

Families, policy and the law

Selected essays on contemporary issues for Australia

edited by Alan Hayes and Daryl Higgins



Australian Government

Australian Institute of Family Studies



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Alan Hayes and Daryl Higgins

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[1]

Weaving a common narrative **An introduction to essays on families, policy and** **the law in Australia**

Alan Hayes and Daryl Higgins

There are few areas of policy that carry greater complexity than those that focus on families. The dynamics of family formation are, and have always been, intricately connected with the evolving conditions of societies and the constraints and values they embrace at any given era. Some things, however, are perennial. The functions families fulfil have remained essentially unchanged despite the shifts in the circumstances and challenges that families confront. Not surprisingly, the ways in which policy-makers seek to address the needs of families also evolve and, in turn, influence the changing social context.

Broadly speaking, policy initiatives seek to support family stability, facilitate positive functioning, enhance their safety and security, and generally promote the wellbeing of family members to the benefit of their communities and the wider society. Family policy involves a complex mix of social, economic, educational, employment, housing and health policies, along with a range of other child- and family-focused priorities. These policy “levers” are used to enhance opportunities, build capacity and capitalise on individual and family strengths.

Just as social policy is framed by the complexities of family and societal change, child- and family-focused legal systems also confront the challenges of change. Changing social and policy contexts have far-reaching implications for the law. While legislation tends to follow such change, it can also drive change.

The collected essays in this volume seek to explore some of the complexities that confront both those who frame social policy and those involved in the social services and legal systems that intersect with child and family issues. The genesis of the volume was in a set of papers presented to the 12th Australian Institute of Family Studies Conference held in Melbourne from 25 to 27 July 2012. In reflecting on the wealth of material presented at the conference, we were impressed by the many papers that focused on topics at the intersection of policy and the law. We have added some invited essays to these conference presentations to provide succinct snapshots of some of the issues with

which Australia, like many other nations, grapples in this first part of the 21st century. It is by no means an exhaustive coverage of the terrain, but a sampling of some of the contemporary issues at the forefront of thinking about the complexities of the lives of Australian children and families.

Some of the topics have long histories, whereas others have more recently emerged. The aim of the collection is to stimulate consideration of some of the challenges confronting those at the intersections of social policy and the law. While individual authors may hold clear positions on the underlying issues, the volume is not a work of advocacy; rather, it seeks to explore some of the key issues and complexities involved in each topic area and stimulate informed consideration of these. Our focus in creating this collection of essays is to try to highlight the common narratives. Academic and professional disciplines tend to approach issues from their own separate perspectives and use different language and assumptions. These can amplify difference despite broad common commitment to advancing the best interests of children and their families. Some of the research and scholarship described here has used insights from interagency efforts and collaborative approaches to overcome existing gaps and divergent approaches.

The volume is organised in four parts. Part A, “Diverse Family Formation: Identity, Recognition and the Law”, has 11 contributions (Chapters 2–12). Weston and Qu explore contemporary trends in family formation, transitions and functioning. They conclude that while there have been historical shifts in family formation and diversity in family form, the functions of families remain relatively unchanged. Some forms, however, are generally more stable than others and marriages tend to have greater longevity than cohabitating relationships. That said, within each form there is still variation in functioning.

Shifts in family formation and form shape identity and fuel the desire of many to seek their origins. The chapter by Price-Robertson reflects on the rise of interest in genealogy and the popularity of online sites that enable tracing of one’s ancestry. He argues that, in the absence of “grand narratives”, many seek meaning through identifying their biological origins.

However, biological origins are not always clear, especially for those who have experienced adoption in the era when the process was “closed”. The confidentiality of records related to adoption during that period makes it very difficult, if not impossible, to tap one’s roots. Three essays (Chapters 4–6), by Kenny and Higgins, Mushin, and Castle, explore the legacy of policies in this area, including those that underpinned the practice of forced adoption and the more recent era of “open” adoption. With hindsight, policies that resulted in the forced removal of children from their families are now seen as resulting in considerable pain and enduring harm for many of those involved. One generation’s actions have become another’s cause for apology. Castle considers the current policy of open adoption and explores the gulf between legislation and the lived realities of mothers, fathers and adoptive parents.

The focus of the next three essays (Chapters 7–9) is the rise of surrogacy and donor insemination and the complexities they present. Cuthbert and Fronek explore the effects of surrogacy on family formation and the emergence of commercial surrogacy arrangements as a means of “acquiring” children, especially as intercountry adoption becomes a less accessible option. Such arrangements carry considerable challenges, both for traditional views of family formation and for the law as it grapples with the commercial aspects of surrogacy. There is also a gulf between the “power” of the couple who will raise the child conceived under commercial surrogacy arrangements and the woman who carries the foetus from conception to delivery. Everingham considers the

tensions between the “biological imperative” to have a child who is genetically related to at least one of the members of the couple and the legal constraints they confront in considering surrogacy arrangements. Wise and Kovacs focus on the policy and legal issues attending assisted reproduction. They especially consider the implications for family functioning arising from the shift to providing access to the identity of those who provide sperm for donor insemination procedures.

Sifris (Chapter 10) explores the legal complexities of same-sex parenting, highlighting the challenges that attend the diversity of family forms and the legislative complexities of dealing with these while also safeguarding the best interests of children. The final two essays in this part (Chapters 11 and 12) extend beyond the biological nuclear family to reflect the challenges facing step-families (Cartwright) and families headed by grandparents (Brennan and Cass).

Part B, “Legal and Statutory Responses to Families in Difficulty” (Chapters 13–16), focuses on the child protection system and its intersections with the law, including where decisions are taken to remove children from their families as a result of serious abuse and/or neglect, or to limit involvement with a parent living elsewhere, following separation and divorce. Bromfield, Arney, and Higgins (Chapter 13) provide an overview of the state of Australian child protection systems, focusing on the implications of increasing demand, workforce constraints, limited capacity for early intervention and increasing rates of placement of children and young people in out-of-home care. Mathews and Walsh (Chapter 14) then explore the legislative principles that underpin Australia’s range of mandatory reporting requirements, and how reporting systems can be refined and reformed. The next contribution, by Cashmore (Chapter 15), focuses on out-of-home-care in Australia, providing an overview of the numbers of children in care and discussing options for improvements to the system to enable children to develop the stable relationships that underpin positive development. In the final essay in this section, Faulks (Chapter 16) explores the complexities in family law matters involving allegations of serious child abuse. It provides a detailed consideration of the key issues related to judicial officers in the family courts having available to them evidence about abuse from various parties: the children affected, those to whom it is reported, and the parent alleged to be the perpetrator.

In Part C, nine essays (Chapters 17–25) explore the theme of “Relationship Breakdown and Family Policy and Practice”. We introduce this section with Rhoades’ historical overview of the development of Australian family law, and consideration of current challenges and future directions. The need to achieve a closer alignment between family law and social science evidence, particularly related to child development, is a major focus. In Chapter 18, Parkinson examines the indissolubility of parenthood, first providing an overview of the historical shifts in the ways in which parenting following separation and divorce has been viewed in family law, as successive legislative reforms have sought to improve the situation for children, their parents and extended families.

Two essays follow that consider the tensions between ethical obligations to ensure the confidentiality of matters disclosed to those who provide support to children and their parents and the challenges that confront judicial officers in seeking to get to the heart of complex matters, especially involving allegations of family violence of child protection concerns. Chisholm (Chapter 19) explores the complexities of precisely who can be considered to be a family counsellor and what are the constraints of confidentiality that attend counselling. Then Altobelli and Bryant (Chapter 20) argue that existing

approaches to confidentiality are in the best interests of victims of violence and abuse—be they children or parents.

Family violence is the focus of the next five essays (Chapter 21–25). Croucher explores the gulf between the courts and the systems focused on family violence and child protection, advocating the need for greater complementarity of jurisdictions, policies and service systems. Kaspiew, De Maio, Deblaquiere, and Horsfall (Chapter 22) then address the challenges of complex families, using analyses of data from the evaluation of a pilot program for family dispute resolution involving coordination between lawyers and family dispute resolution practitioners. They highlight the need for closer collaboration between sectors within a complex family law system. In Chapter 23, Kaspiew, De Maio, Qu, and Deblaquiere explore the nexus between a history of family dysfunction and the amount of time spent with one parent, focusing particularly on parents who have minimal contact (typically, though not exclusively, fathers). Fehllberg and Millward (Chapter 24) provide an examination of the effects of family violence on parenting arrangement and financial settlements in family disputes. While violence may cease following separation and divorce, its effects can still be seen in the hesitance of the “victim” to pursue legal remedies related to financial rights and child support. Part C ends with a further consideration by Moloney (Chapter 25) of the current state of family law within the historical context of the passing of the *Family Law Act 1975*, and the continuing desire to seek higher levels of cooperation between separating couples.

Part D, “Social Science and Developments in Australian Criminal and Family Law” (Chapters 26–28), includes three essays that explore the place of social science knowledge in the operation of the law. Quadara (Chapter 26) focuses on child sexual assault and the place of social science in informing the process, from first responses to final judicial determination. Kearney (Chapter 27) provides a discussion of legal principles that might improve the use of social science knowledge and that could be used to ensure that parenting determinations are in the best interests of children and their families. In the final essay in this section, Hayes (Chapter 28) discusses some of the common misunderstandings and pitfalls that attend the use of social science “evidence” in family law matters involving children.

The volume ends with a summary chapter that focuses on the sources of complexity at the intersections of social policy and the law in the Australian federation. The private and public nature of family life is considered as another key contributor to the tensions that surround both policy and the law. Finally, there is a brief consideration of some of the recent drivers of reform in family policy and Australian legal systems.

Brought together in one volume, the essays provide, if not a single voice, then at least an orchestrated harmony that narrates not only historical perspectives and current views, but points to some of the challenges for future directions in policy and law relating to the protection and wellbeing of children and their families in Australia.

PART A

Diverse family formation

Identity, recognition and law

[2]

Trends in family transitions, forms and functioning

Essential issues for policy development and legislation

Ruth Weston and Lixia Qu

THIS CHAPTER FOCUSES ON various ways in which family formation pathways and the characteristics and functioning of families have changed over the decades. The picture is largely one of increasing diversity, with important implications for policies and legislation designed to protect the wellbeing of all families—the bedrock of society.¹

Trends in marriage

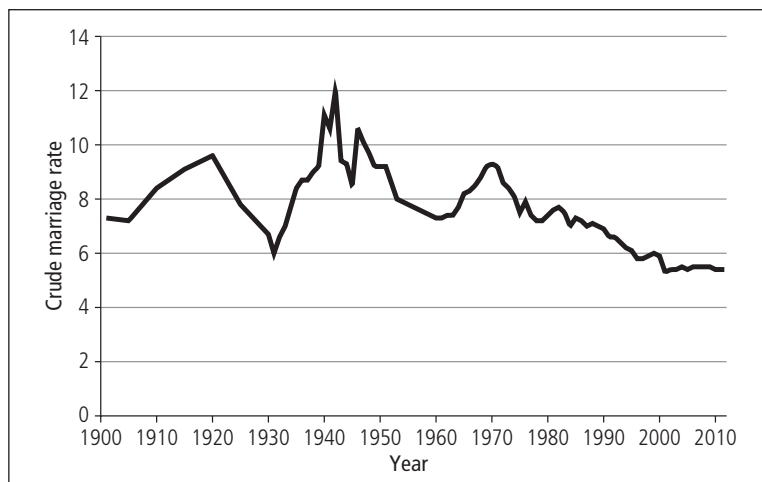
Most young people want to marry and have children (Qu & Soriano, 2004; Smart, 2002), and although most people still marry at some stage in their lives, marriage rates have declined since the “Golden Era” of the post–World War II period. A broader perspective, however, reveals that the crude marriage rate has fluctuated greatly over the years, with the highest rates occurring in 1940–42 (when the prospect of military service appears to have sparked hasty marriages), and directly after World War II in 1946–48 (9.7–10.6 marriages per 1,000 people in the resident population) (see Figure 1 on page 8).

The rate increased again in the 1960s due to continued economic prosperity, the fall in age at first marriage, continuing strong social disapproval of sexual relationships outside marriage; and the introduction of the oral contraceptive pill.² From 1972 onwards, the crude marriage rate has mostly fallen, with the lowest rate (5.3) occurring in 2001. Since this time, the rate has fluctuated between 5.4 and 5.5. The trend over the most recent decades has been accompanied by increases in age at marriage and increases in rates

1 Unless otherwise specified, the trends outlined in this chapter are based on data provided by the Australian Bureau of Statistics (ABS), including Census data and statistics on marriages, divorces and fertility.

2 Carmichael (1984) pointed out that, rather than delaying marriages, the introduction of the contraceptive pill initially supported early marriages, for almost totally reliable contraception gave couples much greater opportunities than in the past to postpone having children after marriage, thereby allowing women to continue in paid work. But the pill also provided couples with opportunities to live together without marrying. As increasing numbers followed this pathway, the strong social condemnation about premarital sexual relations gradually weakened.

of cohabitation (i.e., de facto relationships). Before outlining the latter trends, however, we will focus on divorce, given that it is only through marriage that divorce is possible.



Note: Crude marriage rate is the number of marriages registered per 1,000 of the resident population in a given year.

Sources: ABS. (various years). *Marriages and divorces Australia*

Figure 1: Crude marriage rate, 1901–2012

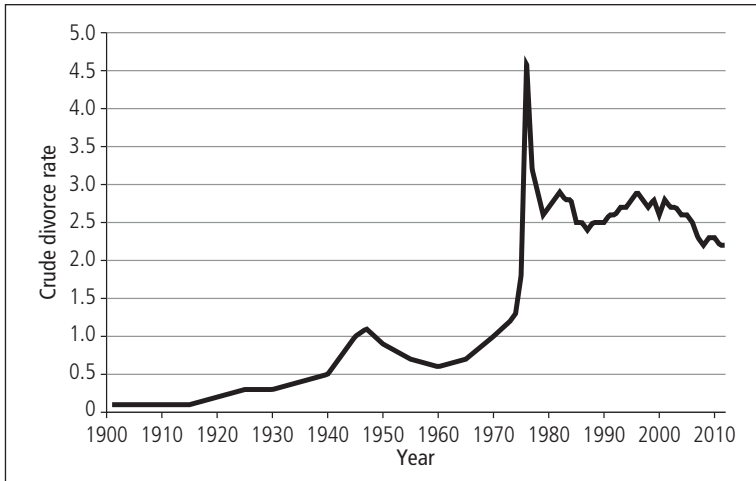
Trends in divorce

While marriage trends play an essential role in shaping those relating to divorce, divorce trends have also been heavily influenced by the interaction of several other factors, including women's increased opportunities to achieve financial independence; improvements in the "safety net" provided to financially vulnerable families; a weakening of the social stigma attached to divorce; and legislative reforms. In addition, as constraints to separation have abated, the future of a couple's relationship has increasingly depended on the extent to which the relationship meets each partner's emotional needs. As a result, several social commentators have pointed out that the threshold for remaining together has fallen (see Qu & Soriano, 2004).³

In the first decade of the 20th century, the number of divorces recorded each year ranged from 300 to 500. As Figure 2 (on page 9) shows, the crude divorce rate rose slightly in the 1920s to mid-1940s, peaking at 1.1 divorces per 1,000 resident population in 1947, partly reflecting the instability of hasty wartime marriages and the disruptive effects of the war on marriage (Carmichael & McDonald, 1987; Coughlan, 1957).

The rate then declined slightly until the 1960s, when it changed direction again. The rise followed the introduction of the *Matrimonial Causes Act 1959*, which came into operation in 1961. The Act established uniform legislation across all Australian states and territories and provided 14 grounds for divorce, with people having to either prove fault or undergo five years of separation.

³ Interestingly, the emotional side of parental separation is also being given increased emphasis in policies directed towards helping separated parents develop their parenting plans and forge new pathways. As Kaspiew et al. (2009) pointed out, a key objective of the family law reforms introduced in 2006 was to create a cultural shift away from treating separation and disputes about the children as legal problems towards seeing them as relationship problems.



Note: Crude divorce rate is the number of divorces granted per 1,000 of the resident population in a given year.

Sources: ABS. (various years). *Marriages and divorces Australia*

Figure 2: Crude divorce rate, 1901–2012

In response to increasing social pressure, the Federal Government, after much debate, introduced the *Family Law Act 1975*, which came into operation in January 1976. The Act allowed divorce based on only one ground—“irretrievable breakdown”—as measured by at least 12 months of separation. The crude divorce rate soared to its highest peak of 4.6 divorces per 1,000 resident population in that year, reflecting the formalisation of some long-term separations and the bringing forward of some divorces that had been filed in the previous years but had not yet been finalised. The highest number of divorces was also recorded in that year (63,230). Since then, the crude divorce rate has mostly fluctuated between 2.5 and 2.9, with a trough occurring in the mid-1980s. However, the rate has fallen in the most recent decade (from 2.8 in 2001 to 2.2–2.3 between 2007 and 2012).

Although many divorces occur to couples with children under 18 years old, the proportion of all divorces that involve children has declined since the early 1970s—from 68% in 1971 to 61% in 1980, 56% in 1990, 53% in 2000, and 48% in 2012. Since 2000, around 43,000 to 54,000 children under 18 years have experienced the divorce of their parents each year.

Rise in cohabitation and its fragility

Marriage and divorce trends have weakened greatly as proxies for couple formation and dissolution, given the rise in cohabitation and its relative fragility. The proportion of all couples who are cohabiting appears to have increased by one to three percentage points across each Census year, from 6% in 1986 to 16% in 2011. Cohabitation is especially common among young people. For example, the majority of partnered teenagers and those in their early 20s were cohabiting in 2011, while the obverse applied to those aged 25 years and older.

For most of the 20th century, almost all heterosexual couples married then moved in together, whereas the reverse is true today: most couples who marry have already been living with each other for some time. The proportion of marriages preceded by

cohabitation increased at a more or less steady rate between 1975, when only 16% of couples who married had been cohabiting, and 2011, when 78% had been cohabiting.

However, a cohabiting relationship is far less stable than marriage, regardless of whether couples have children (Qu & Weston, 2008, 2012). The increase in cohabitation in general and associated instability of these relationships⁴ has highlighted the potential financial vulnerability to which people in longer term cohabitation may be exposed and some of the difficulties faced by parents in settling property and parenting matters. These are issues that contributed to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, which came into operation on 1 March 2009 (and 1 July 2010 for South Australia) and applies in all states except Western Australia.

Under the so-called “de facto property regime” established through this legislation, cohabiting couples who meet certain criteria (e.g., they have lived together for at least two years, or have a child of the relationship) are treated in the same way as married couples.⁵ Before its passage, the new legislation’s treatment of cohabitation of at least two years in the same way as marriage sparked a great deal of controversy, highlighting the tension between respecting people’s private decisions to live together outside marriage and protecting their potential vulnerability in nationally consistent ways should the relationship break down (see Parkinson, 2008). However, little is known about cohabiting couples’ understanding of the legal consequences of their staying together for at least two years, should they have begun their relationship after the “de facto property regime” was established.

Resulting family forms

Trends in couple formation and the stability of relationships, along with fertility, have contributed to the relative prevalence of different family forms—an issue examined in this section. For statistical purposes, the ABS defines families as follows:

Two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or de facto), adoption, step or fostering; and who are usually resident in the same household. The basis of a family is formed by identifying the presence of a couple relationship, lone parent–child relationship or other blood relationship. Some households will, therefore, contain more than one family. (ABS, 2005, para. 21)

Under this “household family” definition, families may comprise: couples with or without co-resident children of any age; single parents with co-resident children of any age; grandparents caring for grandchildren; and other families of related adults, such as brothers or sisters living together, where no couple or parent–child relationship exists (although this excludes relatives beyond first cousins).

However, it is important to keep in mind that the concept of “family” is neither unitary nor unchanging. It involves the drawing of boundaries delineating “who is in” and “who is out”, with the boundaries changing as individuals move through their life

⁴ Given the difficulty in drawing a nationally representative sample of couples in same-sex unions, little is known of their stability. Some overseas studies that have attempted to derive representative samples, however, have suggested that same-sex cohabitations are less stable than heterosexual cohabitations or marriage (see Andersson, Noack, Seierstad, & Weedon-Fekjaer, 2006; Lau, 2012).

⁵ Previously, property disputes were handled by the state courts, so cohabiting parents needed to go to the federal family courts for settling disputes over children, and state-based courts for handling property matters.

course. The boundaries drawn by analysts and policy-makers vary according to the purpose behind their focus on families, and even members of the same household may hold different ideas about whether a particular co-resident is a member of their “family”. This may arise, for example, when a parent re-partners. Virtually all people also have family members who are spread across households and communities.⁶ Grandparents, for instance, are very likely to see their adult children and grandchildren as “family”, even if separated by vast distances, and also probably include their own siblings and wider kin in this extended sense of family. The two households formed in the process of parental separation is another clear example of families crossing household boundaries.

Defining Indigenous family boundaries is particularly challenging, for some Indigenous communities adopt kinship terminology that differs from each other and from that used in the “Anglo-Celtic” system (Morphy, 2006). Especially in remote areas, households comprising Indigenous people tend to be complex and fluid in their composition, with kinship networks overlapping, and adults and children often moving between households (see ABS & Australian Institute of Health and Welfare [AIHW], 2011).

Figure 3 (on page 12) shows the extent of change in basic family forms since 1976. Couple-only families and couple families with dependent children were the most common family forms in 2011, representing 38% and 37% respectively of all families. In total, 11% of all families were one-parent families with dependent children and 8% were couple families with non-dependent children only. The remainder (hereafter referred to as “other families”) accounted for 7%, and include one-parent families with non-dependent children only, along with families comprising related individuals, who are neither living with a partner nor having a parent–child relationship (e.g., siblings living together).⁷ Of all these “other families”, about three-quarters comprised one-parent families with non-dependent children only.

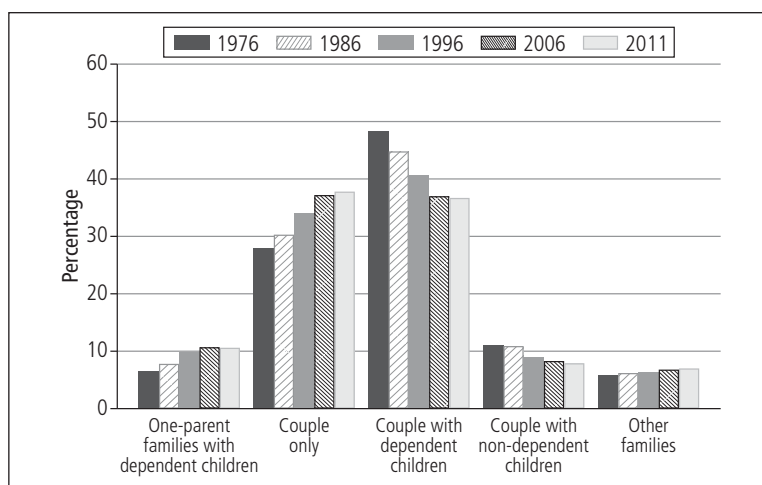
Over the last 45 years, the greatest changes that have occurred relate to the two most common family forms—couple-only families and couple families with dependent children:

- In 1976, couple families with dependent children predominated, representing 48% of all families, while only 28% were couple-only families.
- By 2006, these two family types were equally common, with each representing 37% of all families.
- In 2011, however, couple-only families were marginally more common than couple families with dependent children (38% vs 37%).

The proportion of one-parent families with dependent children also increased (from 7% to 11%). At the same time, the already small proportion of couple families with only non-dependent children fell (from 11% to 8%). Finally, the proportion of families that lie outside the above classifications (i.e., “other families”) changed little (representing around 6–7% across the time periods).

6 The ABS, of course, recognises the fact that families cross household boundaries, and points out that: (a) extending the concept of “family” to those living outside a household would lead to “double counting” of some individuals; and (b) some of the ABS surveys (e.g., the General Social Survey and Family Characteristics Survey) take account of exchanges of support between relatives who do not reside within the same household.

7 The ABS does not include one-parent families with non-dependent children in the “other families” category. The inclusion in this chapter of one-parent families with non-dependent children in the “other families” category has been made for the sake of simplicity, given that almost all families are of neither type.



Note: "Other families" include one-parent families with non-dependent children.

Source: Hugo (2001)

Figure 3: Family forms, 1976–2011

Family functioning

While the changes in the representation of the different family forms are considerable, they represent the net effects of even greater levels of change in the life courses of individuals. For instance, some single parents with dependent children will have re-partnered, thereby becoming couples with dependent children, while some couples with dependent children will have separated, with the mother and children typically forming a one-parent family for a time.⁸

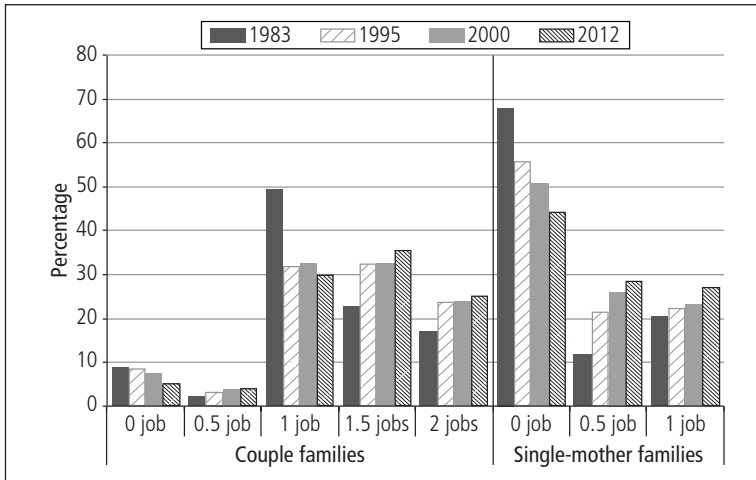
Transitions into different family forms can have important financial implications, with flow-on effects on functioning. For example, most one-parent families with dependent children are formed through relationship dissolution, and most are headed by mothers (86% in 2011). These families tend to be considerably worse off financially than other families. On the other hand, re-partnering is likely to improve their financial circumstances. (For further discussion on the financial effects of relationship dissolution, see Australian Council of Social Services, 2012; de Vaus, Gray, Qu, & Stanton, 2010; Hayes, Qu, Weston, & Baxter, 2011.) Whatever the change in financial circumstances, these transitions carry other risks, including those associated with children's acceptance of a new step-parent and the negotiation of parenting roles (see Cartwright, Farnsworth, & Mobley, 2009).

But of all the changes in family functioning that have occurred within family forms, perhaps the most generic and spectacular is the changing role of parents; that is, the switch from the male breadwinner/female homemaker model to one where parents increasingly share the breadwinning role. It was not until 1966 that the Federal Government permitted married women to be appointed or remain as permanent officers

⁸ Despite the fact that some children spend a considerable number of nights with each parent after parental separation, most children spend most or all nights with their mother. Mothers are also less likely than fathers to re-partner, at least within the first few years of separation (see Qu & Weston, 2010). In addition, a UK study suggests that the older women are when they become single mothers (which in most cases happens after relationship breakdown), the less likely they are to re-partner (Skew, 2009).

in the Commonwealth Public Service and to return to their jobs after the birth of their children. Increasing proportions of women over the last few decades have maintained some attachment to the labour force upon having children.

The surge of mothers in the workforce is well illustrated in Figure 4. Among couple families, those with a single-income earner clearly predominated in 1983, representing almost half the families; however, by 2012, this proportion had fallen to 30%. Single mothers' rates of both full-time and part-time paid work (especially the latter) have also increased over this period. Whereas in 1983, 20% of single mothers had full-time paid work and 12% had part-time paid work, in 2012, the rates were 27% and 29% respectively.



