conducting further research to ensure that the policies developed are adequate and appropriate. This research will include:

- identifying the relevant issues and trends that are documented by Canadian case law;
- examining and assessing the current response to allegations of child abuse by the civil and criminal legal systems, including working with the provinces to review charging policies; and
- evaluating the usefulness of parenting education programs as a tool to reduce unwarranted allegations by fully informing parents about the harm it causes children.

Recommendation 18

Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:

18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed by this Committee;

18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;

18.3 The desirability of considering both parents' income, or financial capacity,

Element 4: Financial Responsibility

The impact of child support is an important element of the framework within which custody and access determinations are made.

When parents separate, they are free to agree on how they will continue to support their children financially. If they cannot agree, both parents will continue to be financially responsible for their children but a court must decide which parent will be primarily responsible for the children and how much the other parent will have to contribute to their expenses. The Federal Child Support Guidelines are designed to ensure that children continue to benefit from the financial means of both parents after they separate. The Guidelines attempt to balance the need for certainty with the need for flexibility to take into account the individual circumstances of each family.

The federal Department of Justice has identified many issues related to the Guidelines through various research projects, including a detailed review of case law. These issues are of three types: technical issues; issues requiring clarification or minor policy changes; and more substantive Guidelines issues requiring important policy changes or requiring an amendment to the *Divorce Act*.

The Committee raises several substantive issues in this area. These include the definition of "child of the marriage" in the *Divorce Act*, the formula and economic assumptions that underlie the Guidelines and the section on shared custody, and issues relating to access costs. Addressing these issues will

in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is “shared parenting”;

18.4 Recognition of the expenses incurred by support payors while caring for their children;

18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;

18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;

18.7 The ability of parties to contract out of the Federal Child Support Guidelines; and

18.8 The impact of the Guidelines on the income of parties receiving public assistance.

require further research and will need to be coordinated with policy developed in the area of custody and access.

The Department of Justice has been monitoring the implementation of the Federal Child Support Guidelines since they came into effect on May 1, 1997. The *Divorce Act* stipulates that by May 1, 2002, the Minister of Justice must provide Parliament with the results of a comprehensive review of the provisions and operations of the Guidelines and the determination of child support under the Act. The Department of Justice is closely reviewing the implementation of the Guidelines and recommending amendments as the need arises. However, given the extent of the child support reforms, the system requires time to adjust. After less than two years into the implementation of the child support reforms, their application is just starting to stabilize and their real effects cannot yet be ascertained.

Individual research reports on aspects of the implementation of the Guidelines are published as they become available. The overall program of research is planned to continue until March 2001. A comprehensive synthesis of all research projects will be presented as part of the report to be tabled in Parliament in 2002.

The concerns raised by the Special Joint Committee are being given particular attention in the review of the Guidelines. As noted above, further research is required to assess the success of the Guidelines in meeting its objectives. However, the Department of Justice is looking at what changes could be made prior to the five-year review to help clarify certain sections of the Guidelines.

Element 5: Collaboration and Partnerships

The fifth element of the Strategy signals the Government of Canada’s commitment to promoting collaborative efforts to support families involved in separation and divorce while respecting jurisdictional responsibilities.

As noted earlier, the shared constitutional jurisdiction of family law leaves the Government of Canada with a mandate mainly related to legislative authority over the *Divorce Act*. There is, however, a need for a much broader range of measures to support families going through separation and divorce, and these

will require the collaborative efforts of a wide variety of disciplines and sectors.

Divorce is often a difficult process, and there are serious limitations to the role that legislative reform can play. Parental cooperation and reasonable behaviour, for example, cannot be forced or enforced by the law. However, healthier relationships and less-adversarial conflict resolution can be fostered through the use of educational and social service activities.

The Government of Canada has already made a commitment to collaboration and partnerships in this area. Federal funding was provided in the 1997 Budget to support Unified Family Courts. This money is being used to provide 24 new Unified Family Court positions in Newfoundland, Nova Scotia, Saskatchewan and Ontario, and to assist and promote the development of associated support services, such as assessments, mediation and parent-education courses.

The Department of Justice also funds an array of provincial pilot projects throughout the country under its Federal Child Support initiative. These projects cover such areas as case management, supervised access, mediation and parenting education. Last year, the Department invested more than \$650,000 to support provincial and territorial parent education programming across the country.

A Health Canada publication, *Because Life Goes on - Helping Children and Youth Live with Separation and Divorce*, provides information and resources to help parents help their children as they face separation and divorce. The booklet, which is being updated and expanded, is also designed to assist professionals in such fields as education, health, justice and social services in their work with children and their families.

Health Canada also sponsored an intersectoral workshop in October 1998 in Ottawa with the goal of identifying the stresses and impacts of separation and divorce on children and families and determining potential areas for support and collaboration. Participants included representatives of various levels and departments within government and non-governmental organizations as well as individuals whose work relates to supporting families involved in separation and divorce. Highlights of the workshop included suggestions about knowledge development, research, communication, education

and community-level services. A post-workshop planning group has been established to follow up on the conceptual framework and guiding principles discussed at the workshop and move toward an intersectoral strategy to support families going through separation and divorce.