Sources: ABS. (2012b). *Labour force status and other characteristics of families*

Figure 4: Number of jobs among families with dependent children and students, 1983–2012

Some less common family forms and living arrangements

Each of the above family forms is characterised by a great deal of diversity. Two of the less common forms represented within these broader categories—same-sex couple families and grandparent families—are briefly mentioned below. In addition, the living arrangements of some people do not fit neatly into the classification of households and family forms outlined above. For example, there are families entailing separated parents whose children spend virtually the same amounts of time in the two homes, and individuals who live apart from their partner.

Same-sex couple families

According to Census figures, the proportion of all couples (married or cohabiting) that are of the same sex increased from 0.3% in 1996 to 0.7% in 2011. The rise in same-sex relationships was notable for persons aged under 65 years. As the ABS (2012b) pointed out, this increase may reflect an increasing willingness for same-sex couples to disclose their relationship. It may also be the case that same-sex partners are now more prepared to form a couple household, rather than to maintain separate homes (i.e., to adopt a “living apart together” arrangement).

The 2011 Census data indicate a marginally higher proportion of males than females among same-sex couples (52% vs 48%). Most same-sex couples have no children living with them. However, female couples were seven times more likely than male couples to be living with children (22% vs 3%). More than half of the same-sex couples with children had only one child (59% of male couples and 52% of female couples), compared with 36% of opposite-sex couples with children. In total, 0.1% of all dependent children in families were living in same-sex couple families in 2011 (ABS 2012c).

Grandparent families

The forms families take, as specified by the ABS, are based on the relationships between the reference person⁹ and other household members. Where there are grandparent–grandchild relationships in the absence of parent–child relationships, then the family is classified as a grandparent family.¹⁰ It should be noted that no information is available concerning the extent to which these children are being supported financially by the grandparents. The ABS (2012a) therefore cautions against assuming who has the caring role within such families, and points out that in some cases a young adult grandchild who is a full-time student may move to live with their grandparents in order to provide help to them.

Nevertheless, it seems to often be the case that grandparent families are formed when the parents are unable to care for their children, owing to a combination of traumas, such as mental health problems, alcohol or substance addictions, family violence, child abuse, parental incarceration, or death (COTA National Seniors, 2003; Horner, Downie, Hay, & Wichmann, 2007; McHugh & Valentine, 2011).

According to the 2011 Census, there were 46,680 grandparent families in total, representing just under 1% of all families. Of all grandparent families, 64% comprised couple- or single-grandparent families with dependent grandchildren (whether under 15 years old, or older dependent students) and 36% comprised grandparent families with only non-dependent grandchildren.

Comparable data on grandparents are not available for earlier Census years. However, three ABS surveys on family characteristics, conducted in 2003, 2006–07 and 2009–10, identified grandparent families in which the grandparents were the guardians or main carers of resident children aged under 18 years. The data suggest that the number of grandparent families with children under 18 years old fell slightly between 2003 and 2009–10 (23,000 in 2003, 14,000 in 2006–07 and 16,000 in 2009–10) (ABS, 2008, 2011b).¹¹

Separated families with equal shared care time

One of the key objectives of the 2006 changes to the family law system was to encourage greater involvement of both parents in children's lives following separation, provided that the children are protected from family violence, child abuse or neglect. As part of

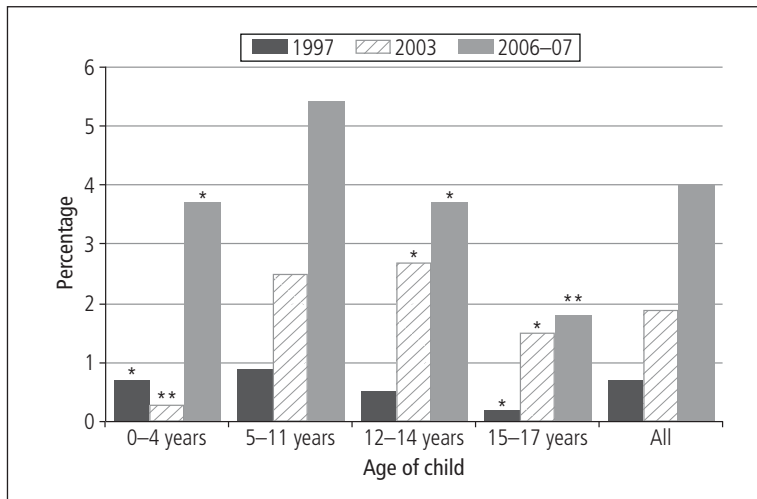
9 The 2011 Census dictionary defines the family or household reference person as “the household member used in Census coding as the starting point for identifying the relationships between usual residents of a household. Familial relationships are defined in terms of the relationship between the family reference person and all other family members” (ABS, 2011a).

10 Grandparent couple families form part of the couple families with children classification, while lone grandparents with grandchildren (and no parents in the household) are treated as one-parent families.

11 Although the definition of grandparent families differs between the Census 2011 and ABS surveys, it is noteworthy that the Census 2011 suggests that there were around 21,760 couple- and single-grandparent families with grandchildren under 15 years old.

this general goal, the reforms were also specifically designed to encourage substantially shared care time where such arrangements are reasonably practicable and in the child's best interest. It seems reasonable to suggest that, in general, the more equal the overnight stays with each parent, the more likely it would be that, when completing a Census form or survey, each parent of the same children would see the children as members of his/her household.

Figure 5, derived from repeated ABS surveys, shows the proportion of children in four different age groups with equal care-time arrangements (here defined as 48–52% of nights with each parent) in 1997, 2003 and 2006–07. These results are based on the reports of parents who indicated that they cared for their child for at least half the nights.



Note: * These estimated percentages are based on a small number of cases and should therefore be interpreted with caution. ** These estimated percentages are considered too unreliable for general use.

Sources: Customised tables provided by the ABS based on the Family Characteristics Survey, conducted in 1997 and 2003, and the Family Characteristics and Transitions Survey, conducted in 2006–07.

Figure 5: Proportion of children with equal care-time arrangements, by age of children, 1997, 2003 and 2006–07

It appears that equal care time is an uncommon, but nonetheless increasing, arrangement for children whose parents have separated. The proportions in equal care time in the 1997 survey were very low, with negligible differences apparent across the age groups. The proportion of all children under 18 years of separated parents experiencing equal care time increased from 0.7% in 1997 to 1.9% in 2003, and 4.0% in 2006–07. In other words, equal care-time arrangements, though very uncommon, appeared to be increasing even before the 2006 reforms were introduced. Although most of the age-related estimates are unreliable, owing to the small number of children on which they are based, children aged 5–11 and 12–14 years seemed more likely than the other two age groups to experience equal care time.

It is important to note that the parents of some of the older children represented in these ABS surveys would have been separated for several years. Data from the first two waves of the Australian Institute of Family Studies (AIFS) Longitudinal Study of Separated

Families (LSSF) (Kaspiew et al., 2009; Qu & Weston, 2010) suggest that equal care time is now relatively common among families—at least during the first couple of years of separation.¹²

According to the reports of all parents who participated in Wave 1 of the LSSF, equal care time was experienced by 7% of the children some 15 months after separation. This arrangement was most commonly experienced by children aged 5–11 years and 12–14 years (11–12%), followed by those aged 3–4 years (9%), then teenagers aged 15–17 years (6%). Only 2% of children under 3 years old experienced this arrangement. The second survey wave suggested that, some 12 months later, equal care time was the most stable of the 11 care-time arrangements examined—applying to 86% of the children who had this arrangement in Wave 1.¹³

Couples living apart together

Some individuals in an intimate relationship may choose to live in a separate household from their partner. These circumstances are often referred to as living-apart-together arrangements, though opinions vary as to whether this arrangement should include or exclude couples who are married to each other but are residing in separate homes (e.g., Levin & Trost, 1999; Strohm, Seltzer, Cochran, & Mays, 2009). There is also a “grey area” regarding the point at which a developing intimate relationship between people who live in different households should be considered a living-apart-together relationship. Each partner may hold a different understanding of the nature of the relationship and their living arrangements.

Using Wave 5 of the Household, Income and Labour Dynamics in Australia (HILDA) Survey (conducted in 2005), Reimondos, Evans, and Gray (2011) found that around 24% of respondents aged 18 years or more who were neither married nor cohabiting indicated that they were in an ongoing relationship with someone with whom they were not living. This represents 9% of all respondents who were 18 years or older. While 40% had commenced their relationship fewer than 12 months prior to interview, another 28% had been in this relationship for at least three years. Those aged 45 years or more were more likely than younger groups to have commenced their relationship at least three years prior to interview. Reimondos and colleagues also found that while nearly two-thirds of the respondents expected to live with their partner within the next three years, this was reported by only one-third of the older, previously married, individuals (mostly aged 45 years or more) with these living arrangements. In nearly three-quarters of all cases, the two residences were located in the same city and most of the others lived within the same state.

12 The 10,000 parents in the LSSF had been separated for an average of 15 months when first interviewed (in late 2008). The second survey, based on 70% of the original sample, was conducted in late 2009. Data were weighted to account for known sample biases, including that associated with loss of sample members by Wave 2. The sample was drawn from the Child Support Agency (now the Department of Human Services Child Support Program) database. The study was commissioned by the Attorney-General's Department (AGD) and the then Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) and formed part of the family law reform evaluation conducted by AIFS (see Kaspiew et al., 2009). Unlike the ABS surveys, which focused on all children born of the separated parents, the LSSF focused on only one child in each family.

13 The different care-time arrangements ranged from the child never seeing the father to the child never seeing the mother, and included categories in which the father or mother had daytime-only care.

Concluding thoughts

Trends in the formation and stability of families have changed in striking ways over past decades, as have the roles of parents, whether they live together or apart. Indeed, families are constantly evolving in response to the many opportunities and constraints they confront during the course of their development, including those arising from the economy, technology, various forms of legislation, and societal values. Such factors themselves continue to evolve, with family transitions being key drivers of some of these changes.

Nevertheless, some of the fundamental things about families do not change. Most importantly, they represent the basic unit of society—a unit in which much “caring and sharing” between members is expected to occur—and, importantly, the site in which most children are raised. As such, families play a central role in shaping the health and wellbeing of all immediate family members. To quote Thornton, Axinn, and Xie (2007), “today, as has been true for thousands of years, the family is still a primary unit of human interaction, providing the basis for both generational renewal and individual linkage to the larger society” (p. 3). In Western societies, it is the parents who typically have the responsibility of raising their children to become healthy, well-adjusted and contributing members of society, to the extent that this is possible. They are also expected to ensure that their family is linked in productive ways with the larger society, and to draw on community resources to help meet their familial responsibilities. The meeting of basic needs common to all families can be enhanced or threatened by a variety of interacting factors relating to their characteristics and transitions being contemplated (such as childbearing or separating), along with external forces. Close monitoring of trends in family forms, transitions and functioning is essential for proactive policy development.

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[3]

Ancestry, identity and meaning

The importance of biological ties in contemporary society

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BIOLOGICAL TIES ARE IMPORTANT to people; there is no doubting that. But exactly why they are important is increasingly relevant at a time when so much about the family exists in flux—the shapes of families are shifting, as are the technologies used to assist in creating them. Beneath many of the current debates over family structure or assisted reproductive technologies (e.g., those concerned with adoption, surrogacy, donor insemination, and gay- and lesbian-parented families) lay some fundamental moral questions. Is it important to know one's biological parents? Are biological parent–child relationships different, in any important moral sense, to non-biological parent–child relationships? What value should be attributed to biological ties?¹

Recently, some authors have focused on the role that biological relationships play in the life task of identity formation. Velleman (2005, 2008), for example, argued that an ongoing connection with biological parents is so significant in forming one's self-knowledge and identity that it is morally wrong to deprive someone of this. Thus, in his view, practices such as anonymous gamete donation are inherently problematic. Alternatively, Haslanger (2009) agreed that biological relationships play a valuable role in healthy identity formation, but only because the current cultural context is strongly “bionormative”.² The way forward, she argued, lies not in shaping moral understandings to fit with a bionormative cultural context, but rather in challenging bionormativity. She said: “I enthusiastically endorse the disruption of old ideologies of the family, and resist new ideologies that entrench and naturalize the value of biological ties” (p. 92).

1 In this chapter, I generally treat the concept of “biological ties” as if it were an unproblematic description of shared ancestry. However, as Dempsey (2006) pointed out, advances in assisted reproductive technologies have problematised such simple conceptions: “For example, biological maternity can be now potentially separated into a biogenetic and a gestational component, which allows for a diffusion of the hitherto singular character of biological motherhood” (p. 45). Unfortunately, space does not permit an exploration of such nuanced understandings of biological ties.

2 That is, the current cultural context manifests a “culturally dominant biologism” (Haslanger, 2009, p. 93).

In this chapter I follow the above authors in exploring this issue. The focus on the role that biological relationships play in identity formation is an important development in broader debates over biological ties, one that takes seriously the often-underestimated role that narrative and meaning play in people's lives. I begin by outlining the positions of Velleman and Haslanger, both of whom are prominent philosophers. Although there is much to learn from these authors, I argue that their writings also serve to illustrate how debate in this area often fails to adequately account for the unique cultural conditions of contemporary society, and thus fail to identify exactly why biological ties mean so much to so many people in today's world.

Biological ties and identity formation

"Meaning in life", Velleman (2005) asserted, "is importantly influenced by biological ties" (p. 357). Indeed, he argued that actually having acquaintance with one or both of one's parents is so important that it is morally wrong to deliberately bring a child into existence knowing that they will be denied this (as is the case, for example, for children of anonymous gamete donors).

According to Velleman, knowing one's parents is valuable for two main reasons. First, it allows individuals to develop accurate and healthy forms of self-knowledge. Coming to understand oneself—one's temperament, proclivities, and styles of thinking, feeling and relating—is an important part of living a flourishing life; but it is no easy task. While physical selves can be reflected in a mirror, inner selves are opaque: often "inaccessible to introspection and therefore visible only from a detached perspective, as seen through other people's eyes" (p. 367). One of the central ways in which true self-understanding can be developed is through contact with one's kin, particularly parents and siblings. This is because, as Velleman (2005) argued:

If I want to see myself as another ... I don't have to imagine myself as seen through other people's eyes: I just have to look at my father, my mother and my brothers, who show me by way of family resemblance what I am like. For information about my appearance, they may not be as good a source as an ordinary mirror; but for information about what I am like as a person, they are the closest thing to a mirror that I can find. (p. 368)

Whether one shares many characteristics with family members or defines oneself in opposition to them, relating with one's immediate kin is often the only way to access "deeply ingrained aspects of oneself" (Velleman, 2005, p. 369).

Second, knowing one's parents helps one to develop a coherent and positive sense of identity. According to Velleman, identity development is not simply a matter of garnering self-knowledge, but also of telling a story about that knowledge and the events of one's life. Such stories, or narratives, can provide a sense of meaning and emotional resolution that a causal explanation of qualities or events simply cannot. Importantly, it is people's kin who provide the material with which some of their most significant narratives are constructed. While those who are unaware of their biological origins can certainly develop meaningful narratives within the context of their non-biological families, they will likely "have the sense of not knowing important stories about themselves, and of therefore missing some meaning implicit in their lives, unless and until they know their biological origins" (Velleman, 2005, p. 376).

In contrast to these views, Haslanger (2009) welcomed new ideologies of the family and relationships. She argued that Velleman's emphasis on biological kin as a key to self-

knowledge is highly exaggerated. Yes, people need others in order to develop certain forms of self-knowledge, but these others need not only be their kin; they may be friends, community members, public figures, or even the fictitious characters of films or literature. Furthermore, the development of self-knowledge is as much about introspection and the exercise of agency as about the mirroring of others.

Haslanger (2009) went on to examine the claim that biological ties are a significant factor in healthy identity development. She argued that the personal narratives that people develop normally adhere to certain dominant cultural schemas, and that the dominant schema for the family in contemporary post-industrial societies is the “natural nuclear family” schema, which says that children are best conceived and raised by two heterosexual adults joined in a loving relationship (i.e., marriage). She agreed that the “natural nuclear family schema plays an important role in forming identities—including healthy identities—in our current cultural context” (p. 113). However, she argued that this is not because biological ties are inherently necessary for healthy psychological development or that the nuclear family unit is always the optimum environment in which to raise children; rather negative effects are often associated with living outside of a hegemonic cultural schema. Of those disconnected from their biological parents, she said: “lacking knowledge about one’s biological family, one is left without questions that matter culturally, and this is stigmatizing” (p. 113). It is difficult to live a flourishing life when one is the member of a stigmatised group, when one does not have access to the relationships and forms of knowledge that the dominant family schema deems normal and necessary. For Haslanger, the way forward lies in challenging bionormativity, not in pandering to it.

Reflections on the debate

What are we to make of the debate discussed above? Certainly both Velleman (2005, 2008) and Haslanger (2009) have presented sophisticated cases for their opposing views, and focus on issues—such as the role that narrative identity plays in a flourishing life—that are sidelined in much of the relevant literature. However, in important ways their arguments are also lacking.

Velleman posited that biological ties are important because of the pivotal role they play in the development of self-knowledge. Surely Haslanger (2009) was correct when she challenged Velleman’s (2005) claim that parent–child relationships are essentially the only route to “deeply ingrained aspects of oneself” (p. 369). Surely people come to know themselves in multiple ways: through relationships, through identification with fictional or historical characters, through introspection, through the exercise of agency, through understanding their own culture and upbringing, and not least through the joys and hardships of life. Harris (2009) demonstrated that the role that parents play in shaping their children’s characters is often assumed to be much more significant than it actually is; that children’s peer groups and their genetics, for instance, are considerably stronger predictors of character than parenting practices. It would appear that by attributing more weight to the familial relationship than is warranted, Velleman was committing an error of reasoning similar to that identified by Harris.

Velleman (2005) then discussed the role that biological ties play in identity development and the construction of personal narratives—he was one of the first authors to explore this issue in any great depth. Haslanger’s (2009) response—her assertion that the importance attributed to kinship stems from bionormative cultural schemas—appears convincing. It is difficult, for instance, to imagine individuals having “the sense of not knowing

important stories about themselves" (Velleman, 2005, p. 367) if they lived in a society that paid little heed to biological connections. However, Haslanger's proposed course of action is untenable. She encourages the "disruption of old ideologies of the family" (p. 92), as if the "natural nuclear family" schema is the only factor contributing to the value individuals place on biological connections. In doing so, she both underestimates important human propensities and fails to adequately account for a number of the defining characteristics of the contemporary social order. The remainder of this chapter is an attempt to support the above claims.

In the next sections of this chapter, I present an argument that departs from those of Velleman and Haslanger. I argue that most people are compelled to develop personal narratives that position their existence within a story or framework that extends beyond the borders of their own birth and death in order to create narratives that give their lives a sense of continuity and meaning. Increasingly in contemporary society, for reasons I outline, these narratives are built around biological connections and ancestors.

The human propensity for meaning

Human beings have a unique propensity for developing and adopting ideologies—be they mythological, religious, philosophical or political—that ascribe meaning to the universe and individual existence. Traditionally, every known human culture has offered its members meaningful *grand narratives*—creation stories, myths, rituals, and religious and spiritual beliefs—which have provided a framework that allows them to position their own life stories within a broader context and helps to imbue their individual experiences, sufferings and mortality with meaning (Brown, 1991).³

Numerous theorists have recognised this propensity for meaning and attempted to explain its origins. Perhaps the tradition that has most closely examined the role that meaning-providing belief systems play in promoting psychological security is existentialism. In particular, theorists who have investigated existentialist concerns within a psychiatric or psychoanalytic framework (e.g., Becker, 1973; May, 1991; Yalom, 1980), although divergent in their writings, all focus on the ways in which cultural belief systems and narratives work to allay a number of primary human concerns, such as the fear of death, meaninglessness, isolation and the responsibility that accompanies psychic freedom. For these writers, meaning-rich ideologies and cultural narratives help individuals to address problems and anxieties that almost invariably burden self-conscious, autonomous beings.

More recently, Dennett (2006) and Dawkins (2006) have led a growing number of authors who argue that human beings are "hardwired" to view the universe as inherently meaningful, and who treat the tendency towards mythological and religious thinking as a natural, evolved phenomenon that is amenable to scientific study. Dennett, for instance, posited that the tendency to believe in God, deities or other supernatural forces arises out of an evolved capacity to attribute intentional action to others. This capacity became very beneficial in evolutionary terms, for it allowed humans to develop bonds based on empathy and to more effectively anticipate the behaviours of others. However, it also led to the tendency to fallaciously see intentions underlying all events, and to invent supernatural entities to account for those events or

3 The anthropologist Brown (1991) developed a list of "human universals", which "comprise those features of culture, society, language, behavior, and psyche for which there are no known exception" (p. 11). Included in this list were "creation myths", "end times myths", "beliefs and narratives", "magical thinking", "beliefs about death", "death rituals", "mourning" and "rites of passage".

phenomena that were not obviously attributable to the intentions of human or other animals. Contemporary religious doctrines are, according to Dennett, simply more refined versions of earlier animistic belief systems, which saw natural phenomena, such as the weather or the changing of the seasons or the genesis of the Earth, as being guided by spirits or deities.

For the purposes of this chapter, it does not matter whether one accepts that the propensity to imbue human life with meaning arises out of deep existential anxieties, or is a product of human evolutionary history, or is due to some other reason altogether. I describe the existential and evolutionary theories above to demonstrate that many other theorists are concerned with this issue, and also that there are at least conceivable descriptions of its aetiology. What matters here is that people are predisposed in this way; that the human search for meaning, whatever its genesis, is an empirical reality and is therefore a relevant factor in the consideration of certain moral issues.

The loss of meaningful grand narratives

If every known culture has offered its members grand narratives, which have enabled them to position their own life stories within a broader context and helped them to imbue their individual lives with meaning, an illuminating question to ask is this: What do contemporary, post-industrial societies offer in this regard?

Such societies are historically unique in that they are increasingly guided by secular, scientific understandings of existence; understandings that fail to clearly direct people's propensity for meaning, and do not offer an emotionally satisfying explanation of how individual life stories fit within a larger narrative (Mellor & Shilling, 1993). As Mellor and Shilling wrote, "modernity has developed alongside an extensive desacralisation of social life, yet has failed to replace religious certainties with scientific certainties" (p. 413). Take the dominant contemporary creation story—Darwinian "evolution by natural selection"—as an example.⁴ Evolutionary theory provides a sophisticated answer as to *how* humanity came to be, but is silent on the *why*. Many evolutionary theorists believe that life began when "at some point a particularly remarkable molecule was formed by accident ... [and] it had the extraordinary property of being able to create copies of itself" (Dawkins, 1976, p. 15). This may well be true, but presenting the history of life as an "accident", followed by the unfolding of blind forces offers no sense that there might be meaning or a purpose to human life beyond that which is invented. Evolutionary theory provides an extremely lengthy narrative framework, no doubt, but it is not one that sits comfortably with a tendency to ascribe meaning to the universe.

Furthermore, many of the central narratives of the secular-scientific world view actively promote the idea that the universe and human life is free of intrinsic meaning. Midgley (2003) argued that, far from being value-neutral, science is guided by a number of pervasive myths, which she describes as "imaginative patterns, networks of powerful symbols that suggest particular ways of interpreting the world" (p. 1). These myths are not necessarily false, but they are also not the result of scientific investigation; rather, they reflect metaphors and non-empirical, metaphysical presuppositions. The most dominant of these myths, Midgley contends, are: atomism, or the idea that the universe is divisible into basic units; reductionism, or the idea that the universe (or systems within it, such as societies or biological entities) is best understood by investigating

⁴ It is important to note that I am not concerned with the veracity of this theory, but rather the effect it has on individuals.

its individual components; and, materialism, or the view that there is no non-physical aspect to reality.

The next question to ask, then, is: What is happening in post-traditional societies to the human propensity for meaning? Is it dwindling, conditioned out of existence by the hegemony of the secular-scientific worldview? Or is it simply finding new avenues of expression?

Narrative identity and the body

For many in contemporary society, the physical body is a central constituent of identity. Of course, bodies have always been important—they connect individuals to the world and others; they are the ultimate source of life, of experience, of all pleasure and pain—but never have they been so central to people's personal narratives (Giddens, 1991; Shilling, 1993). Giddens proposed that the dissolution of grand narratives and tradition has been accompanied by an increase in "ontological insecurity", where people's fundamental existential questions remain unanswered, and they struggle to develop a sense of order and meaning in their lives. As meaning and self-identity are no longer simply bestowed by grand narratives or reliable social structures, they become the responsibility—the "reflexive projects"—of individuals. Furthermore, Giddens argued, "regularised control of the body is a fundamental means whereby a biography of self-identity is maintained" (p. 57). Shilling agreed, submitting that "there is a tendency for the body to become increasingly central to the modern person's sense of self-identity" (p. 3).

The rise of consumerism in the post-traditional world has also played a significant role in increasing the body's salience in personal narratives. Turner (1996) argued that "with mass culture and consumerism came a new self, a more visible self, and the body comes to symbolise overtly the status of the personal self" (p. 1). Mellor and Shilling (1993) agreed that there has been "a massive rise of the body in consumer culture as the bearer of symbolic value", which leads to "a tendency for people to place more importance on the body as constitutive of the self" (p. 413). As examples, these authors point to the proliferation of images of bodies—invariably young and trim—in advertisements and popular entertainment, and the rise of "body projects" (e.g., health and fitness regimes, diets, cosmetic surgery, body art) as central practices of personal identity.

It can also be seen that the secular and scientific ideologies discussed above encourage people to view themselves as simply material beings. Mainstream medicine, for instance, treats the body as a biological machine devoid of a spirit or soul, and many accept its purely physical accounts of the aetiology, course and treatments of different disease states. Similarly, much contemporary psychology and psychiatry, with its emphasis on neurobiology and cognition, is structured around a materialistic conception of mental health and disease; where depression, for instance, was once viewed as a "dark night of the soul" or an adaptive response to difficult circumstances, it is now seen by many as a "chemical imbalance" in the brain necessitating chemical intervention. Even traditional religious and spiritual practices, such as yoga and mindfulness meditation, are often stripped of any metaphysical context and seen as simply holistic forms of exercise or mental training. In a multitude of ways people are encouraged to think of the self in physical terms.

Personal creation stories

One result of the fact that the body has become a more central focus of identity is that physicality now also tends to be dominant in those wide-reaching narratives that people

use to ground their lives in a broader, meaning-providing context. In many traditional cultures, a sense of continuity and meaning was provided through connection with ancestors, it is true, but it was also provided through stories of the non-physical or spiritual: through belief in realms or states that exist after death, or in the idea that one's soul or karmic force continues through a series of incarnations. In the post-traditional order, secular and materialistic understandings of the self overshadow the influence of spiritual beliefs. The propensity to position one's own life stories within a broader narrative framework has, for many, found a new avenue of expression: through stories that involve them in a corporeal lineage, that see them as a link in a chain of bodies that extends into the distant past and will continue to exist in perpetuity.

Although research with adoptees, foster children and donor-conceived people has consistently identified a sense of "genealogical bewilderment", or identity confusion, among those who do not know their biological parent(s) (Kirkman, 2004; Turner & Coyle, 2000), this research tends to focus on facets of identity such as self-esteem or a sense of belonging, rather than on the broader sense of narrative meaning described in this chapter.⁵ Exceptions include March's (1995) study with adoptees, in which interviewees "lacked the biological kinship ties used to establish generational continuity" (p. 657), and Turner and Coyle's (2000) work with donor-conceived people, where the authors identified a feeling of "genetic discontinuity", and argued that those raised without knowledge of their biological parents should be provided with "a forum within which their particular need to construct a past and be understood within a genetic context can be met" (p. 2042).

There are, however, more oblique forms of evidence that can be seen to support my argument. For instance, consider the massive rise in popularity of genealogy. Although interest in ancestry dates back centuries, it was traditionally the preserve of the aristocratic classes, not the popular pursuit seen today (Zerubavel, 2012). Today, websites such as Ancestry.com and FamilySearch.org are hugely successful, each with millions of paying subscribers. Indeed, Wells (2006) observed that genealogy is "the second most popular American hobby after gardening (and the second most visited category of Web sites after pornography)" (p. 11). Finkler (2001) convincingly argued that "the ideology of genetic inheritance promises contemporary humans immortality within the flux of the postmodern world" (p. 248) as the "individual exists in a transient world but is fastened biologically to the past and future" (pp. 248–249). However, it is important to also note that those conducting genealogical investigations are seldom simply searching for the names of their ancestors or genetic information (Mason, 2008). Rather, they are (or are also) looking for the *stories* of their ancestors; stories that then become the various threads of broader genealogical tapestries. Identifying with the stories and circumstances of one's ancestors can promote "an almost interpersonal sense of the past ... a way of experiencing even distant historical events quasi-autobiographically" (Zerubavel, 2012,

5 The extent to which qualitative research with adoptees, foster children or donor-conceived people can be used to support the argument I present in this chapter is a difficult question, and one that for lack of space I cannot adequately explore. If the propensity for meaning does indeed stem from existential concerns and/or evolutionary forces, there would be strong reason to believe that this propensity may be operating largely outside of conscious awareness. For example, Terror Management Theory, a popular branch of social psychology, has in recent years empirically verified that the fear accompanying an awareness of mortality *unconsciously* motivates individuals to invest in cultural belief systems that imbue their lives with meaning (for a review of this research, see Burke, Martens, & Faucher, 2010).

p. 21). What is this if not an attempt to create a narrative that provides a broader context for one's own existence?

Consider also the fact that many adoptees and children of anonymous gamete donors go to great lengths to identify and learn about their biological parents (Kenny, Higgins, Soloff, & Sweid, 2012; Kirkman, 2004). But why should this be so? Levy and Lotz (2005) claimed that their desire to locate their biological parents was simply a symptom of the misguided emphasis placed on genetics in contemporary society. While it is true that some adoptees and children of anonymous gamete donors search out their biological parents solely for genetic information, for many others such information is a secondary concern, or even of no concern at all (Kirkman, 2004). In an effective attempt to counter the arguments of authors such as Levy and Lotz, Laing (2006) offered the following thought experiment:

Imagine an adult adopted as a child who is seeking out his father. Suppose he discovers there is a match for paternity with X. He is elated but soon discovers that X is not his father but the twin of his father, Y. The discovery that X is not his father at all, but his uncle, will be a matter of great significance even though the DNA for both X and Y might be the same (p. 549).

This example demonstrates that the valuing of biological ties cannot simply be attributed to a desire for genetic information (because for almost all intents and purposes, the uncle is as biologically similar to the adopted child as the father). This example suggests that most people would prefer to meet X over Y because what they are actually searching for is a story—a personal creation story, if you like. What was my father like? What were the conditions that led him to make his reproductive decisions? How does he feel about me? Yes, these are “questions that matter culturally” (Haslanger, 2009, p. 113) and so can be a cause for stigma if they remained unanswered, but in societies in which diverse family forms are increasingly common, this explanation seems unable to fully account for the intensity with which many conduct searches for their kin. It seems likely that these questions are also important because they speak directly to the decisions and conditions that led to one's very existence, and not knowing their answers leaves a lacuna right at the closest link of a chain that could connect one—in a meaning-providing way—to one's forebears.

Conclusion

In sum, I agree with Velleman (2005) that knowing one's family history provides a broad context “in which large stretches of my own life can take on meaning in relation to the story of my ancestors” (pp. 375–376). However, while Velleman saw this as being indicative of the inherent importance of biological ties, I argue it is simply the current manifestation of a deeper human propensity to position one's own life story within a broader, meaning-providing narrative. While the grand narratives of traditional societies (such as myths, creation stories, religious and spiritual beliefs) give their members the means to express this propensity, the grand narratives of contemporary society leave people wanting. In the absence of meaning-providing grand narratives (and in the presence of secularism, scientism and consumerism), people's biological history and ancestry have become common ways for them to attempt to position their own lives within a broader context. Thus, Haslanger's (2009) suggestion of resisting bionormativity by disrupting “old ideologies of the family” ignores both the human propensity for meaning and some of the central features of the current social order.

Those involved in debates over issues such as adoption, surrogacy and donor insemination often come down on one or the other side of the classic nature/nurture divide. Many, like Velleman, take what is basically an essentialist approach, seeing biological relationships as inherently valuable. Such authors run the risk of naturalising what are actually socially constructed phenomena, and supporting conservative conceptions of family life. Others, like Haslanger, adopt more of a constructivist position, arguing that the value of biological ties is socially constructed, and that it can and should be challenged. These authors have a tendency to overestimate the extent to which individuals in the post-traditional order are able to fashion their own identities, and risk trivialising the deep importance that many attribute to biological connections. As is almost always the case when the nature/nurture problem surfaces in a particular debate, the complex realities of the human situation are not properly captured by polarised philosophical positions.

Although the argument I present in this chapter needs a much broader treatment than I can give it here, I hope to have at least initiated a conversation, and to have demonstrated that there may be ways to conceive of the importance of biological ties that adequately account for the characteristics of contemporary society.

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[4]

Past adoption practices **Key messages for service delivery responses and** **current policies**

Pauline Kenny and Daryl Higgins

THIS CHAPTER DRAWS FROM the findings of the report *Past Adoption Experiences: The National Research Study on the Service Response to Past Adoption Practices*, released by the Australian Institute of Family Studies in August 2012 (Kenny, Higgins, Soloff, & Sweid, 2012). Here we examine the nature of identity and connection through the lens of the study participants' lived experiences of past adoptions, and the subsequent effects on the formation of "self" within these constructs, including barriers and enablers. We then explore the influence of these experiences on the participants' views about family formation and composition as they relate to the current climate of adoption, donor conception and surrogacy, as well as permanent care arrangements in the child protection system.

This chapter provides an opportunity to reflect the voices of those who took part in the research, particularly of those who were adopted as children, and what they saw as being integral to current policy discussions in these domains, as they view themselves as the living results of a past "social experiment".

Past adoption practices in Australia

In the decades prior to the mid-1970s, it was common in Australia for babies of young, vulnerable women (usually unwed mothers) to be adopted. Shame and silence surrounded pregnancy out of wedlock. This was matched by mounting social pressure to meet the needs of infertile couples. Societal views—reflected in organisational practices in hospitals, children's homes, government welfare departments, and other agencies—prioritised the needs of "deserving" infertile couples. The needs of single or other vulnerable young pregnant women giving birth were largely ignored (Higgins, 2012).¹

¹ Wherever possible, the term "mother" is used in this paper to refer to the person who gave birth to the child.

Adoptions in Australia reached a peak of almost 10,000 per year in 1971–72. Since then, rates of adoption have dropped significantly. In 2012–13, there were 339 adoptions—up slightly from 333 in 2011–12, which was the lowest number on record (AIHW, 2013). Of these, only 54 (16%) were local adoptions, 129 (38%) were intercountry adoptions, and 156 (46%) were “known” child adoptions.

When the adoption process in Australia was at its peak, adoptions were “closed”. Closed adoption was where an adopted child’s original birth certificate was sealed forever and an amended birth certificate was issued that established the child’s new identity and relationship with their adoptive family. Mothers were not informed about the adoptive families, and the very fact of their adoption was usually kept secret from the children. Changes in legislation now allow access to such information (if no veto from the other party has been put in place). The majority of local adoptions (those of children born or permanently residing in Australia) are now “open”.

Reforms affecting past practices

Legislative and social reforms and other significant events have contributed to the shifts away from the peak period of adoption in Australia in the late 1960s and early 1970s, such as:

- the establishment of the Council of the Single Mother and Her Children (Victoria) in 1970, and a national equivalent set up in 1973, aimed at challenging the stigma of adoption and providing support to single and “relinquishing” mothers;
- the status of “illegitimacy” changing to “ex-nuptial births”, starting in 1974 with a *Status of Children Act* (Victoria and Tasmania);
- abortion becoming allowable under some circumstances in most states from the early 1970s (see the 1969 Menhennitt ruling [*R v Davidson*] in Victoria, and the 1971 Levine ruling in NSW);
- the Commonwealth Government’s introduction of the Supporting Mother’s Benefit in 1973;
- further legislative reforms to overturn the blanket of secrecy surrounding adoption (up until changes in the 1980s, information on parents was not made available to adopted children/adults);
- establishment of registers for those wishing to make contact (both for parents and adopted children), beginning in 1976 in NSW;
- implementation of legislation in Victoria (1984) granting adopted persons over 18 the right to access their birth certificate, subject to mandatory counselling, with similar changes following in other states; and
- legislative changes in most of the eight states/territories by the early 1990s that ensured that consent for adoption had to come from both mothers and fathers.

However, the damages incurred to many thousands of Australians prior to such reforms are certainly evident today, as recognised by the Australian Government’s formal apology in March 2013 for the Commonwealth’s contribution to former forced adoptions. Although legislative responsibility for adoptions has remained with the states and territories, it is an important acknowledgement of the collective responsibility held nationally for the current service and support needs of those affected.

Past Adoption Experiences study

On 4 June 2010, the Community and Disability Services Ministers’ Conference (CDSMC) announced that the ministers had agreed to a joint national research study into closed

adoption and its effects, to be conducted by the Australian Institute of Family Studies. This study complements the Senate Inquiry into the role of the Commonwealth in former forced adoptions (Senate Community Affairs References Committee, 2012).²

The key focus of the AIFS study was on current needs for services and supports, and was designed to produce evidence that can assist with improving service responses to those affected by past practices, including the provision of information, counselling, search and contact services and other supports.

The study—the results of which were published in the report *Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices*—targeted a wide group of those with past adoption experiences, including: mothers and fathers separated from a child by adoption, adopted individuals, adoptive parents, wider family members (to look at “ripple effects”), and those servicing their current needs (counsellors, psychologists and other professionals).

It incorporated mixed methods (online surveys; reply-paid survey; in-depth interviews and focus groups), integrating results from across the different elements of the study, and used and built on existing research and evidence about the extent and effects of past adoption experiences.

Over 1,500 individuals across Australia participated in the study, comprising:

- 823 adopted individuals;
- 505 mothers;
- 94 adoptive parents;
- 94 other family members; and
- 12 fathers.

In addition, we surveyed 58 service providers about their views on the current needs and service provision models for those affected by past adoption practices.

Follow-up individual interviews and focus groups included over 300 participants in 19 locations across all states and territories.

Themes from the study

One of the advantages to this study was that there was a nationally coherent voice among the participants. Although a broad lens was applied, we are able to reflect on some of the lessons learned regarding past adoption practices, with specific focus on the currency of some of those issues in today’s legal and ethical discussions relating to assisted reproduction, current adoption practices and permanency care planning.

We have chosen to focus on three key themes within the findings of the study—identity, connection and access to information—as they pertain to the experiences of the adopted individuals in particular, who were not only the largest respondent group, but who are living examples of the outcomes of past policies and practices.

Theme 1: Identity

I grew up feeling like an imposter, needing to be extra good to ensure that I would fit in and not be rejected. Only through meeting my natural family members did I learn about other parts of who I am. Only then I became able

² The Senate Community Affairs Reference Committee examined the role, if any, of the Commonwealth Government in forced adoption practices, and its potential role in developing a national framework to address the consequences for mothers, their families and children subjected to such practices.

to make my own choices [about who I am] more freely. (cited in Kenny et al., 2012, p. 112)

A point to make early in this discussion is that the findings from the study indicate that for adopted individuals, regardless of the quality of upbringing they experienced from their adoptive families, the majority of participants said that their adoption had some negative effects on their lives. Identity issues was one of the most challenging of these. Therefore, seeking information about themselves and family members from whom they were separated was fundamental for many adopted individuals, particularly as this process relates to the formation of identity.

The concept of identity was viewed from two predominant perspectives:

- Where have I come from (biologically)?
and
- How have I been raised?

These questions probably do not appear to be markedly different to how non-adopted individuals may contemplate their views of self and how these concepts are formulated; however, the tensions existing between the two questions for those who grew up as an adoptee in the period of closed adoptions were obvious in the results of this study.

Neither of these fundamental questions appeared to be viewed as being mutually exclusive; indeed, this was rarely so. For many, there was a constant sense of “not fitting” or “belonging” within their adoptive families, even if they felt loved, and their subsequent reaction was often a driving need to conform or modify their behaviours in order to counteract these differences. This only added to their confusion as to who they fundamentally viewed themselves to “be”.

For other adoptees who indicated that they had not experienced such an underlying feeling of “trying to fit in” and who felt completely assimilated with their adoptive families, some still indicated that they faced challenges. Meeting their biological relatives triggered further reflection on how they’d previously viewed themselves and their sense of identity. Certain aspects of their personalities started to make more sense; similarities in hobbies and interests and seeing themselves physically reflected in their relative’s features all became significant in contributing to how these participants now considered what constituted their identities. While this may have answered some long-held questions, the effects of such discovery can’t be underestimated:

I just need to accept that as an adoptee, I am a mixture of my birth parents and my adoptive parents. I have genetic, emotional and personality traits from my birth mother and have learned personality traits from my adoptive parents. Unfortunately, that makes me feel that I don’t really fit with either parents. (cited in Kenny et al., 2012, p. 98)

Sadly, there were some participants in the study who did not discover they were adopted until later in their lives; many only once their adoptive parents had passed away. Late-discovery adoptees may experience significant emotional damage as they find themselves contemplating a life and what they considered to be their identity that has been based on lies and deception, no matter how well-intentioned their adoptive families may have been in keeping the adoption secret. As one participant articulated about their experience of discovering their adoption at a later age, the effects were significant:

Absolutely let down. I had led a lie for my first 24 years of my life. Upon disclosure, a big black hole opened up for me: “Who was I really?” (cited in Kenny et al., 2012, p. 99)

So the concept of identity formation is certainly complex, and arguably more so for those adoptees who have no information about their families of origin. The capacity to contact and make further connections with their biological relatives and explore more thoroughly their own ideas and experiences of what it means to be “me” is important.

Theme 2: Connection

The closed records adoption system was a violation of the human right to know oneself. To be given an entirely fictional identity was a further cruelty. To have birth rights stripped away is utterly immoral and wrong. (cited in Kenny et al., 2012, p. 87)

Of all the messages that emerged from the adopted individuals who participated in the study in relation to what was most important to them now and into the future, the one that was held with the most passion and conviction was the right to have access to their own information. The inaccessibility of their records, birth certificates and contact information of their biological families, and how this relates to the formation of their identity, sense of “place” in the world and, ultimately, connection to their own histories, was felt to have been largely misunderstood or not acknowledged in the wider focus of the adoption discussion, and this was one thing they would like to see rectified.

Currently, all states and territories have variances in their legislation relating to adoptees and access to information. This was identified by study participants as being in dire need of reconsideration; that the complexities and barriers many face in attempting to find and connect with their families of origin were viewed by some to be a violation of their human rights:

I want the restoration of my human right to full disclosure regarding who I am and how I got here. (cited in Kenny et al., 2012, p. 108)

Further barriers to obtaining information that would help them form connections, which participants felt could be revised legislatively, included:

- the parameters surrounding contact and information vetos;
- the cost of accessing original birth certificates and other documentation; and
- the variability in the quality of the information and the way in which such information is provided.

Another more complex and certainly less enforceable challenge for adoptees is the lack of willingness by some family members to disclose information about their biological families. This was an issue particularly in the case of mothers failing to reveal the identity of fathers; but also of adoptive parents who continue to perpetuate the lie about their child being adopted:

I would dearly love to find my birth father because recently I have become disabled and they are talking genetics. Unfortunately, my birth mother is not willing to help me do this (cited in Kenny et al., 2012, p. 109).

The most pertinent point here is in order for those adoptees affected by closed adoption practices to be able to connect with their families of origin, their access to information

needs to be viewed as being a right, not a privilege; for the rest of the community, this is something that is generally taken for granted. Importantly, and certainly from the viewpoint of service and support needs, the barriers that prevent this information from being accessible creates a further frustration, and often, unnecessary trauma when adoptees are denied the opportunity to make connections not only about how, as an individual, they develop their own sense of self, but also how they are placed within a broader societal view of what comprises identity.

Theme 3: Access to information

In this section, we examine the tensions existing between an adoptee's socially constructed identity (i.e., who they are and where they fit within their social selves), versus the biological information that informs the individual of what they are made up of (i.e., genetic/medical histories).

Biologically and socially constructed views about what comprises us as individuals largely centres on family. Everyday questions like: Where is your family from? Does your family have a medical history of a particular condition? Who do you get your hair or eye colour from? are all examples of how having some knowledge about our genetic histories makes sense to others when exchanging information to try to formulate a picture of who we're talking to. Certainly, this focus poses a number of issues for those who have no access to such information, as they have, at least in part, constructed their identities.

Not surprisingly, the nature and nurture debate featured strongly across all respondent groups in this study. Interestingly, some adoptive parents, once they had met their child's families of origin, very strongly asserted their beliefs about nature being the more dominant paradigm when it came to how their children's personalities are developed. But this discussion is more than that. It is not only about having access to information that aids in connecting with others to help formulate identity, but also about the actual capacity to function as an individual in a society that stipulates certain measures of identity before one can participate.

Our desire to belong, to connect, to relate, to fit in, are all examples of how these external/societal viewpoints of what comprises an identity place perhaps unnecessary focus and hence stress on those who do not have such information from which to go by in their journeys of self-discovery. Adoptees live their lives as a constant tug-of-war between, on the one hand, what feels alright for an individual in their knowledge of self and what their adoptive family and others have done to help them understand their unique situation, and, on the other, the reality of what society asks of them on a daily basis to prove who they say they are.

One extreme and certainly distressing example of how access to information about self affects the formation of identity are those individuals whose adoptions were arranged "informally", or illegally in some instances. They are faced with the incredibly challenging reality of having absolutely no information about themselves and where they have come from. So how do they operate in a society that requires an ever-increasing level of such information in order to enjoy the same privileges as the large majority? As one adopted individual said to us:

I would also like to be able to access my genealogy and family history and have the same right to the base information that I believe is a child's right to have. The law should not deny me or protect those who created what turns out to be a lie. In other words, the history I was raised with turns out not to be my history, but an adopted history (cited in Kenny et al., 2012, p. 109).

Implications of the study findings

It's huge, and I think we need to have a voice and say, "This is what it did to us". (cited in Kenny et al., 2012, p. 102)

Identity formation has been a key focus of this chapter; what it means at an individual level, a societal level and a functional level, and how experiences of both current and past legislative environments relating to access to personal information affects people still today. These effects have manifested in many and varied ways for those who participated in our study. One point that was made early in this discussion was that many of the adopted individuals (around 70%) indicated that they thought their experience of adoption had had some negative effect on their health and wellbeing; and the proportion of adopted individuals who said their upbringing had been good was roughly equivalent to the proportion who were unhappy with their upbringing and their experience of growing up in an adoptive family.

The strongest message from our participants across most respondent groups was the need to ensure that "this never happens again"—and that the lessons learned are implemented today in relation to policies that relate to children and families. These issues are still current for those affected. Issues relating to the health and welfare of participants were not just historical—people were reflecting the current difficulties they were experiencing. For example, adopted individuals' scores on a measure of current wellbeing were significantly lower and levels of psychological distress significantly higher than comparative data available on the general population.

From the perspective of adopted individuals, one of the main reasons they wanted to participate in the study was in the hope that the provision of information about their own experiences would be of benefit for future policy and practices in relation to the current adoption and donor conception environment in Australia—so that what has happened to them doesn't happen to others, particularly in relation to:

- the effects of adoption on themselves (predominantly around identity, abandonment and attachment issues); and
- the inaccessibility of information.

It is evident that many were motivated by their need to know who they are and where they have come from, which is more than simply having access to medical records or genetic information. Participants—including adopted individuals, parents and adoptive families—all agreed that people need support in doing this. Adopted individuals sent a strong message about the need to alert people to the significant unintended consequences of "well-meaning" policies:

I think the underlying root of the problem is the baby-supply industry. The same issues are coming up with donor conception, surrogacy, "selling" children on the Internet, especially in America. The same issues are popping up and they're being repeated ... I'm seeing people put in similar situations where they'll never know who their father is. They're told, "But you've been given life, you're better off because we want you". It's about the needs of the parents, not the child. (cited in Kenny et al., 2012, p. 120)

It is therefore essential that debate continues, reflecting on the key messages from this important national study reflecting a large and diverse orchestra of voices from those touched by an experience from the past era of "closed adoption" in Australia.

The key needs identified by the study included:

- acknowledgement, recognition and increased community awareness of and education about past adoption practices and their subsequent effects;
- specialised workforce training and development for health and welfare professionals to appropriately respond to the needs of those affected;
- a review of current search and contact service systems, with a commitment to develop improved service models;
- improved access to information through the joining of state and territory databases, governed by a single statutory body;
- improved access to and assistance with costs for mental, behavioural and physical health services; and
- ensuring that lessons from past practices are learned from and translated where appropriate into current child welfare policies, and that adoption-specific services are created or enhanced to respond to the consequences of past practices.

What's changed ... and what can change?

Future adoptions, surrogacy, IVF etc. be focused around the child and not just that of the parent. It always seems as though that is the voiceless person in the debate and where the impact appears perpetually underrated. (cited in Kenny et al., 2012, p. 120)

In the introductory sections of this chapter, we provided an overview of some of the contributing factors that led to the “adoption boom” in Australia. One of the most compelling factors that contributed to this “boom” was the discrimination associated with illegitimate births and the societal viewpoint that every child needs two married parents. Clearly, belief systems in Australia have shifted in such a way over the past three decades that we recognise there are many and varied ways to form a family, none any less legitimate than another, with a massive rise in the proportion of marriages preceded by cohabitation—from 16% in 1975 to 78% in 2008 (Higgins, 2013).

The AIFS report (Kenny et al., 2012) complements the report from the Senate Community Affairs References Committee (2012) into the Commonwealth Contribution to Former Forced Adoption Policies and Practices. The final Senate Inquiry report outlined the contributions of the Commonwealth Government, its policies and practices to contributing to forced adoptions; and acknowledged the role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and children who were subject to forced adoption policies.

What is clear from both the study by AIFS and the Senate Inquiry report is that force comes in a range of forms. In particular, mothers who were separated from their child who was adopted talked about the illegal acts to which they were subjected, the prejudicial and differential treatment they received (e.g., hospitals having different practices in relation to wed and unwed mothers), the absence of support from family, the lack of options provided, the failure of officials to appropriately take consent for the adoption, factors influencing their capacity to make decisions (including the administration of drugs and use of psychological coercion), and the broader attitudes of society that were reflected in the actions of the institutions, agencies and professionals. This supports the range of existing smaller scale studies, case studies and personal biographies that highlight the interlinking layers of coercion, secrecy, silence, shame and blame that pervaded the past experience of “closed adoption” in Australia (Higgins, 2010).

If we use a public health perspective to examine the effects of past adoption practices, we can see that the social and economic costs and consequences of preventable health issues are borne not only by the individuals but by the entire community. Studies have consistently shown that population-level prevention and early intervention are cost-effective and can positively alter risk and protective factors that affect individuals.

In this context, if we consider some of the child protection reforms being considered across Australia at present (see Box 1), it is certainly important to bear in mind the potential longer term implications for children whose connection to their parents are severed, as well as their mothers, fathers and wider family members. An urgent policy issue for consideration therefore, is the lessons that can be learned from past adoption practices that can be applied to intercountry adoptions, adoption and permanent care for children in statutory out-of-home care, anonymous donor conception and surrogacy.

Research on past adoption practices can provide timely cautions about the potential effects on future generations of children if attention is not paid to their needs for identity, connection and access to information.

Box 1: Recent state parliamentary child protection inquiries

New South Wales

Improving child protection <tinyurl.com/bppqf5c>

A safe home for life: Report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012. (2013). Sydney: FACS. Retrieved from <tinyurl.com/po5vkxb>.

Child protection legislative reforms (Fact Sheet). (2013). Sydney: FACS. Retrieved from <tinyurl.com/mya7mmx>.

Queensland

Queensland Child Protection Commission of Inquiry <www.childprotectioninquiry.qld.gov.au>

Taking responsibility: A roadmap for Queensland child protection. (2013). Brisbane: Queensland Child Protection Commission of Inquiry. Retrieved from <tinyurl.com/nkrnsfc>.

Victoria

Protecting Victoria's Vulnerable Children Inquiry <www.childprotectioninquiry.vic.gov.au>

Report of the Protecting Victoria's Vulnerable Children Inquiry. By P. Cummins, D. Scott, & W. Scales. (2012). Melbourne: Dept. of Premier and Cabinet. Retrieved from <www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html>.

Victoria's vulnerable children: Our shared responsibility. Strategy 2013–2022. (2013). Melbourne: Victorian government. Retrieved from <tinyurl.com/jwn4j7c>. (A whole-of-government strategy developed in response to the inquiry.)

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- Senate Community Affairs References Committee. (2012). *Commonwealth contribution to former forced adoption policies and practices*. Canberra: Senate Community Affairs References Committee. Retrieved from <tinyurl.com/lfw9we>

[5]

The forced adoption apology Righting wrongs of a dark past

Nahum Mushin

IN NORMAL DISCOURSE BETWEEN people, if one person wrongs another it is appropriate to offer an apology. Likewise, when a nation wrongs some or all of its people or those of another nation, it is appropriate to offer an apology. Australia has offered three apologies to its people in recent times. The first of those was to its Indigenous people, the Stolen Generations, for the wrongful removal of approximately 100,000 Indigenous children from their parents over many decades until the 1960s.¹ The second apology was to the Forgotten Australians—approximately 500,000 children, including migrants, who grew up in institutionalised care.²

The most recent offer of a national apology was to people affected by forced adoption.³ This essay outlines the process leading to the apology, elements of drafting of the document itself and issues that needed to be considered. The essential aspect of any public apology—the concrete measures—are examined and some ongoing questions are addressed. Finally, the question is asked: Where to from here?

Background

In late 2010, the Australian Senate referred an inquiry into former forced adoption policies and practices to its Community Affairs References Committee.⁴ The Committee, constituted by members of the Government, Opposition and the Greens, received a large number of written and oral submissions over a period of approximately 18 months. Its report was tabled in the Senate on 29 February 2012 (“Senate Report”; Senate Community Affairs References Committee, 2012).

1 This Apology to Australia’s Indigenous Peoples was offered on 13 February 2008.

2 This Apology to the Forgotten Australians and Former Child Migrants was offered on 16 November 2009.

3 The National Apology for Forced Adoptions was offered on 21 March 2013.

4 See the Hansard transcript for the Senate, 15 November 2010, p. 1173.

Adoption

The Commonwealth of Australia has never had jurisdiction over adoption. The only exception to that has been its jurisdiction over the territories, which it ceded in the 1970s and 1980s.⁵

Adoption is a legal process in which a court orders that a child be removed from the care of his/her parent(s) and placed in the care of other people, who thereupon take on all the parental responsibilities. Thereafter:

the adopted child shall be treated in law as if the adopted child were not a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person shall be treated in law as if the person were not a parent of the child.⁶

As is evident, the essence of such an order is that the adopted child's relationship with his/her parents comes to an end in every respect. While some relaxation of the termination of the relationship has occurred in more recent times, the essence of the concept of adoption was to effectively eliminate every aspect of the child's past from the moment of placement with the adoptive parents. The adoption order made by a court gave legal effect to that.

Forced adoption

Particularly given that a court order is, and always was, necessary to formalise an adoption, how could an adoption be "forced"? In order to answer that question, it is necessary to look not at that formal process but rather at the societal attitudes and circumstances in which the children were removed from their mothers.