The results of important data collected through the National Longitudinal Survey of Children and Youth are being disseminated by Human Resources Development Canada. Research papers analyze the data on changes in families, the impact of family structure on children's outcomes, and the relationship of custody arrangements to the development of emotional or behavioural problems in children. This information, in addition to giving us a better understanding of how children are faring in Canada, can assist in shaping policies and services for children affected by separation and divorce.

The Government of Canada will also explore the following ways to further promote collaborative efforts to assist divorcing families:

- Federal collaboration with provinces and territories to undertake joint planning to share information and to work together to identify priorities for collaborative action: The federal role, subject to the availability of resources, could include providing assistance in researching, developing and evaluating new service models to enhance court-based services, including information, education, counselling, mediation, and clinical interventions and supervision, where required.
- Government collaboration with NGOs to develop community responses: Communities play an important role in supporting and strengthening families. While extended families are often the primary source of support during a time of crisis or uncertainty, other resources within the community can also play a role to support divorcing families. Religious institutions, non-profit organizations, associations and charitable groups, schools and government agencies are some examples of community resources that might be able to provide advice and assistance. The key is to link families with the most appropriate community resources.
- Promoting collaboration among professionals from different sectors to develop models for preventive and clinical

interventions: There are a wide variety of professionals who provide services to divorcing families, including lawyers, mediators, court assessors, counsellors, therapists, court-service workers and parent-education program facilitators. The Government of Canada can encourage and help these professional groups to work together to develop common standards and integrated services.

Element 6: Building a Better Understanding

The task of reviewing laws and making proposals for law reform in the area of family law is complicated by a lack of good empirical research and Canada-wide family law statistics. It is not sufficient to rely on anecdotal and personal experience stories, which often serve only to highlight the very different, conflicting views that exist about these difficult and emotional issues.

For the Sake of the Children specifically identified (p. 78) the need to undertake further study about high-conflict issues, particularly false allegations of abuse and neglect, parental alienation, the behaviours, patterns and dynamics of domestic violence, and parental child abduction. It is also important to collect better data about the problems of access denial and failure to exercise access.

The issues raised by the Committee are important but cannot be researched effectively in the absence of reliable baseline information on current practice in Canada. How are parenting arrangements currently developed? Although there are very few actual contested custody trials, there is not a good understanding of how agreements are reached when they are not court imposed. How common are different parenting arrangements and what patterns do they take? What types of contact do children have with their non-custodial parents? Does it differ significantly depending on the court order? What obstacles impede contact? How do arrangements change over time?

There are challenges associated with conducting good-quality research in this area, including the need for resources to carry out original research and to undertake in-depth analyses of existing data sources such as Statistics Canada's National Longitudinal Survey on Children and Youth and the "Family and Friends" component of the General Social Survey.

Recommendation 45

The Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way.

Research to address the issues identified above will be integrated into the research framework being undertaken by the Department of Justice as part of the comprehensive review of the provisions and operation of the Federal Child Support Guidelines.

For the Sake of the Children also identified the need to build a better understanding of concerns related to Aboriginal people, noting that the issues require study beyond that undertaken by the Committee. The Government of Canada will, as part of this Strategy for Reform, engage in further consultation with Aboriginal organizations and communities across Canada. One objective will be to identify possible improvements to current policy and services to provide the necessary culturally sensitive responses to custody and access issues in the Aboriginal context.

IMPLEMENTING THE STRATEGY FOR REFORM

It is a major undertaking to make fundamental changes to so many aspects of the law, particularly in an area where there is at present no clear consensus on how to proceed. The process to implement this Strategy for Reform must involve a review and consultation process coordinated with the Government of Canada's review of the Federal Child Support Guidelines.

The Minister of Justice is required to provide Parliament with the results of a comprehensive review of the provisions and operations of the Guidelines and the determination of child support under the Act by May 1, 2002. Legislative amendments to the custody and access provisions of the *Divorce Act* could be integrated into that process. The actions identified in this Strategy for Reform will be carried out jointly with the provinces and territories. They will involve public consultations on specific reform proposals with a view to ensuring that the report to Parliament on the Guidelines can include both custody and access and child support reforms.

The other, equally important aspect of this Strategy involves the collaborative efforts to promote a less-adversarial legal process and improved educational and social service activities to assist divorcing families. Some things can be acted upon quickly, while others will need more discussion and consultation. Making changes to long-standing institutions and systems will present challenges and will require concerted and dedicated efforts as well as resources. The Government of Canada will make every effort to work with the provinces and territories to

develop effective, coordinated reforms in a timely manner.

Changes in this area of the law will be part of a larger drive to ensure that all parts of our society focus on children's needs. Canadians want their country to be one where all children thrive in an atmosphere of love, care and understanding, valued as individuals in childhood and given opportunities to reach their full potential as adults.

In keeping with this vision, federal, provincial and territorial social union ministers are making progress on a collaborative National Children's Agenda, a collective strategy to improve the well being of all Canadian children.