The Senate Committee found:

Evidence suggests that by 1954, community pressure on single mothers to surrender their babies was intense. An article in "The Argus" newspaper highlighted this pressure stating that in many cases, the young mother may have been subjected to threats and bribes to surrender her baby and left with no opportunity to discuss her feelings with an objective and disinterested professional. (Senate Report, para. 2.29)

First, there was great demand for babies who might be adopted, particularly in circumstances of infertility. Second, the mothers were usually single and large numbers of them were underage. Third, while the law usually requires underage people to be represented by an adult acting in the capacity of a guardian, that did not occur in adoption. These young women were isolated, often interstate, institutionalised and depersonalised. They were literally on their own, required to accede to decisions of others regarding their babies and without the most fundamental access to support and advice.

The Senate Report (in Chapter 3) is replete with evidence of the terrible experiences endured by mothers who found themselves in these circumstances. One of the main issues concerned the legal requirement of their consent to the adoption. When they entered these institutions, it was usually on the basis of an assumption that their babies

⁵ Self-government of the Northern Territory took place in 1978 and of the Australian Capital Territory in 1988.

⁶ *Adoption Act 1984* (Vic) s 53(1)(b). There are the same or similar provisions in each jurisdiction.

would be adopted. They were not involved in any consideration of the merits of adoption of their children. The law required that a mother sign a consent to adoption. It could not be signed until at least five days after the birth. They were required to be given a form of revocation of consent to adoption which they could exercise within 30 days of the birth. Many consents were forged, others were signed by mothers prior to the expiration of the five days and then post-dated, and many mothers were not told about their right of revocation or given the form.

Birth experiences were often dreadful. Mothers were drugged and/or tied to their beds. Most were prevented from holding their child. Sheets were put up to stop them from even seeing their babies. Some mothers were falsely told that their babies had died.

In many instances, the relationship between the baby's mother and father had long since ceased. To the extent that fathers sought to maintain an ongoing role, they were usually excluded from involvement. Likewise with grandparents. While many did not support their daughters and often actively supported adoption, others wanted to be involved but were not permitted to be. In at least one instance the grandparents were escorted from the hospital and not permitted to visit their daughter.

While the word "forced" has been utilised to describe these incidents, it is suggested that it is not an adequate word to cover everything that occurred. It is beyond challenge that mothers were effectively given no choice. They were placed in a position where they had neither the strength nor the ability to resist. They were put under enormous pressure. In those senses they were forced. But there is more. We cannot escape the proposition that much of what occurred was illegal. Lack of informed consent, ignorance of the right of revocation, no independent advice, the use of drugs and restraints and like matters were outside the law. The above matters also raise fundamental issues of society's moral and ethical conduct.

The result of these circumstances is that the nation has a large number of people with physical, and particularly mental, health problems, many of them profound. It has been revealing and most distressing to witness the extent of the damage that has been done to so many people in our society, damage with which they have lived for decades.

The argument in justification of these practices asserts that they represented society's values or "mores" at the time. Whether rightly or wrongly, society viewed single mothers bringing up babies as unacceptable. It was not in the babies' interests and there were large numbers of infertile couples in stable relationships who were able to provide much better homes for them.

Even if the argument were valid in principle, which is not accepted, the circumstances in which these adoptions occurred must invalidate it. That flows from the concepts of "force" and "illegality" described above. Even ignoring the issue of the best interests of the child for the moment, if mothers had had access to independent advice, those who were underage had had guardians, consents had been executed in accordance with the law and other legal requirements including the right of revocation had been observed, and mothers had not been institutionalised and dehumanised and had had support from their families and other loved ones, the argument is tenable. But that was not what happened. Accordingly, the argument is untenable.

The Senate's recommendations

The Senate Report made 20 recommendations, the first seven of which were relevant to the apology (pp. ix–xii). The other 13 related to the concrete measures discussed further below.

The Committee recommended:

1. The establishment of “a national framework to address the consequences of forced adoption ... by the Commonwealth, states and territories through the Community and Disability Services Ministers’ Conference”.
2. “That the Commonwealth Government issue a formal statement of apology that identifies the actions and policies that resulted in forced adoption and acknowledges, on behalf of the nation, the harm suffered by many parents whose children were forcibly removed and by the children who were separated from their parents.”
3. “That state and territory governments and non-government institutions that administered adoptions should issue formal statements of apology that acknowledge practices that were illegal or unethical, as well as other practices that contributed to the harm suffered by many parents whose children were forcibly removed and by the children who were separated from their parents.”
4. The apologies be in accordance with the principles in a Canadian report (discussed below).
5. The apologies “should include statements that take responsibility for the past policy choices made by institutions’ leaders and staff, and not be qualified by reference to values or professional practice during the period in question”.
6. Formal apologies should “be accompanied by undertakings to take concrete actions that offer appropriate redress for past mistakes”.
7. The Commonwealth apology should “be presented in a range of forms, and be widely published”.

In accordance with recommendation 3, prior to the offering of the Commonwealth apology, all state and territory parliaments, with the exception of the Northern Territory, offered their own apologies.

The Forced Adoptions Apology Reference Group

The Government accepted the Senate’s recommendations for an apology and gave the primary responsibility for its implementation to the then Attorney-General, the Hon. Nicola Roxon MP. Ms Roxon established the Forced Adoptions Apology Reference Group, which was charged with the task of drafting the apology.⁷ The reference group was also invited to express views on other relevant issues, in particular the concrete measures.

The reference group met on four occasions between August and November 2012. Its report containing the draft of the apology was delivered to the Attorney-General in December 2012. The reference group’s deliberations were assisted by consultations by the chair with interested people in every Australian capital city other than Darwin. The views expressed at those consultations were consonant with those expressed within the group, thereby giving confidence to the group in its decisions.

The reference group also had the benefit of advice from the Human Rights Commission.

The Commonwealth’s role in forced adoption

While the Commonwealth had only very limited jurisdictional responsibility for adoption (through the territories), it must take at least some responsibility for other aspects of

⁷ The reference group was chaired by the author and included six people affected by forced adoptions (three mothers, two adoptees and one father), three members of the Senate Committee (the Chair, the Deputy Chair and a Coalition Senator), and a Member of the House of Representatives.

forced adoption. The first issue was the lack of government funding available to mothers. By way of summary of its conclusions on that issue the Senate Committee wrote:

Regardless of the quality of information [with regard to the availability of social security benefits], however, the committee concludes that there was not appropriate government funding available to mothers prior to 1973 that would have provided the ongoing financial support necessary for mothers to keep their babies if they lacked any private source of income or family assistance. (Senate Report, para. 5.70)

The second area of the Commonwealth's involvement was in the area of the enactment of model legislation on adoption. Between 1961 and 1964 the Commonwealth and the state governments discussed enacting the proposal. The states and territories passed such legislation between 1964 and 1968. The Commonwealth was directly involved in those enactments in the two territories (Senate Report, para. 6.1 and Chapter 6) and coordinated meetings and correspondence with the states (Senate Report, para. 6.6).

Language

Language is important in everyday discourse, but nowhere more so than when emotions are raw and so many people have suffered profoundly for decades. The Senate Report noted the importance of language (paras 1.9–1.14), and the reference group agreed.

The reference group's first task was to determine how to refer to the person who gave birth to the baby. "Mother" would appear to be the obvious answer. But society uses a number of adjectives with that word when the baby has been adopted by others. They include "birth", "life", "natural", "biological" and "relinquishing". The reference group decided that they were all unnecessary and inappropriate. In addition, "relinquishing" conveys to many people the concept of some act or decision on behalf of the mother to agree, or at least not disagree, with the adoption. In forced adoption that certainly did not occur.

Having decided upon "mother", the terms "father" and "adopted person" or "adopted people" followed. At the beginning of the apology the word "babies" was used. Also, "grandparents", "siblings" and "extended family" required little discussion.

There were other aspects of language which were also decided upon. "Experiences" is preferable to "stories", the latter connoting fiction or over-statement for some people. Words such as "betrayed", "kidnapped" and "abducted" were avoided as being too emotive. "Illegal" was considered to encompass all those concepts as well as conveying, in one word, one of the fundamental features of these events.

The anatomy of an apology

In common parlance, we speak about "giving" or "making" an apology. In fact, we "offer" an apology. We cannot demand that the person or people to whom the apology is offered accept it. The offeree must determine for her or himself whether the apology is to that person and whether it should be accepted.

In that context, a public apology is significantly more complicated. It is necessary to define the category or categories of people to whom it is to be offered. In the context of this apology, that raised the difficult issue of whether there should be any limit on the period of time to which it applied.

While the numbers of adoptions cannot be precisely determined, the Senate Committee determined:

Combining the data above with an assumption that adoption numbers increased at a uniform, steady pace from 1962 to 1969, suggests that the number of adoptions between 1951 and 1975 was between 140 000 and 150 000. Total adoptions from 1940 (the first year the committee found records) to the present day would be well in excess of 210 000 and could be as high as 250 000. (Senate Report, para. 1.35)

It will be seen that the numbers of adoptions peaked in the 24 years to 1975. Some mothers urged us to restrict the apology to that period or even a little less (late 1950s to early 1970s). At the outset, the reference group decided that the apology should be based on the twin pillars of diversity and inclusiveness. If the apology were offered to as wide a group of people as possible within the confines of the evidence, it would have the greatest prospect of being accepted by the community. Accordingly, to restrict it to a specific time period, while validating people's experiences within that time period, would invalidate experiences outside it. Therefore, the apology was not offered in a confined period.

Reference was made above to Senate recommendation 4, which proposed that the apology be in accordance with a particular set of principles. In 1999, the Law Commission of Canada published research that set out five criteria on which an apology such as this should be based (Law Commission of Canada, cited in Senate Community Affairs References Committee, 2004). While the Senate Report quotes them in full (para. 9.15), they may be summarised as follows:

1. Acknowledgement of the wrong done or naming the offence.
2. Accepting responsibility for the wrong that was done.
3. The expression of sincere regret and profound remorse.
4. The assurance or promise that the wrong done will not recur.
5. Reparation through concrete measures.

The apology was drawn in accordance with those criteria.

Two difficult issues

The first, and probably most complicated, issue in the whole apology process was the role of adoptive parents. The offer of the apology did not include them. That has angered many people. Adoptive parents assert that they were at least innocent of any wrongdoing and saw themselves as doing the best for the children. They had no role in the circumstances leading to the adoptions. On the other hand, mothers see adoptive parents as active parties in the forced removal of their children.

It is not proposed to discuss that issue here. No matter what the logic of the arguments might suggest, on any view, the emotional issues for people affected by forced adoption would not permit of any other outcome. Nevertheless, it is a question that will need to be addressed in due course.

The role of adoptive parents leads to the second difficult issue. Adoptees have suffered, and continue to suffer, enormous grief, anger and like emotions. Many adoptions have been successful, some have been unsuccessful. But large numbers of adoptees have, at some time, blamed their mothers for "giving me away". Reconciliation of relationships between adoptees and particularly their mothers, but also their fathers, siblings and extended family members, has often been highly fraught. During the consultations, adoptees often described themselves as "the meat in the sandwich" between their parents and their adoptive parents. This issue is considered further below.

The concrete measures

In its response to the Senate Report, the Commonwealth Government pledged certain concrete measures in accordance with Senate recommendation 6 and the Canadian Law Commission's recommendation 5, both quoted above (Australian Government, 2013). They were:

- \$3.5 million for the then Department of Health and Ageing (now Department of Health) to increase the capacity of the Access to Allied Psychological Services program until the end of the 2014 financial year;
- \$1.5 million to the same department for the development of guidelines and training materials for mental health professionals to assist in the diagnosis, treatment and care of those affected by forced adoption practices;
- \$5 million to the then Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) for improved access to specialist support services, peer and professional counselling and records tracing support; and
- \$1.5 million to the National Archives of Australia to deliver a website and exhibition.

At the time of writing, implementation of those concrete measures has commenced, with the appointment and first meeting of the Forced Adoption Implementation Working Group.⁸

While not specifically included in the concrete measures, it is vital that the nation be better informed about these events. A process of education should be undertaken for that purpose. There are two particular points which should be made, both to mothers and adoptees on the one hand and the wider society on the other.

First, the facts irrefutably establish that mothers were forced to give up their babies in circumstances described above and in the Senate Report. That has now been officially affirmed by the apology.

Secondly, the facts also conclusively establish that the procedures by which adoptees were adopted did not involve abandonment, betrayal or any other such concept by their mothers. The events occurred as a result of a gross failure of public policy involving moral and ethical impropriety and, in many instances, illegality.

The future of adoption

Taking the consultations referred to above as a guide, the vast majority of people affected by forced adoption would like to see the total abolition of adoption. The fundamental argument is that it cannot be in a child's best interests to have all aspects of his or her past obliterated from the record.

It is not the place of this essay to express a final view on that issue. However, from the vantage point of 21 years as a Judge of the Family Court of Australia, people's backgrounds—including culture, ethnicity, forebears, ancestry and many other like matters—are an important part of who each of us is within the society. There are developments in adoption law that attempt to achieve a better balance in that regard. Whether they are the complete answer to the problem must be left for another time.

⁸ The Forced Adoption Implementation Working Group is constituted by the writer as chair, five mothers (three of whom were members of the reference group), three adoptees (including one from the reference group), one father from the reference group, and the three Senators who were on the reference group.

Conclusion

The offering of the apology by then Prime Minister Gillard on 21 March 2013 was an important event in Australia's history. It is appropriate for us to stop to think about these matters. They are relevant to the moral status of the nation.

The next step is to put the words into actions. That process has started. The degree of its success will determine the overall success of our efforts in acknowledging a very dark part of our national history.

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[6]

Current open adoptions Mothers' perspectives

Phillipa Castle

THIS CHAPTER SUMMARISES A qualitative study that investigated mothers' experiences of mandated contact in adoption, which was introduced in the state of Victoria in 1984.¹ Mandated contact was conceived with the aim of being in the best interests of the child. The study explored the relationship between the right to have contact and the experience of contact itself for the mother. Specifically, the chapter describes the contact arrangements, the contact event, the mother's mental health, information exchange vs face-to-face contact, and the role of the adoptive parents and the County Court of Victoria.

Background

Contact between mothers and adoptive families has been legally mandated and practised in Victoria since the *Victorian Adoption Act 1984* came into effect. While other states encourage contact, the inclusion of mandated contact arrangements in a Victorian adoption order is unique within Australia, and legally operationalises the gradual dismantling of confidentiality practices that have occurred internationally over the last forty years. The Victorian legislation recognises the significance of the mother's relationship to the adopted child and their identity formation (Triseliotis, 1993), as well as upholding the rights of mothers; an antidote to closed adoption practices that excluded them and made them powerless.

The legislation asks mothers to nominate a preferred frequency of contact in the form of face-to-face meetings and information exchange, which, with the agreement of the adoptive parents, is written into the adoption order. In practice, contact is generally set at between one to four times annually. This is a minimum standard and contact beyond the

¹ The 2012 Senate inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices was aware of the sensitivity around language when discussing adoption and this paper will reflect the Senate decision to, wherever possible, use the term "mother" to refer to the person who gave birth to the child.

nominated frequency is at the discretion of the adopting parents. How contact is to be conducted is not prescribed beyond the requirement that the adoption service manage the arrangements for the year between the placement of the baby and the order being ratified in the Victorian County Court.

In a 2005 meta-analysis, British researchers Logan and Smith reported that, in general, studies have supported the belief that openness benefits the mother. However, research has also reminded us that openness is not a universal panacea. Brodzinsky (1990) found that a powerful sense of loss and isolation experienced during the early adoption period accompanied both open and closed adoptions. Reporting on the Minnesota–Texas Adoption Study, McRoy, Grotevant, Ayers-Lopez, and Henney (2007) cautioned that, while fully disclosed adoptions elicited the highest satisfaction, there is no one type of openness that fits everyone’s needs; rather, the level of openness should be decided on a case-by-case basis and all parties should be made aware that changes in levels of openness are to be expected over the course of the adoption. Given the spectrum of expected experience, Grotevant (2000) nominated collaboration as being the quality necessary for successful ongoing adoption relationships. Silverstein and Demick (1994) suggested empathy as being the mechanism for operationalising collaboration when adoption relationships are being negotiated. Their findings were not specific to a mandated cohort.

Meanwhile, for nearly 30 years, Victorian adoptions have included mandated openness. How have mothers experienced that and what is the relationship between the right to have contact and the contact itself?

Between July 2007 and April 2008, to demonstrate a variety of responses, 15 mothers were interviewed who had, since 1984, voluntarily relinquished a child for adoption. The women were recruited through the Catholic welfare service, Centacare; the southern region Adoption and Permanent Care Program; a country newspaper advertisement; and word of mouth. The interviews generated qualitative data that were analysed for themes around the experience of contact. The age of the women at the time of the relinquishment ranged from 16 to 30 years old, mean age 22.4 years. The age of the women at the time of the interviews ranged from 21 to 50 years old, mean age 35.5 years. At the time of the interviews, seven of the adopted children were under 18 (five under 5 years old) and eight children were over 18; the oldest was 23.

Contact arrangements

While the legislation was in place at the time of all the relinquishments, only 7 of the 15 mothers had ongoing, face-to-face contact at the time of the interview.

Two mothers had put a temporary hold on their contact: one due to dissatisfaction with the limitations of the contact arrangement and the resultant conflict with the adoptive parents (contact had resumed during the life of the adoption order and she is now in independent contact with her adult daughter); the other was due to the mother’s feelings of betrayal and vulnerability when the adoptive parents adopted a second child (she reported she was going to resume contact “soon”).

A further three mothers had complete breakdowns in their contact with the relinquished child. One was instigated by the mother as a method of managing the “pain” of seeing her relinquished son doing well. The other two breakdowns were despite repeated requests for contact (through the adoption service) from the mothers.

Although the legal obligations are perceived to be in the best interests of the child, both mothers and adoptive parents were making choices about their level of participation

in contact. For the mothers, their withdrawal from contact appeared to be a perceived solution to their emotional response; they managed their feelings by regulating their physical exposure to the adoption.

Three of the mothers had no face-to-face contact (information exchange only) written into the adoption order. One mother, had information exchange in the adoption order for the first ten years only. She had thought:

I can't have both. I can't give him up for adoption and then expect to be a part of it, so I just wanted to keep the contact for a certain amount of time and see that he was happy ... And then just let them be, basically. (Sue)²

She regretted that decision. Once ratified, the order does not allow the mother to re-negotiate and she received no further information once the child reached ten years old, despite repeated requests. The second had information exchange during the life of the adoption order; however, periodically she had put that on hold as she experienced periods of depression, which she linked to the relinquishment. Since her relinquished child turned 18 she has had no information exchange or direct contact and search procedures were not in place.

The third mother had information exchange that she discovered had not been passed on to her relinquished child by the adoptive parents. He reportedly found the information by accident at age 16. She is now in face-to-face contact with her adult son. He sought her out as soon as he turned 18.

Again, either mothers or adoptive parents within the individual triads were making choices on whether to participate in contact, even in the less immediate form of information exchange.

These experiences demonstrate that, despite legal clarity, contact arrangements broadly reflect the findings of the Minnesota–Texas Adoption Study; that changes in levels of openness are to be expected over the course of the adoption. More specifically, the mandate of openness was not universally applied and that over one-half of the women interviewed had significant difficulties in maintaining contact with their relinquished child, seemingly as a result of the emotional responses experienced by the mother or adoptive parents.

Mental health

The 15 mothers completed the Kessler Psychological Distress Scale (K10) (Kessler et al., 2002), which measures symptoms of anxiety and depression and provided a snapshot of the relinquishing mothers' psychological state at the time of the interview. The K10 allowed a comparison of the mothers to the general Australian population, as identified by the 1997 National Survey of Mental Health and Well Being (Andrews & Slade, 2001; Furukawa, Kessler, Slade, & Andrews, 2003).

Higher K10 scores indicate higher levels of systems of distress. The mean score for mothers was 21.2, compared to the general Australian female population mean of 14.5. The median score for mothers was 18, compared to the general Australian female population median score of 12. One third of participants scored under 15, compared to 68% of the general public, and 13% of participants scored over 30, compared to 3% of the general public. Overall, the mothers demonstrated an elevated level of current anxiety and depressive symptoms.

² All names have been changed to protect privacy.

Responses to contact arrangements

Openness

When recalling the original decision to relinquish their baby for adoption, eight mothers reported that the relinquishment decision was, in part, ameliorated by the promise of open adoption and contact. However, just under half the mothers failed to mention openness as a dimension that they considered in their decision to relinquish.

Entitlement

By definition, contact is an interdependent act that assumes a level of entitlement and requires reciprocity. However, at the time of the relinquishment, most of the mothers remembered feeling a reduced sense of entitlement, which was articulated as a belief that they did not “deserve” contact:

I thought that once I had chosen to give her up for adoption, I actually don't have the right now to interfere [crying] ... don't deserve to meet, 'cos it was my choice to relinquish her. (Wanda)

Issues of entitlement were influential when making the initial decisions regarding the parameters of ongoing contact, with mothers being highly sensitive to the perceived needs of the adoptive parents. For some, this consideration informed their preference, and was expressed as a reduced presence of themselves; their selves and what they wanted would, almost by definition, be construed as being “too much”:

I expressed what I was interested in ... but then I didn't want it to be hard and fast ... I needed to know what the parents would be happy with ... I was probably worried that they might think that I might try and take things over or, you know, become more a part of their lives than they wanted. I didn't want to be a burden, be an imposition, be anything that would make them feel uncomfortable. (Lois)

While three other mothers were also sensitive to the needs of the adoptive parents and felt the need to minimise their presence, they also recognised the necessity of their presence in the life of the child:

Deciding about access and how often I wanted access; that was the most difficult decision I think. I guess because access was such a new concept to me, and to actually figure out what would be right. I thought four times a year might overwhelm them ... [but] maybe twice a year isn't enough for him [her son] to know who I am ... It was really hard to decide ... I decided on four times a year. (Rita)

Flexibility

The effect of a reduced sense of entitlement appeared to persist beyond the establishment of contact, and continued to influence the ongoing negotiations of contact and its boundaries, even in the most positive open contact arrangements, which were differentiated by flexible boundaries:

We've never stepped on their toes ... We have never asked them for anything. Given how good it is, I don't want them to go backwards, but they ring whenever they want. It's something I've never been able to do. I don't know

why. I don't want them at any point to think that we are trying to become too involved ... I don't really want them to go backwards, for them to start having boundaries, like, when it comes to us. If I push them, are they going to stop the way they are? So for that, I am prepared to follow them. (Anne)

Two mothers whose relinquished children are now young adults, relayed narratives that seemingly defined the benchmarks of successful open adoption; that is, independent, enduring, flexible boundaries between all members of the adoption triad. The organising factors were identified as the containment of the mother's pain and grief during contact events, and the mother's evaluation that the adoptive parents valued their presence in the life of the child.

The role of contact

In general, mothers expressed a bittersweet evaluation of contact:

It's better to be happy [and see your child] and hurt, than hurt and not know about it. (Betty)

While the mothers described contrary emotional states, the concrete act of contact appeared to provide a place of reassurance; the decision to relinquish was a good decision because the relinquished child was seen to be OK:

And I say to myself that I have done the right thing ... She is doing well, developing, she's happy ... How do you know until you see it for yourself? (Sarah)

Face-to-face contact was described as a circumstance where emotional states could be processed; contact provided a place to grieve and heal:

I think [contact] allows me to face the situation and deal with it, because if I didn't see her in the first two years after the adoption, it would have been ... more difficult for me. But I saw her growing up from an infant to a toddler and so it was easier ... I dealt with my emotions head on ... instead of denying everything ... And I wanted to deal with and face that emotion right from the start, and I think it's a very healthy thing to do. (Kirsty)

But inevitably the mothers found it hard and contact had its limits:

Contact is bloody hard. It's traumatic and at the end of the day you sometimes go, "Why the hell am I doing this?" ... Look, it was nice and I certainly enjoyed seeing her and being with her, but it's an artificial event, I suppose ... It wasn't about trying to get to know me, it was just going through the motions. (Jacqui)

Information exchange vs face-to-face contact

Face-to-face contact—the continuing physical exposure to the reality of relinquishment—was mostly perceived as being a difficult but necessary process. In contrast, the three mothers who had information exchange only, expressed narratives of the unseen relinquished child that were raw and unprocessed; responses based on fantasy, which felt “surreal” or were destabilising once physical contact began with the adult child.

However, all three mothers agreed that they had “not missed out” by not having face-to-face contact. In fact, they maintained a belief that contact would have made the relinquishment harder. Their reasons echoed the tacit assumption of closed adoption; that the pain of loss can be avoided. However, they also embodied the unacknowledged cost; that avoidance can be painful in and of itself. Two of these mothers suffered recurring episodes of serious mental illness, which they linked directly to relinquishment triggers.

Adoptive parents

The attitude of the adoptive parents appeared to be decisive in three circumstances where the contact had begun reasonably enough but had deteriorated over time to the point that contact arrangements had broken down (one temporarily). However, when discussing the option of exercising their rights in court:

I did [consider going to court] at one stage, but not now. I couldn't do it to him. There's just no way, no way I could do it to him ... I have no rights anymore ... Yeah, I can force them to visit, but what's the point? The family is just going to make it hard. I don't want to see him like that ... you know, I just want him to think that he's got the control. (Betty)

Another mother also reported she wouldn't “force” contact:

I wouldn't have forced it because it is Emily's decision, so to speak, even though I know it would be what she was picking up on. But if she'd verbalised it and said that she didn't want contact, then I would have just had to accept that ... What happened is that Emily saw the psychologist and said to her that she wanted contact, so that was my saving grace. (Jacqui)

Where the adoptive parents had ceased contact, the leverage that the adoption order afforded the mother was rendered either effective or ineffective depending on the perceived wishes of the child. Women with terminated arrangements did not use the power of the court if they thought the child did not desire it, even if they also believed the child's response was a reflection of the adoptive parents' influence. The mother's stance was child-centred.

The ultimate power of the child to decide, independently or in court, was recognised and enjoyed, by one mother:

And the older she got ... you know, she was able to articulate her rights, and I think the parents were scared ... If this ever went to court, there was no question that she was going to be looking for contact, if not wanting to live with me. (Arabella)

The existence of legally enforceable contact did have an effect though. While untested, a further two mothers were comforted by the knowledge that their right to contact would be upheld by a court of law. For the mother who had suspended contact:

I find it reassuring that in the back of my mind I know that I can have contact with him when I want to, that I can ring up and say, “Can we organise contact?” (Trudy)

Discussion

This study highlighted that court-ordered openness does not seamlessly translate into regular contact between the mother and her relinquished child. A difference appeared between what the law provides for and how contact is practised. Face-to-face contact was not universal and, where present, was not universally applied. Some women experienced contact as stated in the adoption order. Some women's contact went beyond the statute and they experienced independent, enduring, flexible boundaries between all members of the adoption triad. This appeared to become possible when the mother's pain and grief was not expressed during contact events, and the mother believed the adoptive parents valued their presence in the life of the child. However, the women were not uniformly positive or negative in their descriptions of contact. While contact might have been seen as necessary, "healthy" or reassuring, all the descriptions contained elements reflecting their sorrow and the pain of loss.

The progression of continued contact was, in some cases, reactive to the preferences of the various members of the adoption triad. There were examples of all three members of the adoption triad exercising the power implicit in choosing to participate in contact. In the case of the mothers, this was expressed as a withdrawal from contact.

The mothers appeared to moderate their level of contact in response to their emotional capacity. As a cohort, the mothers experienced above average levels of contemporary anxiety and depressive symptoms. From the outset, descriptions of the relinquishment process contained attitudes of being undeserving and less than entitled to contact, and these feelings appeared to influence any ongoing contact, thus creating a power differential. The mother's understanding of her place was assessed in relation to the perceived needs of the others in the adoption triad, where the mother did not lead, or, if she did, she perceived the risks of damaging or losing the relationships. The mother's behaviour was predicated on her perception of the adoptive parents' limits. This was seen even where relationships were positive, open and fluid.

There is little argument against the value of having a ratified document as a legal protection for all parties. The very existence of the legal rights of the mother has the potential to affect her continued meeting with the adoptive family in a powerful way. Through this instrument, all members are aware that contact is culturally sanctioned, a manifestation of the best interests of the child. However, the study found that often various members of the triad made decisions independent of any legal obligation, and the legal leverage of the court order remained untested. At best, its existence provided comfort through imagined control. Where relationships had broken down, the legal power of court-ordered contact was not used by the women in this study. The wishes of the child were decisive, and this seemingly diluted any sense of entitlement or power, even though the wishes of the child were not perceived as being autonomous but a reflection of the adoptive parents' influence.

The forms of parenthood created through open adoption are currently expressed in terms of "rights", and this study has demonstrated the lack of leverage these offer those whom they are designed to protect. Maybe the law is unable to create a commitment to shared parental responsibility and connection within the adoption triad? Maybe the law can only adopt the language and attitudes that uphold an expectation that these qualities exist? The creation of a shared commitment to parental responsibility and connection must precede, but include, the law, saturating the consciousness of all parties, a prerequisite to the formation of open adoption.

The study highlighted that, concurrent with the emotional difficulties of relinquishment and contact, there are perceptions of a lack of power and entitlement. Both factors influence participation in contact. While the law may seek to address the latter, the findings of this study suggest that the role and entitlements of the mother be emphasised in the training of adoptive parents.

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Perfecting adoption? Reflections on the rise of commercial offshore surrogacy and family formation in Australia

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CURRENT INDICATIONS ARE THAT increasing numbers of Australians are moving to commercial offshore surrogacy arrangements—in places including India and Thailand—to satisfy their desire to become parents. This is in line with international trends (Rotabi & Bromfield, 2012). This new phenomenon raises issues of concern to researchers, particularly related to the position of women who act as surrogate mothers (Bailey, 2011; Crozier & Martin, 2012; Deonandan, Green, & van Beinum, 2012). It also raises practice issues for professionals such as lawyers and social workers that are yet to be fully charted. In this chapter, we draw on our experience and perspectives as researchers in the field of adoption, focusing on intercountry adoption, to reflect on the rise of commercial offshore surrogacy as a mode of family formation.

We argue that commercial offshore surrogacy is usefully framed as the latest shift in a highly dynamic market for accessing children for the purposes of family formation. This market has seen several shifts and transformations, at least since the introduction of legislated adoption in Australia in the early decades of the twentieth century. We suggest that insights into commercial offshore surrogacy may be gained by comparing this development with the rise of intercountry adoption in Australia in the mid-1970s, which represented a comparable offshore shift in the market for children when Australians responded to a crisis in the supply of local children available for adoption by sourcing children from overseas. By examining the rise of commercial offshore surrogacy alongside the rise of intercountry adoption some 40 years ago, this chapter highlights a number of characteristics of the current shift in the market in children which, we argue, warrants further close attention by researchers, policy-makers and legislators. It also helps us to see that, while a new phenomenon, commercial offshore surrogacy has historical antecedents and these histories provide us with lessons that we need to heed.

A note on the market terminology

Our research into intercountry adoption and reflections on offshore surrogacy lead us to characterise the exchange and now commercial production of children for the purposes of family formation as a “market” for children that adapts in response to pressures of supply and demand, which may be affected in varying ways by attempts to regulate and control these forces and changing social dynamics (Cuthbert, Spark & Murphy, 2010; Quartly & Swain, 2012; Quartly, Swain, & Cuthbert, 2013). This is not to deny the earnest desires of those seeking children with whom to form families, either through adoption or surrogacy. Nor is it to pass any comment on the quality of parenting provided by adoptive or commissioning parents; nor the outcomes of those children who are exchanged or commissioned in such arrangements. Rather, this characterisation highlights the child (whether sought for adoption or commissioned from a surrogate) as an object of exchange. The market metaphor also highlights the power and influence of the people whose children are taken to be raised by others or who bear children for others, relative to those who acquire and raise them. (Briggs, 2012; Smolin, 2004, 2007).

Inequalities in wealth and power have always underwritten the exchange of children for adoption, and continue to underwrite the production of children in surrogacy arrangements. The children of the affluent are not and never have been exchanged to be raised by the poor. The shift from intercountry adoption to commercial offshore surrogacy does not change these political and economic dynamics, for all that it might, as we discuss below, offer apparently progressive and transformative possibilities for parenthood outside heterosexist norms of family formation in Australia. Women with other financial options available to them do not undertake the risky labour of gestation and child birth for the benefit of others to whom they are not connected through kinship. And, importantly, this risky labour is costed differently in the developing world than in advanced economies such as Australia, where even if it were legal, commercial surrogacy would cost many times more than it costs in countries such as India or Thailand.

Response to a market crisis: The rise of intercountry adoption

In the mid-1970s, Australian couples in search of adoptable infants in the local market faced a crisis. As documented elsewhere (Fronek, 2009; Marshall & McDonald, 2001; Quartly et al., 2013), a confluence of factors—including the 1973 Commonwealth Single Mother’s Benefit, the availability of the contraceptive pill, access to abortion in some states, and shifting social attitudes to extramarital sex and births—led to a sudden decline in the numbers of local babies available for adoption. For decades, Australian couples struggling with infertility could safely assume that adoption would provide the solution to their predicament. In the years before the advent of in-vitro fertilisation (IVF) in 1978 and other assisted reproductive technologies, adoption was the primary solution for infertility. Up to 10,000 infants, mostly born by single-mothers, were placed for adoption in the peak year of 1971–72. So, for many couples local adoption provided the answer to their prayers (Quartly et al., 2013).

As documented in the testimonies of the women who gave birth to babies who were removed from them and placed with adoptive families, and the findings of Commonwealth and state parliamentary inquiries into past adoption practices,¹ the pressures of this

¹ See Parliament of New South Wales, Legislative Council, Standing Committee on Social Issues (2000), Parliament of Tasmania, Joint Select Committee (1999), and Parliament of Australia, Senate, Community Affairs References Committee (2012) for the full reports of these inquiries.

demand led to the normalisation of regimes that sanctioned the exploitive and abusive treatment of mostly single mothers and their children in the service of an adoption industry geared to serve the interests of adoptive families. Further insight into the political force of this demand for babies and its capacity to push new sources of children for family formation is revealed in comments made by Alan Trounson, who worked with Carl Wood, one of the pioneers of IVF in Australia:

What had happened in the late '60s, is that abortion was made available to women, and so suddenly there were no babies ... for adoption. We had to develop something different because the physicians who were then treating women for infertility were being pressured much more to get a solution, and so IVF was born out of that particular need. (Trounson, cited in Donovan, 2011)

The first IVF baby was born in 1978. New markets for children also opened offshore from the mid-1970s. Eventually, both assisted reproductive technologies and sourcing of children overseas combined to produce the commercial offshore surrogacy market.

While the humanitarian rescue of children from war zones was a recurrent feature of warfare throughout the twentieth century (Quartly et al., 2013), the mass removal of children for the purposes of adoption was enabled in Australia by a further confluence of events, which included the growing shortage of children for adoption on the local market, the war in Vietnam, and access to relatively cheap long-distance air travel. Following a steady stream of privately arranged adoptions of Cambodian and Vietnamese children from the late 1960s (Rosenwald, 2009), it was the mass airlift of “war orphans” from Saigon in April 1975 that gripped the attention of the Australian public and thrust the possibility of overseas adoptions into the popular imagination (Forkert, 2012; Fronek, 2012). In the aftermath of Saigon’s “Operation Babylift”, authorities in Australian states and territories were besieged with requests from Australians seeking overseas babies for adoption. Parent groups became organised and some took matters into their own hands and organised visits to countries across Southeast Asia, and elsewhere, in an effort to source adoptable children (Quartly et al., 2013).

The market shifted much more quickly than legislative frameworks or professional practice in the field and for several years the Commonwealth and state and territory governments played “catch-up” in an attempt to regulate this new market for children (Fronek, 2009), which operated for some time without adequate regulation. Within a decade of Operation Babylift, intercountry adoption services were established in all Australian states and territories, and this mode of adoption became a normalised route to family formation for many Australian couples. Over time, intercountry adoption was no longer framed as an extraordinary response to children in crisis, but normalised as a destination—usually the last resort after failed IVF treatments—on the route to alternative family formation.

Déjà vu? Moving offshore for Australian family formation

In March 2009, *The Age* newspaper profiled the first known Australian couple, identified as Matthew and Rachel, to have undertaken a commercial offshore surrogacy arrangement in India (Gray, 2009). Since 2009, many others have followed. Data indicate that this is a rapidly growing phenomenon, outstripping intercountry adoption as a way of making families for Australians unable to conceive naturally or through

assisted reproductive technologies, and providing a route to family formation for those who are socially infertile—a group that does not qualify for adoption, including older adults, single people and gay couples. As discussed further below, commercial surrogacy (outlawed in Australia) is emerging as the preferred model. While legally available and without the financial costs, altruistic surrogacy does not have the same appeal to prospective parents. One obvious challenge is the understandable difficulty in finding Australian women prepared altruistically to bear children for other people to raise, but it also appears the commercial element in offshore arrangements forms part of their appeal.

The Age reported in June 2012 that the numbers of commercial offshore surrogate births to Australian commissioning parents had grown dramatically and rapidly: from 97 births in 2009 to 269 in 2011, and as many as 254 in the first half of 2012 alone (Whitelaw, 2012). ABC's news analysis television program, *Lateline*, reported in March 2013 that nearly 400 babies had been born to Australian parents by Indian surrogates in 2011 (Brewster, 2013). By contrast, 2011–12 figures on adoption in Australia from the Australian Institute of Health and Welfare (AIHW, 2012) show the continued decline of both domestic and intercountry adoption in Australia, registering a 78% decline over 25 years. In 2011–12, Australia registered its lowest number of finalised adoptions with 333, a decrease from the total of the previous financial year, 387. While nearly 50% of all adoptions are intercountry, these numbers continue to decline, from 215 in 2010–11, to 149 in 2011–12. Notably, both numbers fall short of the reported 254 births via commercial offshore surrogacy for just six months of 2012, and the 400 surrogate births in 2011. While intercountry adoptions have exceeded local adoptions in Australia for more than a decade, evidence within Australia and worldwide suggests that this mode of family formation is in decline (AIHW, 2012; Selman, 2012). With the decline in the numbers of children available for adoption and no decline in the demand for children, commercial offshore surrogacy provides another urgently needed source of children.

For Matthew, Rachel and hundreds like them, the move to commercial offshore surrogacy for family formation follows either years of failed attempts at conceiving a child unassisted and through IVF, and waiting for a child through what they call the “failed system” of intercountry adoption; or is undertaken because of ineligibility to adopt within Australian legislated adoption systems. Commercial offshore surrogacy organised through a dedicated clinic in Mumbai, India, delivered a baby to Matthew and Rachel within a year, which intercountry adoption was unable to do within a projected waiting period of six and a half years (Gray, 2009).

The assessment of intercountry adoption within Australia as a “failed system” arises from it being viewed within a family formation framework, and seen primarily as a service for childless adults. However, this is only one way to view intercountry adoption. Properly, and in line with child-focused approaches, it should be seen as one option on a continuum of child care or placement options; generally the last resort when family preservation and other efforts to keep the child within its family and community of origin fail (Cuthbert et al., 2010; Fronek & Cuthbert, 2012a, 2012b). As evidenced in the 2005 parliamentary inquiry into intercountry adoption in Australia, many Australians view intercountry adoption primarily as a *service* for them, and its success or failure is measured in terms of its capacity to deliver them a child within an acceptable time frame (Parliament of Australia, House of Representatives Standing Committee on Family and Human Services, 2005).

New markets, new models

Parallels and some telling differences emerge when the current rise in commercial offshore surrogacy is compared with the rise of intercountry adoption in Australia in the mid-1970s. Both are demand-driven phenomena, prompted by a decline in available children in existing markets and enabled by a range of new technologies and new social circumstances. What accessible long-distance air travel did for the development of intercountry adoption, the Internet and assisted reproductive technologies have done for commercial offshore surrogacy. The trade in children for family formation now operates at a global level of trade in ova and sperm. These technological and biomedical possibilities then combine with much older factors of poverty and disadvantage in the sourcing of women to bear these web-sourced, technologically assembled embryos.

In the mid-1970s and now, the continuing decline in the numbers of babies available for adoption has led not simply to a shift in the market but also, we argue, to the emergence of a new market model. In both cases, the downturn in supply has been described as a “crisis” or as a “failed system” requiring urgent action to meet the needs of adults for access to children (as distinct from the needs of the children themselves). In both cases, the demand for children forged a new market that has both reflected and played some part in shifting prevalent views about family. The move to intercountry adoption from the mid-1970s made adoption visible in ways that it wasn’t previously, and challenged monocultural views of both family and nation in a period when Australia was dismantling the White Australia policy and moving towards multiculturalism.

In the 1960s, the “success” of adoptive placements was measured in terms of its invisibility, which was assured through increasing secrecy and professional practices such as matching (e.g., where a blond infant would be “matched” with fair adoptive parents) (Marshall & McDonald, 2001). The “seamless” insertion of the adopted child into the adoptive family was upheld by adoption professionals as the pre-condition for successful adoption—successful because invisible. This invisibility was further ensured by the secrecy provisions introduced in successive reforms to legislation from the mid-twentieth century (Quartly et al., 2013). By contrast, the intercountry adoptive family visibly declares itself to be a family formed outside biology and across racial and cultural lines—the family formed through intercountry adoption makes adoption visible. Further, early intercountry adoption challenged then prevalent views about what constitutes an adoptable child, what constitutes a family and what constitutes an Australian citizen, thus expanding received definitions and assumptions across all of these fronts.

Similarly, the growing numbers of commercial offshore surrogacy arrangements are currently challenging and seeking to revise received orthodoxies about family and parenthood. As we discuss below, a key market for offshore surrogacy arrangements is gay male couples, a category expressly excluded from adoption in most Australian states and territories. The inclusion of gay and single people within the category of “parent” represents a challenge to dominant heterosexual norms, and to the concept of family as being the preserve of this norm (Pringle, 2004). Thus, where intercountry adoption may be seen to have expanded the definition of the adoptable child within the then monocultural norms of Australian society, family formation through commercial offshore surrogacy has contributed to a shift in the understanding of who is eligible to parent, to include individuals who by reason of age, marital status or sexual orientation have formerly been excluded from heterosexist norms of parenthood and family. This has had the effect of placing the right to parent—over and above the right of children to family-

based care—as of central concern in surrogacy debates in Australia, a point to which we return (Riggs & Due, 2010).

On the money ...

The history of legislated adoption in Australia—from the first decades of the 20th century to the commencement of the adoption reform movement that began in the 1980s and continued over the next two decades across all Australian states and territories (Quartly et al., 2013)—was propelled on the part of legislators by two key factors. The first was the desire to curtail or at least regulate commercially-based markets in babies and children. The second was the desire to provide increasingly greater levels of security of possession of the child, and confidentiality for the adoptive parents. The legislative distaste for commercial baby markets, where parties (whether parents or baby brokers) profit from the exchange of children, reflects deeply held social values and the assumption that human life is not to be subject to trade. For the period from the 1920s to the mid-1970s, legislated adoption was the dominant mode of alternative family formation (although children continued to be exchanged between families informally), and the legislation worked mostly, but not entirely, to keep commercial elements out of the process (Quartly et al., 2013; Swain, 2012). With shifts in the market into activities not encompassed by adoption legislation—the move to intercountry adoption in the 1970s, and the current rise of commercial offshore surrogacy—the absence of a legislated framework for the activity has seen the re-emergence of commercial elements in child exchange.

Work in Australian legislatures from the 1980s, followed by the further restrictions imposed by the Hague Convention on Intercountry Adoption (1993), have resulted in a tightly controlled intercountry adoption market for Australian families. This has not entirely eliminated commercial elements operating in intercountry adoption, nor eliminated criminal activities such as the stealing of children for the adoption market, concerning which several cases have been exposed in Australia (Sara, 2009). Many adoption proponents consider the restrictions imposed by Australian legislators, which place barriers between needy couples and the children they seek to adopt, to be anti-adoption, inhumane and evidence of a “broken” system (Fronek, 2009).

Commercial offshore surrogacy is similar to the early, unregulated intercountry adoption market in some respects, but in others it is very different. The issue of the transparency of the commercial aspect of the transaction is a case in point. Where those engaged in and promoting intercountry adoption are careful to distance themselves from any activity which might smack of baby-buying—with, for example, financial contributions to orphanages and overseas welfare organisations being framed as humanitarian assistance—commercial offshore surrogacy openly declares its commercial basis. Thus, the necessarily veiled commercial elements that persist in intercountry adoption are boldly unmasked in commercial offshore surrogacy. In our view, this commercial element is the basis of its appeal and, given prohibitions against commercial surrogacy in all Australian state and territory jurisdictions, almost ensures the pursuit of this activity offshore. Such is the power of market demand. Prospective adoptive parents face many hurdles that add uncertainty and complexity to the process. Reformed local adoption practices have led to 95% of all domestic adoptions in 2011–12 being “open” (AIHW, 2012), which means that exclusive possession of the adopted child is not guaranteed (Cuthbert et al., 2010). There are also inter-ethnic and other complications of intercountry adoption (Quartly et al., 2013), and the highly publicised complications that may arise from altruistic surrogacy (not to mention the challenges in finding someone willing to bear a

child only to give it away with no recompense). By contrast, the commercial nature of an offshore surrogacy transaction may be empowering for consumers (assuming they have the funds to enter the market). The exchange of money—not for the child *per se*, but for the reproductive labour and associated medical services that produce the child—brings clarity to the transaction and helps obviate potential emotional complications that may exist in altruistic surrogacy arrangements. Especially when brokered through an agency, commercial offshore surrogacy appears to offer both a market model and a surety of possession that are not available through other means.

Thus, as one mother of a child born through commercial offshore surrogacy writes:

I really believe this is a terrific opportunity for those who are on their last legs trying to have a family ... Speaking with a paediatrician recently, he actually thought offshore commercial surrogacy (gestational) was probably a better outcome than domestically, for the one reason, being, the Indian child bearer, would be so unlikely wanting to keep the child. The risk in the US and here of course, is the distinct possibility (it happens) that the birth mother suddenly decides she wants to retain the baby and nurture him/her. (Chrissie, “donnie1973”, 2009)

One prerogative of this transparently commercial market in children is the freedom of consumers to place their interests and needs at the centre of the enterprise. This is about the desire and need to parent; and, for many excluded from parenting by adoption legislation, it is also about securing the right to parent without the intrusion of the state and its demeaning regimes of screening: “If they feel like you aren’t the right kind of person or if you don’t have the right paperwork, you are knocked back. You are treated like a criminal from the start” (Sam Everingham cited in Whitelaw, 2012). Commercial offshore surrogacy offers the opportunity to experience parenthood—as adoption has in the past—but for a radically expanded category of parents: “The word is out to the gay community in Australia. You can be a father, you can pursue that dream of parenthood. Being gay is not a barrier” (Chiang-Cruise, 2011). Even with the recent announcements made by the Indian government restricting surrogacy services to married couples, it is likely that the commercial surrogacy destination of choice for non-traditional parents will simply move from India to Thailand or other countries (Ritchie, 2013).

Further, surrogacy allows for the possibility of a genetic connection between at least one commissioning parent and the commissioned child; something that adoption cannot offer, even with the legal fiction of the child being “as if” born to the adoptive parents.

Repositioning humanitarianism from child to surrogate mother

The transparency of the commercial basis of offshore surrogacy, both sanctioned and suppressed in modern legislated adoption regimes, occasions interesting shifts in the positioning of humanitarian motives in relation to this mode of family formation. Adoptive parents, especially those adopting children born into poverty, and their advocates are able to mobilise sentimental child rescue or humanitarian motives, sometimes to justify or balance their own profoundly personal desires for a “child of their own” (Murphy, Pinto, & Cuthbert, 2010, p. 147). Such motives are inconsistent with surrogacy, as the transaction with the surrogate mother brings the child into existence; there is no pre-existing child to be rescued from poverty, or a life on the street or in an institution.

Historically, adoption has been framed as a means of marrying private desires (for children) with a public good (providing a home for the child and relieving the state of the burden of its care). Surrogacy, by contrast, is a mode of family formation for which a corresponding potential public benefit is hard to identify. Especially for groups and individuals excluded from parenthood by heterosexist legal regimes, commercial surrogacy is the mechanism through which they can assert their equal rights to parent a child, and the commercial nature of the transaction becomes the mechanism for enacting this right to parent. The chief, and perhaps sole, beneficiaries of the surrogate transaction are the commissioning parents.

Nonetheless, we find that reconfigured altruistic or humanitarian effects are frequently claimed for commercial surrogacy arrangements. Rather than the commercial arrangement (especially as it operates in the developing world) being exploitive, as claimed by critics of surrogacy (Bailey, 2011; Crozier & Martin, 2012; Deonandan et al., 2012), proponents of commercial surrogacy suggest that the commerce itself enables humane outcomes. The cash paid by commissioning parents—in the case of Matthew and Rachel, “around \$10,000, the equivalent of five years’ wages” (Gray, 2009)—provides the surrogate mother with:

a chance for (Indian) women to give their children a chance for the future. The fee is worth between 10 and 15 years income ... It meant her family could get out of the slums and she could provide an education for her children. (Gleeson, 2011)

As reported in *The Western Australian* newspaper, President of Surrogacy Australia, Sam Everingham has refuted claims of exploitation and offers a liberation model for viewing the benefits of surrogacy for the surrogate mothers:

[Mr Everingham] disputed the trade exploited women in poor countries after fears were raised that husbands forced wives into surrogacy. But he said money from surrogacy could free a Thai or Indian woman from the cycle of poverty. (Bastians, 2012)

One woman, Kylie Gower, suffered the breakdown of her relationship in the quest to have children, but will raise as a single mother twins born in India through commercial surrogacy. She was convinced that surrogacy offers a “win-win” for all parties: “The surrogate can put her children through school and university, buy their home and hopefully fulfil some of her own dreams, so Kylie firmly believes it is a ‘win-win’ for all parties” (Simmons, 2013).

Notably, surrogacy advocates are silent on the risks to which the surrogate mother is exposed during the pregnancy and birth, with some mothers unwittingly subject to medical contracts that may sacrifice or jeopardise their lives for the sake of the child, the object of desire and of the commercial transaction (*Times of India*, 2012). Medical care may be extended to the mother only in her capacity as the “carrier” of the child.

It is interesting to speculate on this shift of declared humanitarian benefit from the child, who was formerly represented as being “rescued” from poverty and degradation through intercountry adoption, to the surrogate mother, who is represented as the beneficiary of opportunities not otherwise available to her or her children. The question is whether this has some relationship to perceptions of who is the most vulnerable party to these arrangements, with claims of humanitarian benefit being used to balance critical perceptions of exploitation. It is somewhat ironic that commercialised childbearing, with

questionable volition on the part of many surrogate mothers, is cast as “liberatory” by leading surrogacy advocate Sam Everingham. It may be that in the absence of the compelling “child rescue” narratives that have long been associated with intercountry adoption and indeed other modes of adoption, proponents of the attractiveness of commercial surrogacy for all that it offers those desperate for children, feel the need to modify the self-interest of their position by reference to the benefits the cash will bestow on the woman who bears their child. Alternatively, it may be that for all of its appeal to the consumer, the societal disapprobation of trade in human beings that attaches to the commercial aspects of surrogacy prompts the use of the humanitarian argument in order to neutralise the taint of baby trading.

Narratives of the liberating effects of the money earned through surrogacy may assist in the process of “closing the book” on the woman who bears the much desired child; well paid for her labour, she may be forgotten about by the commissioning parents who, through this transaction, secure a child with all the benefits formerly offered through pre-reform “clean-break” adoptions. Money, especially when quantified in amounts of five to fifteen years of earnings for the surrogate mothers, may also assist in soothing consciences and persuading all concerned that the mother and the commissioning parents are well and truly square.

Conclusion

We conclude that commercial offshore surrogacy represents the latest source of children in a shifting market driven by the needs of adults seeking children for family formation. This market is enabled by new technologies, underwritten by old inequalities and repeats patterns that we have seen before. We offer this view as a necessary corrective to pro-commercial surrogacy narratives, which identify it as both a progressive means of re-writing the heterosexist script of family formation and a liberatory opportunity for women in the developing world.

As with the rise of intercountry adoption in the 1970s, and successive changes to local adoption practices from the 1920s to 1980s, all of which worked to make adoption more attractive to adoptive parents at the expense of the other parties involved, the rise of commercial offshore surrogacy demonstrates the degree to which the market in children is continually driven and shaped by the needs and interests of those seeking children for family formation to which the needs and interests of other parties have historically been and continue to be subordinated. The emerging phenomenon of commercial offshore surrogacy offers commissioning parents all the benefits of “clean-break” adoptions (no longer an option in local Australian adoption due to reforms from the 1980s), the possibility of some genetic connection with the commissioned child (which is not offered by local or intercountry adoption), and the opportunity (now somewhat compromised by restrictions imposed by the Indian government) for an expanded demographic—that is, single people, gay couples, and individuals too old to qualify for adoption—to experience parenthood, which those who can afford to do so are now claiming as a right. Its location in developing countries also extends the attractiveness of intercountry adoption for many prospective parents of sourcing children from people who are comparatively powerless and distant (Smolin, 2004). For the moment, with consumers taking to this mode of family formation in large numbers in Australia and globally, commercial offshore surrogacy appears to be adoption perfected.

The move to commercial offshore surrogacy arises from the limitations of the now declining intercountry adoption market, characterised as a “failed system” by many

seeking children. It also significantly transforms the model for family formation offered by intercountry adoption by using commerce to bypass the restrictions and vetting protocols that apply in legislated adoption. Until the international community moves decisively to regulate this global trade, as the Hague Convention did for intercountry adoption (Hague Conference on Private International Law, 1993), it remains—with some fluctuation—a buyers' market. It may take at least 20 years for a critical mass of the children born in such arrangements to attain adulthood and start to raise the disquieting questions that history tells us they will ask in time. Like Australia's Indigenous Stolen Generations, adult domestic adoptees, persons conceived through assisted reproductive technologies and adult intercountry adoptees, as these children attain their majority they will have questions to ask about their identities, the mothers who bore them, the men and women who donated ova and sperm to whom they are genetically linked, and the policy and legislative regimes (or the absence of these) that allowed their births to take place without due regard to the inevitability of their future questions regarding identity, community and belonging. As has been noted in relation to the recent case of a girl born to an Indian surrogate mother and adopted by a convicted Israeli paedophile, the short-term and longer term welfare of children born in surrogacy arrangements are matters to which insufficient attention has been paid by national and international authorities (Pal, 2013; see also Brewster, 2012).

In Australia, over the last twenty years, a grim reckoning has been made of the legacies of pain, harm and confusion caused by children being separated, removed and dislocated from their families and communities, concerning which three national apologies have now been made (Cuthbert & Quartly, 2012, 2013; Fronek & Cuthbert, 2013). It remains to be seen how the legacy for these children will unfold. As a community, with special reference to the professionals now engaged in work facilitating surrogacy for family formation, we have responsibilities to these children, and the adults they will become. We need to be alert to the questions they will raise in the future and ensure we are prepared to answer them.

That it seemed like a good idea at the time is not an adequate response.

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Use of surrogacy by Australians Implications for policy and law reform

Sam Everingham

THIS CHAPTER USES THE results of an anonymous online survey of 217 intended or current Australian parents through surrogacy, conducted in 2012, to illustrate how surrogacy is practised by Australians. It concludes with a discussion of current challenges with regard to Australian law and policy in this area.

Surrogacy as a means of family formation is defined as a woman carrying a pregnancy for a third party, with the express intention of giving up all parental and custody rights to the resulting child(ren). Surrogacy can be traditional, where the surrogate carries a child using her own eggs (fertilised with sperm from either the intended father or a third-party donor), or (more commonly) gestational, where the surrogate is implanted with an embryo developed from the eggs and sperm from any combination of the intended mother and father and/or from third-party donors.

Reasons for the growth in surrogacy as a means of family formation

International research has shown that the desire for children among the involuntarily infertile remains very strong, even after years of unsuccessful attempts to become pregnant (Blyth, 1995; Edelman, 2004; Langdridge, Connolly, & Sheeran, 2000; van Balen & Trimbos-Kemper, 1995). Langdridge et al. also noted the desire of infertile couples to have a biological connection between the child and at least one of the prospective parents rather than to adopt an unrelated child.

Surrogacy as a means of family formation among Australians who cannot otherwise have a first or subsequent child, has been driven or enabled by a number of factors. These include:

- child protection policy changes in recent decades, which have led to drastic falls in the availability of children via adoption. During 2011–12, Australian authorities noted the lowest number of adoptions ever achieved ($n=333$). Of these, just

54 were of infants aged one year or less (Australian Institute of Health and Welfare [AIHW], 2012);

- source country adoption programs, which have strict criteria as to the age and family types who can adopt; for example, none of Australia's current intercountry adoption agreements allow same-sex couples (AIHW 2012);
- increasing numbers of Australian women putting off childbearing until they are older, leading to higher rates of age-based infertility (Luk, Greenfield, & Seli, 2010);
- improved assisted reproductive techniques, which allow greater use of gestational surrogacy, where the surrogate has no genetic relationship to the child(ren) she carries;
- increasing community awareness of surrogacy as a family formation option; and
- growth in the number of single and partnered gay males desiring to raise a family.

Surrogacy regulation and practice in Australia

In recent years, Australia has introduced regulatory systems guiding the practice of surrogacy that define who can and cannot act as a surrogate, who is eligible to be an intended parent through surrogacy, what financial compensation may be paid to a surrogate, how the law will deal with parental rights, and what, if any, counselling is required prior to entering an arrangement.

While there is now a process in Australia to transfer legal parentage to intended parents where uncompensated surrogacy has been used, advertising for a surrogate or by a potential surrogate is forbidden. Surrogacy arrangements that pay the surrogate any monies beyond medical and other out-of-pocket costs is illegal in any Australian state or territory (except the Northern Territory). Queensland, New South Wales and the ACT have criminal laws in place to discourage residents from engaging in surrogacy in countries where compensating a surrogate for more than medical and out-of-pocket expenses is legal (Page, 2011).

Study aims and methods

Research was commissioned by Surrogacy Australia¹ to better understand how Australians are accessing surrogacy arrangements. The objectives were to establish:

- the socio-demographic characteristics of Australians using and intending to use surrogacy;
- what other options were considered and why these were ruled out;
- how and when uncompensated and compensated surrogacy arrangements are accessed;
- parental attitudes to disclosure and donor identification
- what costs were incurred;
- how this was funded; and
- what users' and intending users' attitudes were to laws criminalising surrogacy in some Australian jurisdictions.

The research collected cross-sectional quantitative data via a 90-item survey comprising mostly fixed-choice questions. The study was fielded between 25 January and 17 February 2012.

¹ A national not-for-profit consumer organisation that promotes advocacy, education and best practice in relation to surrogacy arrangements.

Emailed invitations with a link to a 20-minute survey were sent directly to Surrogacy Australia's email database of members and other families who were considering using, were in the process of using, or had used surrogacy arrangements. The research was endorsed and promoted by the moderator of the online Yahoo!7 chat forums run by GayDadsAustralia. Additionally, the study was promoted on the SurroAustralia Yahoo!7 chat forum for heterosexual families, and via postings and a web link on Surrogacy Australia's closed Facebook group.

Data were analysed by Q Professional using descriptive statistics. Univariate comparisons were made using *t*-test and chi-square statistics. A 95% confidence interval was used to define statistical significance where differences were detected. Some respondents did not answer all questions, and where the number of available responses was lower than the number of participants, this is indicated.

Results

Sample characteristics

A total of 217 respondents commenced the survey and 180 completed every relevant question. Table 1 illustrates the key sample characteristics.

Table 1: Respondent characteristics			
Characteristic	%	Characteristic	%
Jurisdiction (<i>n</i> = 180)		Relationship status (<i>n</i> = 180)	
NSW	33	Single	8
VIC	34	Partnered	92
QLD	12	Household income (<i>n</i> = 180)	
WA	10	< \$78,000	8
SA	2	\$78,000–103,999	16
ACT	2	\$104,000–129,999	15
TAS	2	\$130,000–155,999	9
NT	1	\$156,000–181,999	11
Outside Australia	4	\$182,000–207,999	13
Gender (<i>n</i> = 182)		> \$208,000	28
Male	63	Sexuality (<i>n</i> = 217)	
Female	37	Heterosexual men and women	45
Stage (<i>n</i> = 217)		Gay men	55
Considering surrogacy	29		
In a surrogacy arrangement	29		
Past user of surrogacy	42		

The mean age of respondents was 40 years (range: 24–57 years). Table 1 shows that there were significant numbers of respondents from a state/territory with extraterritorial criminalisation laws in place against compensated surrogacy (NSW, Queensland and the ACT).

Household incomes were, on the whole, very high compared to other double-income Australian households.

In addition, prior to considering surrogacy, 19% of the heterosexual respondents had been carers for another child (in 75% of cases their own biological child).

Options considered for creating a family

Adoption was the commonest alternative to surrogacy considered, particularly for heterosexuals, followed by long-term foster care (see Figure 1).

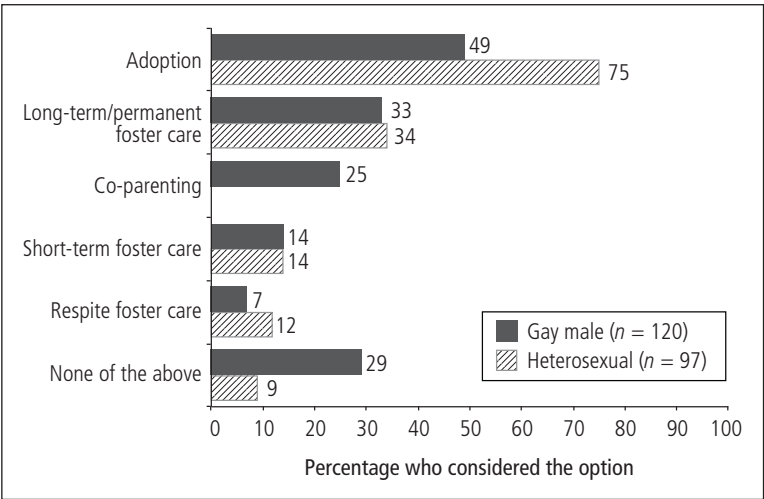


Figure 1: Alternative options considered for creating a family, by sexuality

Among the 34% who did not consider long-term foster care, concern regarding the lack of permanency and a preference for a biological connection were the key barriers (see Figure 2).

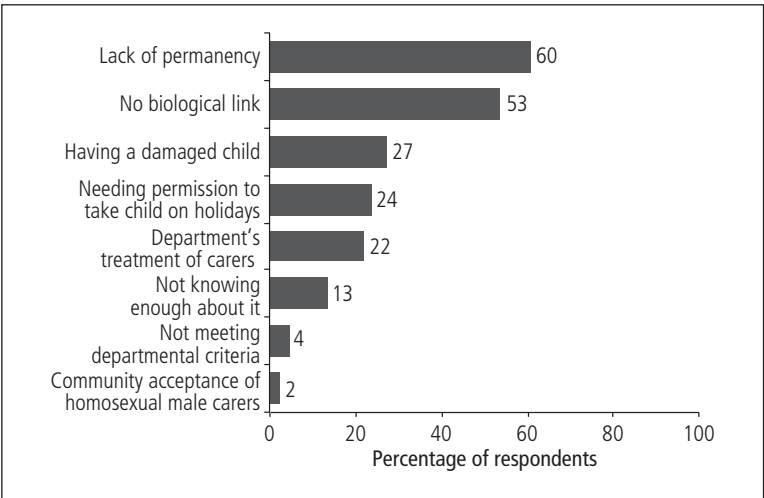


Figure 2: Reasons for not considering long-term foster care

Uncompensated surrogacy

Australian heterosexual intended parents were significantly more likely to have considered an uncompensated arrangement (74%) when compared with gay male intended parents (38%).

Of the 46% who did not consider uncompensated surrogacy, the main reasons they gave for this related to the unenforceable nature of altruistic contracts, leading to concern that their surrogate might decide to keep the child (see Figure 3). The view that asking someone to carry for love alone was an unfair exchange was also commonly expressed, particularly among heterosexual intended parents.

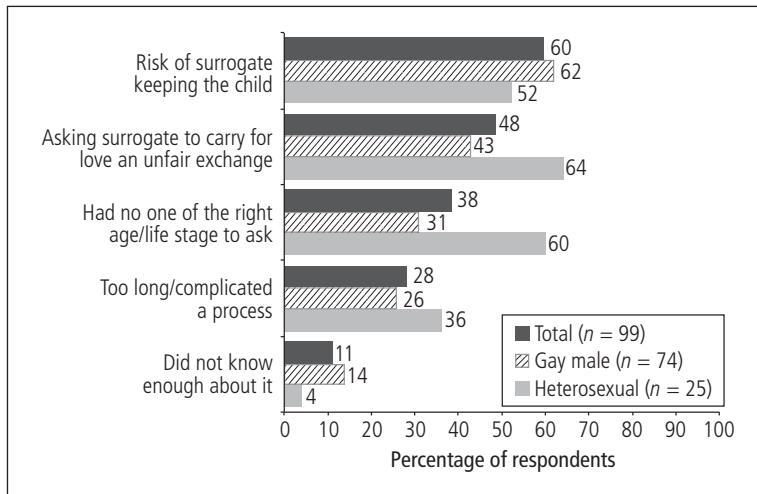


Figure 3: Reasons why uncompensated surrogacy was not considered, by sexuality

Of the 117 who considered altruistic surrogacy, over half (59%) did not ultimately attempt such an arrangement. This group were most likely to report being unable to find a surrogate who would commit to carry altruistically. However, as Table 2 (on page 72) shows, reported reasons were varied.

Intended parents engaging in uncompensated surrogacy often require an egg donor. Among heterosexual respondents who attempted uncompensated arrangements, 23% reported needing an egg donor from the start. An additional 31% required a donor after failing with their own eggs. However, locating a potential altruistic egg donor was not a barrier for most intended parents—76% located a possible donor.

Of those 117 intended parents who looked for an altruistic surrogate, 23 commenced altruistic attempts. Only half of these were commenced under regulated arrangements. Of those who commenced, seven were unsuccessful due to the surrogate not falling pregnant, or the commissioning parents or surrogate changing their mind about progressing.

Compensated surrogacy

Nearly all gay male intended parents (97%) and most heterosexual intended parents (88%) surveyed had considered compensated arrangements outside Australia. Before making such a decision, respondents reported consulting on average five different (mostly online) sources.

Table 2: Reasons for not going ahead with uncompensated surrogacy	
Reason given	% (n 57)
Unable to find altruistic person (wanted payment)	51
Too long/complex a process	32
Risked damaging relationship	32
Not comfortable asking someone else to be surrogate	30
No one offered to be surrogate	30
Not legal at the time	21
Could not locate an egg donor	21
Did not know anyone who had done it	21
Risk of surrogate keeping the child	9
Possible health/legal complications	7
Intended parent fell outside clinical criteria for assisted reproductive technology (ART)	5
Surrogates who offered were not suitable (e.g., had no prior children)	5
Rights of each party were too vague	5
Surrogate changed mind	4
Felt judged and unsupported	4
High costs	4
Hard to find a clinic offering surrogacy	2

Countries used for compensated surrogacy

India was by far the commonest country used, with no significant differences found by client sexuality. However, there appear to have been marked changes in the countries used over recent years. Of parents using overseas arrangements, only 14% reported using a US agency in 2011–12, compared to 52% prior to 2009. In contrast, the proportion using India increased from 29% prior to 2009 to 80% in 2011–12 (see Figure 4).

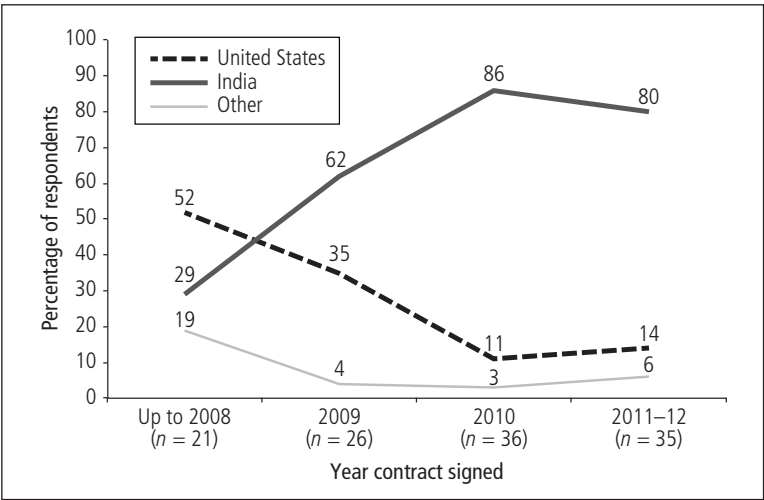


Figure 4: Country used for commercial surrogacy, by year contract was signed

While the number of respondents who had used US agencies ($n=33$) was not large, significant proportions of Australians left themselves financially exposed to potentially large perinatal medical costs in case of pre-term delivery by not taking out post-birth medical insurance,² an item that is prohibitively expensive for many. While this was also true in respect to taking out surrogate health insurance, this might be explained by some US surrogates using pre-existing health insurance policies.

Compensated egg donor issues

Of those heterosexual couples using compensated surrogacy, 30% attempted to self-cycle (used their own eggs). Another 20% shipped frozen embryos overseas.

All gale male intended parents using compensated arrangements had engaged or planned to engage at least one egg donor, while 70% of heterosexual parents used or planned to use an egg donor for an overseas arrangement. While results suggest that the US was once the most common source of egg donors for Australians, in recent years India has become the most common (54% of all donors accessed), in line with its dominance as a centre for surrogacy arrangements. All donors in India, and most in the US, Thailand and South Africa, do so anonymously, in contrast to current Australian practice and guidelines.

Among intended parents in the surveyed sample who had successfully engaged in surrogacy, the proportion who had to use two or more egg donors (because of failure to produce viable embryos from earlier egg donations) was 34% for the US compared to 50% for India.

Number of surrogates engaged

Among those who had engaged successfully with an overseas surrogate to produce one or more children, a higher number of surrogates were engaged by those using India (74% engaged with two or more surrogates) compared to the US (only 19% engaged with two or more surrogates).

Eight per cent of those engaging in compensated surrogacy had a surrogate miscarry in the second or third trimester. For 21% of this group, miscarriages were experienced during two or three surrogate pregnancies after 12 weeks' gestation.

Multiple births

Multiple births are a very common outcome for Australians using compensated surrogacy. Forty per cent of respondents who had used India and 62% who had used the US reported twin births. In contrast, just 14% of regulated uncompensated surrogacy births in Australia in 2010 resulted in twins.

Compensated surrogacy costs

A significant downward trend in total spend has been evident over the last five years, largely due to the move from US- to Asia-based surrogacy arrangements. Among those who had achieved a successful pregnancy and birth in 2010 or 2011, average total estimated costs (including egg donor, surrogacy agency fees, hospital costs, post-birth

² In the US, many Australians rely on their surrogates' insurance pre-birth, but post-birth, health insurance is advisable given there is no universal health coverage available. This involves the "pre-purchase" of medical services at a pre-negotiated price. Non-refundable premiums for singleton pregnancies start at \$11,000.

medical costs, insurance, legal and government fees as well as travel and accommodation) were \$165,000 for the US, compared to \$70,000 for India.

Future intentions

Seventy-nine per cent of those considering surrogacy for the first time were likely, very likely or definitely going to engage in compensated surrogacy (see Figure 5). In states/territories where compensated surrogacy overseas is criminalised, this high proportion was undiminished, with 71% likely, very likely or definitely going to engage.

Those who already had one or more children through surrogacy also had high levels of intention to have another child via surrogacy (40% likely, very likely or definitely). Even among those from an Australian state/territory with criminalisation laws, 46% were definitely, very likely or likely to have another child via compensated surrogacy.

All respondents were asked in which of seven countries they would consider entering into a surrogacy arrangement if they had a need. India received the highest levels of consideration (see Figure 6 on page 75). Only 45% would consider an arrangement in Australia and 42% in the US. Thailand received particularly low levels of consideration (12%), considering its proximity to Australia. This is possibly due to adverse publicity around differences in immigration procedures for infants born in Thailand at the time the survey was conducted. Consideration of surrogacy in Australia is disappointingly low.

Those who had used an agency in the US or India in the past were significantly more likely than the average to consider using that country again.

Response to criminalisation laws

Respondents were asked to imagine they were both considering a compensated arrangement and resident in a state or territory in which laws made engaging in overseas compensated surrogacy a criminal offence (whether or not they actually lived in such a jurisdiction). They were asked to nominate which one of five different decisions they would take (see Figure 7 on page 75).

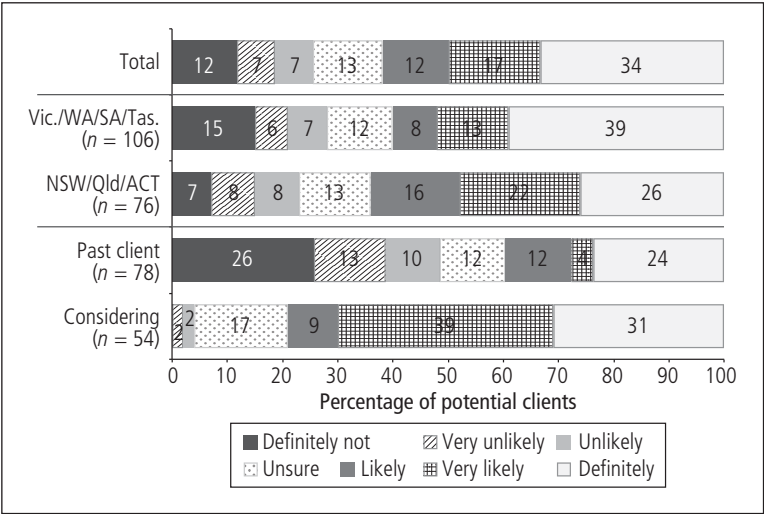


Figure 5: Likelihood of entering into a new compensated surrogacy contract, by state/territory of residence and whether new or past client

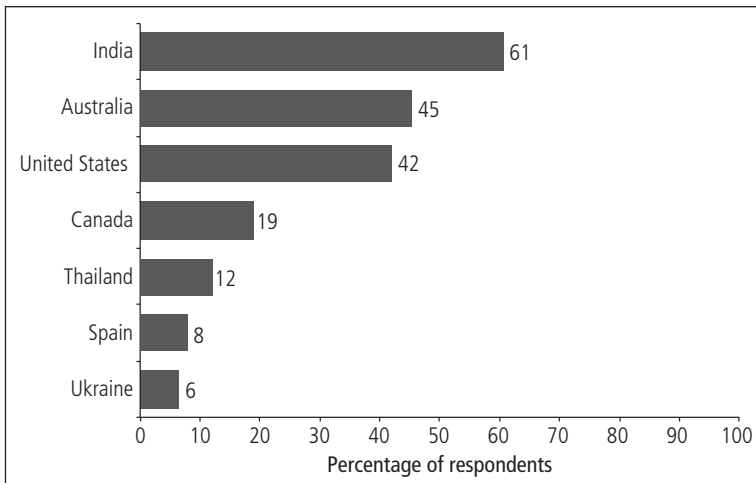


Figure 6: Countries that respondents would consider for future surrogacy

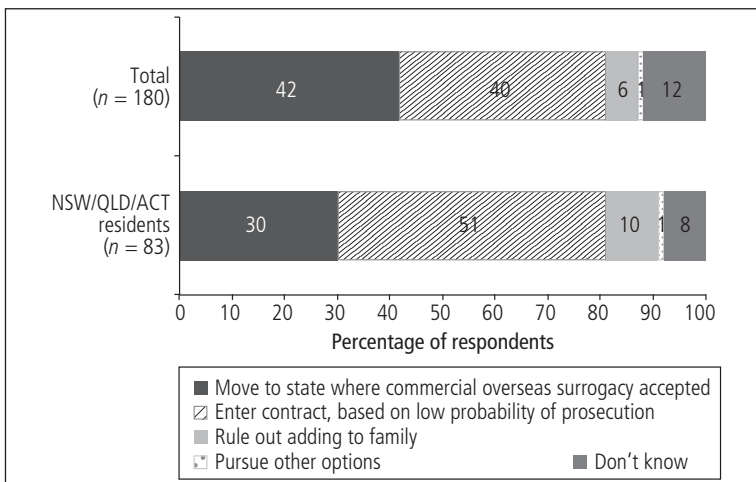


Figure 7: Responses to considering compensated surrogacy in scenario where participant is resident in state with criminalisation laws

Only 7% of respondents said that such laws would be a deterrent to compensated surrogacy. The most common option (for 51%) was to enter into an overseas surrogacy contract regardless, based on a low probability of prosecution. The second most common response entailed moving to an Australian state where overseas surrogacy is not criminalised.

Disclosure issues

Informing children of their origins

Parents and intending parents through surrogacy were asked at what stage, if any, they would tell their child that an egg donor had been used, if this was the case. Most (88%)

would tell the child when they were young, while 8% would tell the child when they were 16–18 years. Three per cent would only inform their child of their donor origins if there was a medical need. One per cent felt it best not to tell at all.

In regard to informing the child that a surrogate had carried them, 95% would tell the child when they were young and 5% when the child was 16–18 years. There were no differences in responses by sexuality of the parents.

Donor identification

Respondents were informed that in some countries, donors can donate either anonymously, with no opportunity for their offspring to make later contact, or via “identity release”, where the child may access donor contact details when they reach adulthood.

Respondents were asked which type of donor they were most comfortable with and what type they felt best for the child. Only 64% were most comfortable with using an identity release donor. A far higher proportion (81%) believed that identity release donors would be of most benefit to their child.

Heterosexual respondents were more likely than gay male respondents to be most comfortable with an anonymous donor (41% vs 32%), though this difference was not statistically significant. Of ten factors considered in selecting a donor, donor willingness to be identified was ranked lowest in importance. Donor health and the donor’s family health history were the principal issues of importance.

Discussion

Shifts in public policy away from adoption to alternative legal orders have clearly had a significant role in dissuading potential parents from permanent foster care, given the lesser certainty of permanency. For example, Victoria’s Permanent Care orders, unlike adoption orders, do not change the legal status of the child and expire when the child turns 18 or marries. There is also provision for revoking or amending such orders.

Intended parents are steering clear of regulated surrogacy

The findings demonstrate that the drive to have a child with a biological link to one or both parents is greater than the barriers erected by Australian legislators trying to discourage use of unregulated and cross-border arrangements.

The number of Australian parents having children through regulated surrogacy arrangements annually remains very low ($n=14$ in 2010) compared to well over 270 babies estimated to have been born to Australians, according to a 2011 self-report survey of just 14 surrogacy agencies in India, the US and Thailand (Everingham, 2012; Macaldowie, Wang, Chambers, & Sullivan 2012).

In fact, even among those survey respondents currently engaged in an arrangement in Australia, a significant proportion chose to use a private arrangement rather than engage in the complexities of regulated surrogacy, thus forgoing benefits (such as the transfer of the intending parental name to the birth certificate) while avoiding what may have been perceived as barriers (lengthy delays due to screening requirements, and legal and psychological counselling).

Drivers of offshore surrogacy

Surrogacy Australia analysed the surrogacy industry internationally, Australian state and federal laws, how these laws are applied in practice, and social media discussion by

intended parents. This revealed a number of factors that have contributed to the high numbers of Australians engaging in overseas arrangements. These include:

- a fast maturing commercial surrogacy industry, marketing itself principally via online and word-of-mouth channels to intended Australian parents;
- the preparedness of Australia's then Department of Immigration and Citizenship to award citizenship by descent to any infant for which DNA testing proves a genetic match with an Australian citizen;
- the reluctance of state governments with criminalisation provisions with regard to compensated surrogacy to police such law;
- state-based surrogacy laws that discourage intended parents from publicly advertising for a surrogate or vice versa;
- the exclusion of certain applicants from accessing regulated surrogacy (e.g., single or partnered males in some states);
- the requirement for lengthy screening and ethics approval processes for all parties before embryo transfers may commence;
- a lack of well-screened Australian surrogates, leading to some surrogacy arrangements breaking down prior to or after birth;
- discomfort among many intended parents in using a close friend or family member as their surrogate; and
- a desire by many intended parents to "fast-track" what is perceived to be a slow process in Australia. Sourcing a surrogate and donor, obtaining a specialist appointment, undergoing screening and psychological evaluation, seeking approvals and starting treatment can delay embryo transfer by a year or more in Australia, while it can be considerably expedited overseas.

The rise (and fall) of Australians using surrogacy in India

Australian citizenship-by-descent applications for infants born to Australians in India (394 in 2011) have increased by 132% over 2008–11 (Department of Immigration and Citizenship, 2012). This rise may have been associated with greater awareness among Australians of India as a surrogacy destination, linked to increased media and online exposure.

The high numbers of Australians choosing India as a destination for surrogacy has been partly due to the availability of highly trained, English-speaking doctors, well-equipped hospitals and speedy access to treatment. Private medical services are comparable in quality with those provided in more economically developed countries, but at a substantially lower cost (Chinai & Goswami, 2007). Between 2004 and 2006, the number of Indian websites advertising surrogacy services more than quadrupled, with marketing heavily geared to foreigners (Smerdon, 2008).

However, since this survey was conducted, India has introduced restrictions on foreigners' access to surrogacy. Australians wanting to access surrogacy in India now require a medical (surrogacy) visa, the conditions of which stipulate that the applicant must have been married for at least two years and be resident in a country in which overseas surrogacy is not illegal. Hence, those excluded from access to this visa include single intended parents, de facto couples and gay men. Such intended parents will be more likely to engage in surrogacy in the US, Thailand or Australia.

Recognition as legal parents

Australian law currently fails to recognise parents using overseas arrangements as the legal parents of their child(ren) through surrogacy, regardless of a biological

connection. This situation, added to the criminal stigma pervasive in some states, may lead some children to view their social parents in a poorer light or, worse, have a tainted view of their own identity. Such outcomes would not be in the best interests of children, despite the intention of Australian legislation to place the best interests of the child as paramount.

Parental disclosure of surrogacy and egg donation

State-based legislation in some jurisdictions that criminalise families using overseas surrogacy makes it more likely that some (particularly heterosexual) families will conceal the nature of their child's origins to both the child and third parties. Such legislation also makes it likely that many children born through surrogacy will later discover that their manner of gestation was conducted outside the law.

It is clear that in many cases donor eggs are required by those using overseas surrogacy. These are mostly acquired from overseas donors who have not agreed to identity release and have often provided only limited medical history. Intended parents will often have only a first name, scant personal details and a picture of their donor to share with their child as they grow up. The vast majority surveyed intended to disclose early to their child that a donor was used.

However, research shows that for heterosexuals parents, intention does not always translate to practice. In a UK study by Jadva, Blake, Casey and Golombok (2012) of 42 heterosexual parents through uncompensated surrogacy followed up intermittently over a ten-year period post-birth, just under half of those using traditional surrogacy had not disclosed the use of the surrogate mother's egg, and thus the child was unaware that the surrogate mother was their genetic mother.

Findings from another study of infertile women planning on using surrogacy to start a family also showed that most women would disclose the use of surrogacy but not the use of gamete donation, suggesting that intended parents find it more difficult to disclose the use of third-party gametes than the use of third-party gestation (van den Akker, 2000).

Conclusions

It is clear that Australians who cannot carry a pregnancy themselves are overwhelmingly choosing to engage in overseas rather than domestic surrogacy arrangements, despite the recent efforts of Australian states to provide legal pathways to parenthood for uncompensated surrogacy arrangements.

Many in this group intend to continue to ignore state-based laws or move interstate in order to create a biological family of their own through surrogacy. These findings, together with the continuing low numbers of intended parents accessing uncompensated surrogacy or foster care arrangements, strongly suggest that Australian adoption, permanent care and legally accessible surrogacy processes are failing to meet the needs of the involuntarily infertile to create or add to their family.

In the interests of both harm minimisation and protecting the interests of children, there is an urgent need to address these issues through a review of relevant policy and legislation. Australia may need to improve access to surrogacy domestically to prevent intended parents being so discouraged by laws and regulations that they circumvent these by engaging with overseas jurisdictions.

Better access to surrogacy within Australia would require far greater availability of appropriately screened and motivated surrogates. For this to occur, the adoption of

models that work well in other jurisdictions would be necessary. Possible initiatives could include:

- a non-government, not-for-profit agency to act as a matching service between surrogates and intended parents;
- appropriate standardised financial compensation for the surrogate mother, managed by a third party, which recognises her time out of the workforce, her labour, physical discomfort and restrictions while pregnant; and
- community education to provide wider understanding of the characteristics needed to be a surrogate mother, to assist in increasing the pool of Australian surrogates.

All children born through surrogacy arrangements should be treated consistently, fairly and be guaranteed the same rights as other children to a prejudice-free life and the protections entailed by legal recognition of their biological parent(s).

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[9]

Secrecy, family relationships and the welfare of children born with the assistance of donor sperm

Developments in research, law and practice

Sarah Wise and Gabor Kovacs

AN INCREASING NUMBER OF babies are being born using donated sperm, where the resulting child is genetically related to the mother but not to the father who raises the child. This chapter discusses a tendency towards secrecy among parents of donor-conceived children, and developments in law and practice designed to ensure children born through donated sperm know how they were conceived and have access to information about their donors and half-siblings. This is couched in what we know about the implications of knowledge and secrecy for family wellbeing and child adjustment. It draws on new research from the Follow-Up of Children Conceived Through Donor Insemination project—a study of 111 Victorian donor-conceived children nested within the Australian Institute of Family Studies' Children and Family Life study.

What is sperm donation?

Sperm donation refers to the use of sperm that has been donated by a third person (donor) to assist an individual or couple in their attempt to become parents. Donor sperm has been used for many decades to achieve pregnancies for couples where the male is infertile or carries a genetic abnormality or hereditary disease. Initially donations were made with fresh sperm (Newton, 1976), and then more extensively with frozen sperm, following the development in 1964 of the technology for freezing and banking sperm using liquid nitrogen (Perloff, Steinberger, & Sherman, 1964).

In 1988 in Victoria, the first legislation in the world to regulate assisted reproductive treatment came into effect. Reliable and central donor conception records have resulted in a more or less accurate count of children conceived with donated sperm since that time. The records show that 3,855 Victorian children were conceived with donated sperm between 1988 and 2011 (Victorian Law Reform Committee, 2012). Many thousands more children would have been conceived using donor sperm across the rest of Australia.

Secrecy, the law and practice in donor conception

Current disclosure practice and legislation

Over the past four decades or so, legislation and donor conception practices in Australia have evolved significantly to encourage greater knowledge and openness. In the past, donor insemination was based on the principle of anonymity. Nowadays, there is a strong move among service providers towards advising disclosure. Practices and ethical standards have been developed by the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (2010) and the National Health and Medical Resource Council (2007) to help prospective recipients understand the significant biological connection that their children will have with the sperm donor. Service providers are encouraged to advise recipients that their children are entitled to knowledge of their biological parents and half-siblings, and that recipients should tell their children about their origins.

Laws also exist in some states (Victoria, NSW and Western Australia) to uphold the right of children born through donated sperm to access information about their biological parents and half-siblings. The main points are that donors must give explicit written consent to providing identifying information to any offspring from his donation once they reach 18 years of age. Identifying information about the donor of the sperm will be placed on a central registry and once the child is 18 years of age, he or she will have access to this information.

However, despite practices and legislation that encourage openness, there are no laws currently in existence that compel parents to tell donor-conceived children about their origins. This is critical, because unlike adoption, where it is more difficult or sometimes impossible to hide the fact that a child was adopted, keeping donor insemination secret is quite easy. It is also important because the majority of couples who conceive using donor sperm do not disclose this fact to their children.

Secrecy within donor conception families

Studies conducted in Australia and overseas suggest that the majority of donor-conceived children remain unaware that the person they know as their father is not their biological parent. In Readings and colleagues' study of 36 donor insemination families recruited from the United Kingdom, most parents had maintained secrecy about their child's origins when the child was aged seven years (Readings, Blake, Casey, Jadva, & Golombok, 2011). In a representative sample of more than 100 donor insemination families in Spain, Italy, The Netherlands and the United Kingdom, not one set of parents had disclosed the donor conception to their child by early school age and only 9% of parents had done so by early adolescence (Golombok et al., 2011). High levels of secrecy were also reported in a study from the United States, conducted in both 1980 and 1996, where approximately 80% of over 134 and 110 couples surveyed respectively decided not to inform their children about the nature of their conception (van Berkel, van der Veen, Kimmel, & te Velde, 1999). Similar findings were reported by Brewaeys (1996) in a review of 23 studies, all of which found that the vast majority of parents had not informed the child.

A trend towards secrecy has also been found in Australia. A report from Sydney showed that only 22 out of 420 (5%) donor-conceived children had been told of their origin (Durna, Bebe, Steigrad, Laeder, & Garrett, 1997). In the Follow-Up of Children Conceived Through Donor Insemination study, only 39 of 111 (35%) successful couples

at the Reproductive Medicine Clinic of Prince Henry's Institute of Medical Research between 1989 and 1999 had told their child about the use of donor sperm when the child was between 5 and 13 years of age (Kovacs, Wise, & Finch, 2012).

What is surprising is that parents' behaviours have changed little over the twenty or so years during which this body of research has been conducted, despite the embedding of more enlightened principles in law and practice. There are grounds to believe that parental decisions not to disclose the donor conception relates to the imbalance between parents in biological relatedness to the child and a fear that disclosure would disrupt the child's relationship with the non-biological parent (Cook, Golombok, Bish, & Murray, 1995).

Proposed legislative change to uphold the rights of donor-conceived people

Concern about the secrecy that surrounds families created through sperm donation has prompted consideration of legislative change to give children the right to know if they were conceived using donor gametes and to have access to information about their donors.

The State Parliament in New South Wales Legislative Committee on Law and Safety (2012), for example, is considering whether there should be provision for the Registrar of Births, Deaths and Marriages to include donor details on the register of births. Currently, a donor-conceived person's birth certificate does not tell them about their biological parent. Use of birth certificates for identification purposes takes into account issues of privacy to ensure that donor-conceived children are not stigmatised by being treated differently to other children.

In Victoria, the Law Reform Committee has recommended that the Victorian Government introduce retrospective legislation to allow all donor-conceived people to obtain identifying information about their donors. Currently, children born through sperm donations are given different levels of access to information about their heritage. Those born after 1988 can obtain identifying information about their biological fathers; those born before 1988 cannot, as the previous legislation protected donors' identities (Victorian Law Reform Committee, 2012). The committee has also recommended that non-identifying information about half-siblings (including the number of donor-conceived siblings, sex and the year and month of birth) be made available so donor-conceived people can be assured that they are not forming a relationship with someone to whom they are biologically related.

In both examples, the proposed legislative changes stop short of saying parents should be legally obliged to tell their children, but such measures would encourage parents to discuss the topic with their children before they unexpectedly discover their biological origins.

Family relationships and child welfare in donor insemination families

The push for greater knowledge, openness and access to identifying information is based on the idea that this contributes to the welfare of donor-conceived people. The welfare of donor offspring is considered to outweigh the interests of donors and parents, who may not want information shared with others.

Parallels have been drawn to the experience of adopted children, who clearly benefit from having open communication with their parents about their adoption and information about their biological parents (Brodzinsky, 2006; Grotevant, 2007; Palacios & Brodzinsky, 2010). Like open adoptions (Howe & Feast, 2000; Wrobel & Dillon, 2009), young donor-conceived children tend to show curiosity about their unknown donor and a desire to discover more about him (Rumball & Adair, 1999; Vanfraussen, Ponjaert-Kristoffersen, & Brewaeys, 2001). Adolescents who have known about their donor conception since childhood also wish to find out more about their donor, with many believing that this would help them acquire a more complete sense of identity (Jadva, Freeman, Kramer, & Golombok, 2009; Scheib, Riordan, & Rubin, 2005).

In turn, donor-conceived children are known to experience confusion and distress if access to information about donors is withheld (McNair, 2004; Victorian Law Reform Commission, 2012). Those who discover their donor conception later in life—particularly those who find out by accident or under adverse circumstances, such as during parental divorce or a health crisis requiring genetic information or donation—are also apt to respond negatively (Jadva et. al., 2009; Turner & Coyle, 2000).

Yet, as discussed above, very few donor-conceived individuals have been told about their genetic origins. While parents operate on the theory that “what they don’t know won’t hurt them”, counsellors and psychologists who advocate that families should be honest with their children suggest that secrecy can interfere with relationship dynamics, jeopardise communication between family members and lead to child psychological problems (Daniels & Taylor, 1993; Schaffer & Diamond, 1993). Clamar (1989), for example, has suggested that keeping the circumstances of conception secret separates those who know the secret (the parents) from those who do not (the children), resulting in a distancing of some members of the family from the others.

Interestingly, the available research does not support the theory that family relationships and children’s welfare is compromised when donor-conceived children are unaware of their origins. Indeed, the published empirical studies involving donor conception families (most of whom have not disclosed) suggest that the majority of fathers had good relationships with their children and felt secure in their parental role, marital satisfaction was high and, on average, child adjustment was normal (Brewaeys, 2001). In Owen and Golombok’s (2009) study comparing 26 donor insemination families with 26 in-vitro fertilisation (IVF) families, 238 adoptive families and 63 natural conception families close to the donor-conceived children’s 18th birthday, warmth in the mother–adolescent relationship was significantly higher in donor insemination families than the other families. Only two of the donor-conceived children were aware of their donor conception.

The Follow-Up of Children Conceived Through Donor Insemination study involved 111 donor conception families when the children were 5–13 years of age, and a very large control group of children in natural conception families (310 single-mother, 693 couple-parent, and 92 step-father families). The study used in-depth measures of family functioning with known psychometric properties (Wise, 2003; Wise & Edwards, 2004).

The functioning of these families and the development of the children were measured across 15 family and child wellbeing variables. In all of the family wellbeing and parenting outcomes considered, there was not one result where the donor conception families showed poorer functioning on average than the comparison groups. The findings of this study showed that the donor conception families were not substantially different on average from other family types in terms of family wellbeing nor in the

development of the children (Kovacs et al., 2012). However, donor conception families showed a higher level of functioning than step-families. Fathers in donor conception families also reported a better quality relationship with their spouse on the dimensions of conflict and positive relationships compared to step-fathers. Interestingly, fathers in donor conception families also reported higher involvement and nurturance in relation to their parenting of children conceived through use of donor sperm compared to step-fathers and their step-children. Mothers in donor conception families also reported a more positive relationship with their children than single mothers did with theirs.

There has only been one previous study (Nachtingall, Tschann, Quiroga, Pitcher, & Becker, 1997) that has compared family functioning between donor-conceived children who have and haven't been told of their origins. This study examined 94 donor conception families with adolescent donor sperm children, using a variety of standardised questionnaires regarding parental attitudes, parental involvement, marital satisfaction and marital intimacy. Findings revealed no difference between children who had and hadn't been told. In the Follow-Up of Children Conceived Through Donor Insemination study, disclosure status was known for 62 of the donor insemination families (29 families where the children had been told and 33 families where the method of conception was still a secret). These families were compared on 15 family and child wellbeing outcomes to estimate mean differences according to knowledge of conception. Mean differences between the two groups were generally very small, not statistically significant and not clinically meaningful; adjustment for covariates did not make a substantive change to the interpretation of group differences. However, further research is necessary to unpack important questions relating to the consequence of discovery (either intentional or accidental) on family relationships at different stages in development.

Conclusions

When donor sperm was first used to achieve pregnancies, donors remained anonymous and very few parents chose to tell. Developments in Australian laws and practice have given or plan to give people conceived with the assistance of donor sperm greater access to information about donors. While knowledge of half-siblings and equality of access to information for people who were conceived before the mandatory provision of identifying information is undecided, nowadays sperm donors understand that there may be future contact with the individuals conceived from their donation and may consent to the release of identifying information in order to facilitate such future contact. The laws and regulations that are in existence today intend to support greater honesty and openness within families in order to mitigate the unhappiness and distress that accompanies truly anonymous sperm donation.

There is a view that existing legislation and practice do not go far enough to uphold a person's right to know that they were conceived using donor sperm, and that families should be compelled to tell. Under national guidelines, medical practitioners are encouraged to advise recipients to tell their children about their origins, but the reality is that the majority of parents still do not disclose the fact that the father who has raised the child is not the biological parent. Certainly, if details are recorded on birth certificates more parents are likely to tell the child before the existence of a biological parent is discovered in an unexpected and potentially damaging way.

Research helps with understanding why parents are reluctant to tell their children and is instructive in learning how to encourage a more open approach. While the number of empirical studies are small, they indicate that—contrary to the views of

family therapists, counsellors and psychologists—family relationships and, in turn, the adjustment of donor-conceived children, do not appear to be compromised when secrecy is maintained. When family functioning is positive, the fear that disclosure could disrupt relationship dynamics—particularly with fathers—is likely to be very real.

While information and counselling is provided to prospective parents before treatment proceeds on the importance of openness for the future welfare of the conceived child, support could also be offered at the same time that parents are encouraged to start conversations about sperm donation with small children. Through forums, workshops and individual counselling, parents would get information and advice on all the issues around telling children about their conception, and receive practical help with issues such as timing and language and how to manage any adverse reactions. A family support approach would help build healthy family relationships based on honesty and trust, and provide confidence and security for adolescents and young adults who wish to have contact with their donor.

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Gay and lesbian parenting The legislative response

Adiva Sifris

SAME-SEX PARENTING HAS BECOME a recognised phenomenon within our community. While perceptions of stigmatisation within the gay and lesbian community and lack of funded research ensure that there remains a paucity of information regarding the number of children raised in these families, the most recent Australian Census data indicate that 12% of same-sex couples have children of any age (including adults) living in their family. Unsurprisingly, lesbian couples (22%) are more likely than gay male couples (3%) to have children living with them (Australian Bureau of Statistics [ABS], 2012).

The latest Census data confirm the findings of previous informal and formal surveys, which have gone some way towards indicating that these families represent a sizeable minority group. A 2001 Victorian community survey indicated that 21% of those surveyed reported that children were part of the relationship, with a further 41% expressing a desire for children in the future (Victorian Gay and Lesbian Rights Lobby, 2001). A 2005 study found that 19% of respondents had children, and a further 21% were planning to have children (McNair & Thomacos, 2005). The 2006 Australian Census figures indicated that 10% of same-sex families had dependent children living primarily with them. A much greater proportion (88%) of these children lived with lesbian couples, and 18% of lesbian couples had resident children, compared with 2% of male couples (Gorman-Murray, personal communication, 2010). The first decade of the 21st century witnessed the passing of legislation throughout Australia recognising same-sex families. These changes heralded the legal and social sanctioning of family structures falling outside the hetero-normative family unit.

The central theme of this chapter is the law's response to the social reality that gay and lesbian couples are having children and raising families. This chapter commences with a description of the constitutional and jurisdictional backdrop against which legislation in relation to same-sex parenting is passed and considered (see also Box 1 on page 90). The reader is then introduced to the important but distinct concepts of "parentage" and "parenting orders" and their relevance to the world of gay and lesbian

parenting. At the nub of this chapter lie the various pathways that gay and lesbian couples may follow to achieve parentage. These options are discussed, as is the law governing these processes and their consequences. The author concludes that while over the past decade there have been significant advances in the legal recognition of diverse family forms, gaps remain in the law. Furthermore, same-sex families present in more diverse forms than the accepted two-parent model and thus further legislative intervention is required.

Box 1: Legislative terminology

Biology dictates that semen from a man and the ovum of a woman are required to conceive a child. Thus gay and lesbian couples are obliged to use donor gametes in order to conceive children. Legislation has been passed on federal as well as state and territory levels regulating the legal parentage of children where donor gametes are used. There is, however, no uniformity in the terminology contained in the various statutes to describe procedures whereby a woman can become pregnant without having sexual intercourse with a man. Such procedures, which may generically be referred to as assisted reproductive technology (ART) or assisted conception procedures, include:

- *donor insemination*—introducing semen from either a known or unknown donor into a woman's body by means other than sexual intercourse; and
- *in vitro fertilisation (IVF)*—taking a female ovum from a woman's body, fertilising it outside her body, and implanting it either in her own body or that of another woman (Young, Monahan, Sifris, & Carroll, 2013).

The practice of IVF has opened up a whole range of possible genetic combinations for both same-sex and opposite-sex couples. For example, a woman's ovum may be fertilised by her partner's semen or the semen from a donor, or both the ovum and the semen may be from donors. For the sake of clarity, throughout this chapter the term “assisted conception procedures” is used to describe donor insemination and IVF procedures.

The constitutional and jurisdictional framework

The law relating to same-sex parenting is complex and diverse. In Australia, legislative power is divided between the Commonwealth and state governments. The Commonwealth Government is primarily entitled to legislate in respect of specific topics set out in sections 51 and 52 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution). Residual powers that are not expressly or impliedly vested in the Commonwealth remain within the exclusive legislative domain of the states. Section 109 of the Constitution provides that in the event of inconsistency between state and Commonwealth legislation, the Commonwealth legislation shall prevail and the state legislation is invalid to the extent of the inconsistency. So far as the ACT and Northern Territory are concerned, pursuant to s122 of the Constitution, the Commonwealth Parliament is empowered to “make laws for the government of any territory”. As a result, the Commonwealth Parliament may override laws passed by the territories. In some areas of family law—for example, adoption, access to assisted conception procedures and surrogacy arrangements—the states retain legislative power. In other areas, such as with whom a child should live on relationship breakdown, the legislative power rests with the

Commonwealth. In effect, this means that each state, territory and the Commonwealth may pass legislation relating to areas that straddle both legislative spheres. For example, legislation relating to the parentage of children born as a result of assisted conception procedures exists on a Commonwealth as well as a state and territory level, creating a complex web of legislation. In order to establish a modicum of uniformity between the jurisdictions, provisions in the Family Law Regulations 1984 (Cth) create a link between the state and federal *Family Law Act 1975* (Cth) (FLA).

The state and territory courts administer state and territory legislation. The federal family courts, which include the Family Court of Australia and the newly named Federal Circuit Court of Australia, are responsible for orders made pursuant to the FLA. These include applications for parenting orders and declarations of parentage. At the time of the establishment of the Family Court of Australia, Western Australia alone established a state family court. The *Family Law Act 1997* (WA) mirrors the FLA. As this court is vested with both state and federal jurisdiction, it does not labour under the same constitutional difficulties as the Family Court of Australia.

Legal parentage and parenting orders

Two facets of scientific development have had a major influence on the law of parentage: assisted reproductive technology and genetic testing. The birth of children through assisted conception procedures has brought into sharp focus the question of who is to be regarded as the legal parent of a child. The very nature of these procedures means that parentage may be fragmented between biological and functional/social parents. Scientific developments are capable of piercing the fictional bubble of functional parenthood and accurately pinpointing biological parentage. The law has reacted to these scientific advancements such that biological parents may not be regarded as legal parents and, conversely, legal parents may have no biological connection to the child.

In circumstances where the law fails to recognise a person as a legal parent, it may nevertheless be possible for the Family Courts to make a parenting order in favour of such a person (s64C of the FLA). The basis for making such an order is that the applicant is a “person concerned with the care, welfare or development of the child” (s65C(c) of the FLA).

Parenting orders may include orders for parental responsibility; that is, long-term decisions regarding the welfare of the child, such as the name a child will be called, the school a child will attend, as well as any important medical decisions regarding the child. Such orders also include where and with whom a child will live and with whom a child will spend time (s64B of the FLA). While the parameters of parenting orders are extensive, they are not as far-reaching as legal parentage—they terminate when the child turns 18 and do not grant parental status as such.

Pathways to parenting and legislative responses

Adoption and heterosexual intercourse are the obvious ways for same-sex couples to form families. Slightly less obvious, but nevertheless centuries old, is assisted conception using donor insemination, a relatively simple procedure requiring little medical or technological knowledge, in which parties may either self-inseminate or use clinical insemination. The relatively recent advent of highly technical assisted conception procedures such as IVF, which also enable children to be conceived through surrogacy arrangements, have presented other viable options for achieving parentage, especially for gay male couples.

Adoption and foster care

In 2012–13 in Australia, a mere 339 adoptions were finalised (Australian Institute of Health and Welfare [AIHW], 2013). Accordingly, the number of same-sex couples adopting children in Australia is negligible. Two reasons may be advanced for the drastic decrease in the number of adoptions in Australia—fewer children are available for adoption, and the advent of assisted conception has decreased the number of childless couples.

For same-sex couples, there are other, more obvious reasons for the low numbers of same-sex couples adopting children. No country with which Australia has intercountry agreements facilitating international adoptions allows same-sex couples to apply (AIHW, 2013). Furthermore, same-sex couples are not eligible to adopt children in all jurisdictions in Australia. The Australian Capital Territory (*Adoption Act 1993*, s 14), New South Wales (*Adoption Act 2000*, ss 23, 28), Tasmania (*Adoption Act 1988*, s 20) and Western Australia (*Adoption Act 1994*, s 39) have legislated so that same-sex couples are eligible to adopt. In all other states, same-sex couples are ineligible to adopt children.

Throughout Australia, single persons are eligible to adopt children, and same-sex couples are eligible to apply to become foster parents. The nonsensical nature of the legislation in jurisdictions where same-sex couples are ineligible to adopt children has been demonstrated in the Victorian decision of *AB v Victorian Equal Opportunity and Human Rights Commission and Department of Human Services* (2010). A same-sex couple had been fostering an 11-year-old boy for some years. As the couple was ineligible to adopt the child as a couple, they decided that one of the couple would apply to adopt him as a single person. The court found that, notwithstanding the couples' ineligibility to adopt, an order could be made for one of the parties to adopt the child as an individual. The desired result was only achieved through a loophole in the Victorian adoption legislation—the fact that the legislation uses the wording “one person” rather than “single person” (Sifris & Gerber, 2011). The outcome in this case demonstrates the problematic nature of the legislation prohibiting same-sex couples from adopting. Nevertheless, given the small number of children available for adoption, and as same-sex adoption is not legal throughout Australia, such couples must look towards other options to achieve legal parentage.

Heterosexual intercourse

One of the ways for same-sex couples to conceive children is, in the words of Kay J in *ND v BM* (2003: [5]), in the “usual and customary manner”, through heterosexual intercourse. Children in same-sex families conceived through heterosexual intercourse fall into two categories. The first is analogous to the heterosexual blended or step-family unit. This occurs when, on the breakdown of a heterosexual relationship, one of the parties enters into a same-sex relationship and the children reside within that household. The second is where same-sex couples elect to use intercourse as a practical means of achieving conception.

When a child is conceived through sexual intercourse, the law does not examine the intentions of the parties as to the status of the donor; the biological position prevails (*ND v BM* (2003)). Inevitably, DNA testing will verify that the male who provided the semen is the biological father and the birth mother is the mother of the child. This, then, will be their status at law; the co-parent in a lesbian relationship will not be legally recognised. The birth mother and the male participant will attract all the rights and obligations of legal parentage, including the fiscal responsibilities that this status brings. This will be the case notwithstanding that an agreement may have been reached between the

parties to the contrary, whereby the male participant is to be regarded as no more than a biological progenitor with no rights or obligations towards the child. Thus, as incongruous as it seems, the mode of conception rather than the intention of the parties determines the legal parentage of the child (Sifris, 2005).

Assisted conception procedures

Legislation relating to assisted conception procedures

To date, four states have introduced legislation regulating access to assisted conception procedures:

- The New South Wales *Assisted Reproductive Technology Act 2007* permits all women, regardless of marital status, to access assisted conception procedures.
- In South Australia, the *Assisted Reproductive Treatment Act 1988* s9(1)(c) only permits women to access assisted conception procedures if they “appear to be infertile”. Consequently, single women and lesbian couples who are not medically infertile are excluded.
- In Victoria, the *Assisted Reproductive Treatment Act 2008* allows single women and lesbian couples to access assisted conception procedures.
- In Western Australia, the *Human Reproductive Technology Act 1991* allows all women, irrespective of sexuality or marital status, to access donor insemination; however, only women “who are unable to conceive a child due to medical reasons” may access IVF. In addition, if a woman wishes to be treated as part of a couple, then that couple must be heterosexual (s23).

Self-regulation, accreditation with the Fertility Society of Australia and compliance with the National Health and Medical Research Council’s *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007) govern access to assisted conception procedures in other jurisdictions.

Recognition of parentage when using assisted conception procedures

The use of donor insemination harks back to the 1700s and it is the most basic and technologically simple form of assisted conception procedure. However, the advent of highly technological assisted conception procedures, in particular IVF, highlighted the inability of the common law to recognise functional as opposed to biological parentage. Commencing in the 1980s, legislation was introduced at the federal, state and territory levels that recognised non-biological parents in *heterosexual* couples as the legal parents of children born as a result of assisted conception procedures, at the expense of the donors of the gametes.

Recognising non-birth mothers in lesbian relationships

Following persistent calls to provide equality for same-sex couples, and commencing with the territories and Western Australia in the early 2000s, all states and territories throughout Australia have passed legislation recognising non-birth mothers in lesbian relationships as the legal parents of children conceived during the course of the relationship. The relevant Acts in each jurisdiction are:

- *Parentage Act 2004* (ACT) s 11(4);
- *Status of Children Act 1996* (NSW) s 14(1A);
- *Status of Children Act 1979* (NT) s 5DA;
- *Status of Children Act 1978* (Qld) ss 19B-19E;

- *Family Relationships Act 1975* (SA) s10C(3);
- *Status of Children Act 1974* (Tas.) s10C;
- *Status of Children Act 1974* (Vic.) ss 13 and 14; and
- *Artificial Conception Act 1985* (WA) s6A.

In this way, a female de facto partner of a woman who consents to an assisted conception procedure is deemed under state and territory laws to be the parent of the resultant child. The logical corollary of recognising the social parent as a legal parent is that pursuant to state and territory legislation, the donor of sperm is regarded as having no legal status in respect of the child. Thus, in *AA v Registrar of Births, Deaths and Marriages and BB* (2011) the District Court of New South Wales ordered that the name of the donor be removed from the birth certificate and replaced with that of the former female partner of the biological mother.

The federal Family Law Act

In 2008, s60H(1) of the federal *Family Law Act 1975* was amended to recognise both members of a lesbian couple as the parents of a child born as result of an assisted conception procedure. The section applies where at the time of conception the parties were living in a de facto relationship (heterosexual couples may be married). In addition, either both parties in the couple must consent to the procedure or the non-biological mother must be recognised as a parent under state or territory legislation (s60H(1) (b) FLA, and Family Law Regulations 1984: reg 12C). One of the main issues currently confronting the Family Courts is the determination of whether the parties were in a genuine de facto relationship at the time of conception (*Keaton v Aldridge* 2009).

The scope of s60H is limited to a child having two parents and thus does not cover situations where parties may agree that the child has three or even four parents. Judicial debate has emerged as to whether s60H(1) expands the meaning of the word “parent” for the purposes of the FLA to include the donor of semen (*Brown J Re Mark* 2004) or whether it is an exhaustive definition of a parent and thus cannot include a donor of semen, notwithstanding the parties’ intentions to the contrary (*Guest J Re Patrick* 2002). This issue remains unresolved but the expanded interpretation of s60H has recently received further approval (*Cronin J Groth v Banks* 2013).

A similar scenario may arise where a lesbian couple and a gay male couple choose to co-parent their child. In *Wilson v Roberts* (2010) a lesbian couple elected to conceive a child using semen from a known donor who was also in a same-sex relationship. A dispute arose as to the level of involvement of the men in the child’s life. The men claimed that there was an agreement that they would have a significant role in the child’s life, which the woman denied. Justice Dessau of the Family Court of Australia decided that in accordance with s60H(1) of the FLA, the two women were the parents of the child, while neither of the men was considered a parent. However, parenting orders were made for the men to spend specified time with the child. These unresolved arguments relating to the status of a known donor have spilled over into the area of surrogacy arrangements, making an already complex area of the law more complicated.

Surrogacy

“Surrogacy involves an arrangement whereby a woman (the surrogate mother) agrees with a couple or a single person (commonly referred to as a ‘commissioning’ couple/person or ‘intended parent(s)’) to carry a child and then to surrender the child to the couple/person on the child’s birth” (Young et al., 2013, para. 7.28). Under these arrangements

the birth mother may be paid (commercial surrogacy) or not paid (altruistic surrogacy). Ethical debates concerning the regulation of surrogacy arrangements continue to rage but are beyond the scope of this chapter.

Surrogacy arrangements have added to the diversity in family structures and created unique problems for the courts. A surrogate mother may wish to remain a significant part of a child's life, just as may those who have donated semen or ova. The limited opportunities for couples to utilise altruistic surrogacy arrangements means that many couples—both heterosexual and same-sex—seek the services of commercial surrogates to achieve parentage. Informal surveys indicate that Australian couples are increasingly crossing borders and turning to international surrogates to fulfil their dreams of raising a family (Whitelaw, 2012). Given the biological necessity of having female gametes to conceive a child and a female body to gestate a child, surrogacy arrangements represent a particularly attractive and viable option for gay male couples to achieve parentage.

The legal status of surrogacy arrangements

All jurisdictions with the exception of the Northern Territory (where surrogacy arrangements are not legislatively regulated but are indirectly regulated by the National Health and Medical Research Council's (2007) ethical guidelines) have passed legislation allowing parties to enter into altruistic surrogacy arrangements. However, these agreements are unenforceable. Consequently, a birth mother is not obligated to surrender her child.

Central to all these legislative schemes is the ability to sever the legal relationship between the surrogate and the child. As such, pursuant to the various state legislative schemes, the state courts may make orders transferring legal parentage from the surrogate mother (and her married or de facto partner if she has one) to the commissioning parent(s).

Given the scarcity of altruistic surrogacy arrangements, it is unsurprising that there have not been a deluge of parentage applications coming before the courts. However, in 2010 the Queensland District Court made a parentage order in favour of a gay male couple (*BLH and HM v SJW and MW* 2010). Moreover, in 2012 when making orders in the New South Wales Supreme Court transferring parentage from a surrogate to a gay male couple, Brereton J commented, "this is the first application under the Act of which I am aware in which the intended parents are a same sex couple" (*Application of MM and KF re FM* 2012: [1]).¹ Thus, gay male couples are joining the ranks of couples becoming legal parents through the use of altruistic surrogacy arrangements.

Existing state legislative provisions

The existing legislation in the states and territories is:

- *Parentage Act 2004* (ACT);
- *Surrogacy Act 2010* (NSW);
- *Surrogacy Act 2010* (Qld);
- *Family Relationships Act 1975* (SA), *Births Deaths and Marriages Registration Act 1996* (SA) and *Assisted Reproductive Treatment Act 1988* (SA), all of which were amended by the *Statutes Amendment (Surrogacy) Act 2009* (SA);
- *Surrogacy Act 2012* (Tas.);

¹ In both these cases, the surrogacy arrangements had been entered into before altruistic surrogacy became legal in Queensland and New South Wales.

- *Assisted Reproductive Treatment Act 2008* (Vic.) and *Status of Children Act 1974* (Vic.); and
- *Surrogacy Act 2008* (WA).

In all Australian jurisdictions, commercial surrogacy is prohibited. In three jurisdictions (the ACT *Parentage Act 2004* s45; NSW *Surrogacy Act 2010* s11; and Queensland *Surrogacy Act 2010* s54), extraterritorial prohibitions are placed on commercial surrogacy arrangements, making entering into an overseas commercial surrogacy agreement an offence.

There are significant differences between the various state and territory legislative regimes, each with their own frustrations and quirks (Millbank, 2011). The eligibility criteria of the commissioning parents are reflective of these inconsistencies and, depending on the legislation, must be:

- a couple rather than an individual in the ACT (*Parentage Act 2004* s24(c)) and South Australia (*Family Relationships Act 1975* s10HA(2)(a)ii);
- married or in a heterosexual de facto relationship for not less than three years in South Australia (*Family Relationships Act 1975* s10HA(2)(b)iii); and
- not be a male individual or couple in Western Australia (*Surrogacy Act 2008* s19(1)(b)(2)).

Surrogacy arrangements and the Family Law Act

In 2008, s60HB was inserted into the FLA to provide that where a state or territory court makes an order transferring parentage from the surrogate to the commissioning parent(s), then for the purposes of the FLA the child is a child of those persons. The conventional interpretation of this legislation has been that as it expressly refers to state and territory legislation, it is limited to altruistic surrogacy arrangements entered into in Australia. It does not apply to international commercial surrogacy arrangements. Whether it applies to altruistic overseas surrogacy arrangements depends, it would seem, on whether a declaration of parentage has been made in the overseas jurisdiction where the arrangements were concluded and whether that country is considered a prescribed overseas jurisdiction pursuant to the Family Law Regulations 1984 (Cth) (*Carlton and Bissett and Another* 2013: 23). In those instances where the Family Courts do not recognise these arrangements, such children may be left in legal limbo and the functional parents must apply to the Family Courts for parenting orders (ss61D, 65C(c) and 61DA FLA) (Keyes, 2012).

Conundrum for the family courts

Despite the extensive new legislation introduced, different approaches have emerged in the Family Courts in the interpretation of the legislation and its application to international commercial surrogacy arrangements, as exemplified in the cases of *Dudley v Chedi* (2011) and *Dennis v Pradchaphet* (2011). These cases involved the same heterosexual Queensland couple who, through international surrogacy arrangements, had three children born on the same day to two different mothers. The three children were conceived using Mr D.'s semen and ova from an anonymous donor.² The commissioning couple brought two separate applications for parenting orders.

In *Dennis v Pradchaphet*, Stevenson J held that the biological parent Mr D. was a parent of the child under the FLA. However, in *Dudley v Chedi*, Watts J declined to

2 "Mr D." is used to signify both Mr Dudley and Mr Dennis, as they are the same person.

make such a declaration. According to his Honour, s60HB would not be enlivened in circumstances where the parties had entered into an illegal surrogacy arrangement.³ However, Watts J went further and referred the papers to the Director of Public Prosecutions for the consideration of the prosecution of the applicants.

The debate surrounding the parameters of the FLA and the scope of the provisions relating to parentage have further intensified. Recently, in *Gough v Kaur* (2012), a heterosexual couple entered into a commercial surrogacy arrangement in Thailand. Notwithstanding that DNA testing indicated that the applicant husband was the biological father of the child, MacMillan J was of the opinion (relying on s 60H(1) of the FLA) that he could not be regarded as a parent under the FLA. However, in *Ellison v Karnchanit* (2012), Ryan J adopted a different approach. Her Honour concluded that where parties had entered into an international surrogacy arrangement and the surrogate was single, the provisions in the FLA relating to the parentage of children born as a result of assisted conception procedures (s60H) as well as those specifically designed for children born under surrogacy arrangements (s60HB) do not apply. However, relying on the interests of the child, Ryan J made an order declaring the applicant biological father the parent of the child (s69VA) (see also *Carlton and Bissett and Another* [2013] in relation to international altruistic surrogacy arrangements). This divergence of opinion was noted by Phipps FM, who commented, “If I was to proceed with this case, I would be faced with conflicting decisions by Family Court of Australia judges” (*Schone and Schone and Anor*, 2012: [6]).

Crisford J of the Family Court of Western Australia approved Ryan J’s decision in *Ellison*. This case concerned a successful application for a proposed step-parent adoption order by a non-birth father of a pair of twins born as a result of an international surrogacy arrangement. The non-birth father in a same-sex relationship intended to apply in his capacity as a step-parent to adopt the children. In order for the non-birth father to be considered a step-parent, the biological father would have to be considered as a legal parent (*Blake and Anor* 2013). Ryan J has since recanted from her position in *Ellison v Karnchanit*, recognising the relevance of state law and the FLA in determining the parentage of children born under international surrogacy arrangements (*Mason and Mason and Anor* 2013).

In response to these issues in the Family Courts, in June 2012 the then Commonwealth Attorney-General charged the Family Law Council with examining the legal issues surrounding family formation and surrogacy in the FLA. Hopefully this report will place surrogacy arrangements firmly on the legislative agenda and meaningful legislative change will follow. Central to the legislative and jurisprudential quagmire that has emerged in this area is the lack of uniformity between the state legislative systems and their interaction with the federal legislation. Clearly, the ultimate solution is for the states to refer power to the Commonwealth to legislate in this area. If this is not possible, then at the very least a two-pronged approach needs to be adopted:

- uniform legislation must be passed by all states and territories; and
- the parameters of the federal legislation regarding the legal recognition of the donor as a parent of a child conceived through assisted conception procedures, including surrogacy arrangements, must be clarified.

The globalisation of the modern surrogacy industry means “the law must make a choice: should it enforce public policy to discourage others, or should it relax the rules to

3 At the time the applications were brought, all surrogacy arrangements were illegal in Queensland.

prioritise the welfare of children born unknowingly into such a minefield” (Gamble, 2012, p. 28). In Australia this remains to be determined.

Conclusion

Same-sex families are not homogenous and may present in a number of non-traditional family types, including a single-parent family; a duplex model, comprising two mothers or two fathers; and a tripartite model, which may include two mothers and a donor, or two fathers and a donor/gestational mother. Lesbian and gay male couples may also elect to “poly-parent” so that a child may have two mothers and two fathers (Zanghellini, 2009, p. 151). In all instances, due to biological necessity, a donor of either ova or semen must be used. The donor may be involved with these families to varying degrees, ranging from being a biological progenitor, uninvolved donor, or uncle/aunt, to a fully fledged father or mother. Advances in assisted conception procedures have turned the impossible into reality—same-sex couples are becoming parents, and biological and social parenting is being fragmented in numerous ways.

This chapter has demonstrated that over the past decade Australian society has witnessed a major shift in family law. It has moved from a legal system based on a heterosexual paradigm, to one that to a large extent incorporates and recognises same-sex couples and their children. While these changes are laudable, the task is incomplete and there remains much to be done. The Australian family law system remains mired in a two-parent model of legal parentage, a paradigm that does not always reflect the reality and diversity of same-sex families.

To this end, three-parent and four-parent families must be brought under the protective umbrella of the law. To better safeguard children’s interests, legislation must not only extend to the recognition of diverse family forms, but also encompass the capacity and flexibility to regulate and accommodate these complex relationships on breakdown. As we move through the second decade of the 21st century, embracing diverse family forms that go beyond the two-parent model is one of the most significant challenges confronting Australian family law, but one that needs to be faced.

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[11]

Step-parenting

Claire Cartwright

MANY AUSTRALIAN CHILDREN SPEND part of their childhood living in a step-family and many will grow up to be the step-parents of tomorrow. According to the Australian Bureau of Statistics [ABS] (2007), approximately one in ten couple families contain resident step-children. In Wave 3 of the Household, Income and Labour Dynamics in Australia (HILDA) survey, 13% of households had either residential or non-residential step-children, or both (Qu & Weston, 2005). Early research, both in Australia and overseas, has found that children often experience difficulty adjusting to the changes associated with their parents' repartnering, especially in regard to developing a relationship with a parent's new partner, the step-parent. This chapter focuses on the role of the step-parent and presents an overview of research and clinical literature that informs our understanding of the role and experiences of being or having a step-parent.

Step-family terminology

A number of different terms have been used to describe step-families, including repartnered families, remarried families, and blended families. A number of terms are also used to describe different step-family types. "Simple step-families" refers to families in which only one of the adults has children from a previous partnership. "Complex step-families" refers to families in which both adults have children from previous partnerships. "Step-father families" are simple step-families with a mother, her children, and her partner. Similarly, "step-mother families" are simple step-families with a father, his children, and his partner.

Step-families can be cohabiting or remarried. Children of either parent may be living in the household, all or part of the time. In complex step-families, children have step-siblings. Some repartnered couples, also referred to as step-couples, go on to have a "mutual" child of their own (referred to in the Australian Census as "blended" families; ABS, 2003). The children in these families then gain a half-brother or half-sister. Hence, while there is evidence that the "step-" terms have some negative connotations, they

allow us to talk about step-family relationships and provide step-family members with names for their step-relationships.

Structural differences of step-families

While established step-families can look very much like non-divorced families from an external perspective, step-families are different in essential ways and these differences underlie many of the challenges that step-families face. Papernow (2006), an American step-family therapist, talks about “step-family architecture” and argues that it is this “architecture” or structure of the step-family system that creates challenges for adults and children.

Unlike non-divorced families, in which babies are born into an established couple’s relationship, the majority of step-families are formed after parental divorce, the death of a parent, or the marriage of a single parent who has raised a child alone (Pryor & Rodgers, 2001). Hence, prior to step-family formation, children have already gone through one major family transition and the stresses associated with that. The transition from a sole-parent family to a step-family then involves a re-organisation of family roles and rules, and the development of new step-relationships (Hetherington, 1999; Papernow, 2006).

Step-family therapists observe that step-parents enter the family as an outsider. The bond between children and parents is well developed, but step-parents and children are relatively unfamiliar with each other. While the couple’s relationship is freely chosen, the relationship between the step-parent and step-children is not. It is a by-product of the couple’s repartnering. Children’s readiness to accept the step-parent is also influenced by their age and gender, and their level of functioning prior to repartnering. Girls appear to experience greater difficulties than boys with gaining a step-father, and adolescents can be more challenging for step-parents (Hetherington & Kelly, 2002). Children who have behavioural or emotional problems during the sole-parent period also experience more adjustment difficulties (Hetherington & Kelly, 2002).

Another important structural difference relates to the couple or marital dyad. In non-divorced families, this dyad is also the parental dyad. However, this is not the case in step-families, where at least one of the adults (or both, in complex families) is not a parent to some of the children in the household. Research suggests that step-couples often find it easier to relate to each other as partners, but struggle in relation to the care and management of the children (Hetherington & Kelly, 2002). A number of studies have found that most conflict between couples in step-families is over issues to do with the children (Hobart, 1990). To add to the complexity, there may also be step-siblings present in the household, some couples may have a “mutual” child, and some children may spend all or some of their time in their other parent’s home.

Step-parents: Stereotypes and ambiguity

The step-parent role, particularly that of the step-mother, has been subjected to negative stereotypes for centuries. This is clearly illustrated in the children’s stories of Hansel and Gretel, Cinderella and Snow White. In all of these stories, wicked step-mothers mistreat their step-children out of jealousy or competition over resources. Stereotypes of the wicked step-mother and abusive step-father can affect children’s perceptions of step-parents and step-parents’ perceptions of themselves in negative ways (Claxton-Oldfield, 2008). As a result, some parents and step-parents reject the use of the term “step-” to describe themselves and their step-family relationships.

As well as these negative stereotypes, the step-parent role and other step-family roles are “non-institutionalised” and therefore lack established societal norms and expectations that could guide step-parents and children in how best to relate to each other (Cherlin & Furstenburg, 1994). This lack of institutionalisation may underlie some of the ambiguity that is associated with the step-parent role. Studies have found that there is a lack of clarity or agreement between step-family members in regard to the step-father role, and adults and children tend to view the role differently, with parents and step-parents believing that a more active parenting role is appropriate, but children seeing the role as being less active and more like a friend (Fine, Coleman, & Ganong, 1999). There is also evidence that step-fathers themselves are not in agreement about what it means to be a step-father (Marsiglio, 1992).

The step-parent role and child wellbeing

Early step-family studies, both in Australia and overseas, found that children in step-families had an increased risk of adjustment difficulties compared to their peers in non-divorced families and also, for some indicators, in sole-parent families (Pryor & Rodgers, 2001). In an early Australian study, Ochiltree (1990) compared the competence of children and adolescents in intact two-parent families, step-families, and one-parent families randomly selected through the Australian school system. Controlling for socio-economic status, children and adolescents in one-parent families were similar to those in two-parent families. Children in step-families, on the other hand, had lower reading ability, impulse control and self-esteem. Rodgers and Pryor (1998), reviewing British research on the outcomes for families of divorce, also concluded that children in step-families had an increased risk of developing emotional and behavioural problems compared to children in non-divorced families, and increased risks of having poor educational outcomes, leaving home early, and beginning sexual activity early compared to those in sole-parent and non-divorced families. Ganong and Coleman (2004), in their review of the step-family literature, concluded that the risk of adjustment problems for children in step-families is now well established.

In 1984, Crosbie-Burnett conducted a seminal study in the United States in which she investigated the relative importance of the marital relationship versus the step-father-child relationship in predicting family happiness in step-father families. She found that satisfactory relationships between step-fathers and children were more highly associated with step-family happiness than was the marital relationship. Bray and Kelly (1998) and Hetherington & Kelly (2002) came to similar conclusions based on their longitudinal studies of step-families. These studies drew attention to the “centrality” of the step-father-child relationship within the step-family system and the importance of the step-parent-child relationship to child and step-family wellbeing.

Pryor (2005) in her New Zealand study of step-family resilience found that children's feelings of closeness to their step-parents correlated with children's perceptions of their own strengths. Ochiltree (1990), in her Australian study, also found that the children in step-families with high self-esteem had a good relationship with their step-parents, while those with low self-esteem did not get on with their step-parents.

Further, results from a large study in the United States found that close relationships with both non-resident fathers and resident step-fathers were associated with better adolescent outcomes; however, relationships with step-fathers affected outcomes more than relationships with non-resident fathers (King, 2006), perhaps as a result of the greater level of day-to-day contact with step-fathers. Hence, there is a growing consensus

among family researchers that the step-parent–child relationship affects child wellbeing, and many of the challenges step-families face revolve around the role of the step-parent (Schrodt, 2006).

The roles adopted by step-parents

There is variability in the roles that step-parents adopt. As mentioned previously, it is common for step-parents (both step-mothers and step-fathers) to take on a parenting role and attempt to build a “normal” family in which the step-parent engages in the care and discipline activities of parenting (e.g., Coleman, Ganong, & Weaver, 2002; Svare, Jay, & Mason, 2004). Other step-parents try to become friends with their step-children and do not take on a disciplinary role, but rather maintain a supportive role (e.g., Kinniburgh-White, Cartwright, & Seymour, 2010). Some step-parents focus primarily on the relationship with their partner and have less involvement with the children (Bray & Kelly, 1998). Still others disengage from the children, which can occur after initial attempts to relate to the children are rejected (Hetherington & Kelly, 2002).

Adaptive roles for step-parents

Researchers and step-family therapists have concluded that an adaptive step-parent role is different from a parenting role. In non-divorced families, authoritative parenting—characterised by strong warmth and support, and moderately strong but responsive discipline—is associated with positive child adjustment (Pryor & Rodgers, 2001). However, a number of studies have found that step-parent discipline and control appear to be particularly problematic in step-families, especially in the first two years (Bray & Kelly, 1998). Many step-parents take on a disciplinary role with their step-children early on. For example, Funder (1996) found that 88% of Australian step-parents in her study began to set standards for children early in step-family life. In a more recent New Zealand study, Mobley (2012) found that two-thirds of the adults she interviewed believed that step-mothers and step-fathers ought ideally to be able to take up a disciplinary role with children and to share this role with parents. In fact, children and adolescents tend to rebel against step-parent discipline (Hetherington & Kelly, 2002) and believe that it is “not the job” of the step-parent (Mobley, 2012). This is particularly so in the first two to three years of step-family life.

Hetherington and Clingempeel (1992), in one of the first longitudinal studies on step-families in the United States, found that those formed prior to children’s adolescence were most successful when the step-father supported the mother’s efforts to discipline the children, attempted to build a close relationship with children, and only gradually attempted to exert authority. Similarly, it has been found that “laid-back” step-parents appear to be more successful in building relationships with children than “take-charge” step-parents, who are concerned with exerting control (Ganong, Coleman, Fine, & Martin, 1999). More recent research, however, has shown that some children, including adolescents, will grant some authority to step-parents whom they trust. Schrodt (2006), in a study of 522 young adult step-children, found that some young adult step-children who had close relationships with their step-fathers, and were confident in their positive concern, had granted the step-father authority in their lives.

Step-family therapists (e.g., Browning & Artlett, 2012; Papernow, 2006) have also emphasised that step-parents need to take time to get to know their step-children before attempting a parenting role, especially in regard to discipline. They believe it works best if step-parents support the parent’s discipline, and act as back up when parents

are not present. Papernow discussed the need to develop a “middle ground” between step-parents and children, which is characterised by sharing interests or activities, and having a sense of knowing and trusting each other. This then allows for the step-parent to eventually have greater influence in the child’s life.

Step-mothers

Finally, it is important to comment on the special difficulties that step-mothers face. While the research discussed above is relevant to step-mothers, it is important to note that women in this role experience greater levels of stress than step-fathers (Hetherington & Kelly, 2002), and children living mainly in step-mother families tend to have more adjustment difficulties than those living in step-father families (Hetherington & Kelly, 2002). Step-mothers also report experiencing less satisfaction in their relationships with step-children and see their relationships as being more conflicted (Hart, 2009; Pruett, Calsyn, & Jensen, 1993).

There may be a number of reasons for these increased difficulties. Perhaps the most important is that many step-mothers find themselves taking on the primary care of their step-children and doing the majority of household tasks for the family (Cartwright & Gibson, 2012; Church, 1999). This is likely influenced by the couple’s gendered expectations that, as the woman in the household, the step-mother will take over the responsibilities for looking after the household and the children (Cartwright & Gibson, 2012). When step-mothers take on this parenting role, they experience a backlash from the step-children, who resent their control or influence (Hetherington & Kelly, 2002).

Step-mothers are also burdened by negative stereotypes that have persisted for centuries, and may find themselves competing with the idealised image of the biological mother. Step-mothers sometimes find themselves in competition with the biological mother (Cartwright & Gibson, 2013), some mothers report feeling threatened by the presence of another woman in their children’s lives, and some may discourage children, actively or more subtly, from developing relationships with their step-mothers (Nielsen, 1999). Finally, there are many fewer step-mothers who live most of the time with their step-children. This means that the role is less understood than the step-father’s role.

Conclusions

Step-parents enter the step-family as an outsider to the parent–child relationship and face significant challenges as they attempt to build relationships with children. Some step-parent–child relationships are troubled, while others become comfortable or close. Researchers and step-family therapists have concluded that it works best if step-parents can initially refrain from taking on a parenting role and spend time establishing a supportive relationship with their step-children. This can be more difficult for step-mothers to achieve as they often feel pressure to take on a parenting role for the children.

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[12]

Grandparents as primary carers of their grandchildren

Policy and practice insights from research

Deborah Brennan and Bettina Cass

GRANDPARENTS HAVE LONG PLAYED a major role in the lives of their children and grandchildren, with some providing extensive emotional, material and practical support. In the last quarter of the 20th century, in Australia as in many other countries, grandparent carers became both politically organised and a focus of policy attention (Arber & Timonen, 2012; Fitzpatrick & COTA National Seniors, 2003; Glaser et al., 2010). The growing public visibility of grandparent carers reflects not only their own political mobilisation but also the increasing reliance of child protection authorities on kinship care. In Australia, almost half of all children placed in home-based care by child protection authorities are placed with relatives or kin, mainly grandparents (Australian Institute of Health and Welfare [AIHW], 2012).

Grandparents become primary carers of their grandchildren in one of three main ways: (a) following a parenting order made by the Family Court or Federal Circuit Court;¹ (b) following application by a state or territory government to the Children's Court for care and protection orders that results in a court order that the child lives with his or her grandparents; and (c) through informal arrangements that may or may not have the agreement of the parents and may or may not involve the state child protection authorities.

This chapter reports the key findings of a project led by researchers from the University of New South Wales.² The study, funded by the Australian Research Council, was con-

1 In April 2013 the Federal Magistrates Court of Australia was re-named the Federal Circuit Court of Australia.

2 Australian Research Council Linkage Grant (LP0776662) *Grandparents as primary carers of their grandchildren: A national, state and territory analysis* (HREC 07312). The Chief Investigators were Bettina Cass, Deborah Brennan, and Sue Green. Anne Hampshire as a Partner Investigator. The SPRC research team members were: Trish Hill, kylie valentine, Marilyn McHugh, Christiane Purcal, Megan Blaxland, Saul Flaxman and Bridget Jenkins. Rochelle Coggan worked on the project while completing an internship at the SPRC. The partner organisations were: Mission Australia, the then Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); Department of Children

ducted in collaboration with non-government organisations and government departments. The research team aimed to bring the voices and perspectives of grandparents into the policy arena as well as contributing to the literature on “social care”, which has been largely silent on grandparents raising grandchildren. We wanted to explore the ways in which grandparent care is positioned at the intersections of state and family, public and private, and formal and informal care provision. We investigated grandparent care in Indigenous and non-Indigenous families and examined the associations between formal and informal grandparent care and various social and demographic variables. These included: family composition and history; pathways into and out of grandparent care; the age, labour force status, income and principal income sources of grandparents and parents; cultural and linguistic background; health and disability status of grandparents, children and grandchildren; housing tenure; availability and strength of informal social networks; use of family and children’s services; and eligibility for receipt of family payments and care allowances at Commonwealth and state/territory levels.

Here we report the major findings of the study and point to their implications for policy and practice.

How many grandparent carers are there in Australia?³

Enumerating grandparent carers may seem a straightforward issue, but it is complex both methodologically and conceptually. In recent years there has been considerable uncertainty about the number of grandparents raising grandchildren in Australia. Having a reasonable estimate of the number of grandparent carers is essential for policy making and professional practice, but there is little clarity about this issue. Authoritative sources have put forward divergent estimates:

- data from the Australian Bureau of Statistics (ABS) Family Characteristics Survey 2003 suggested that there were approximately 22,500 grandparent families caring for 31,100 children (ABS, 2004);
- the ABS Family Characteristics and Transitions Survey 2006–07 findings identified 14,000 such families, headed by around 23,000 grandparents (ABS, 2008); and
- analysis of the Household, Income and Labour Dynamics in Australia (HILDA) survey suggested that 27,718 children under 15 years lived in households with grandparents only (Brandon, 2004).

An important reason for these variations is that the surveys from which they are drawn are not designed to capture grandparents’ responsibility for grandchildren. Statistical agencies often categorise families into types based upon the relationship of household members to one person designated as the “household head”, rather than identifying the actual relationships of care and responsibility, especially when these are outside the norm. As well, sample sizes may be too small to provide reliable estimates, and changes to survey methodology may further contribute to fluctuating estimates.

In 2006, the ABS Census of Population and Housing identified grandparent–grandchildren relationships for the first time. Analysis of Census data suggests that there were:

- 8,050 families where grandparents were raising grandchildren under 15 years (3,271 lone-grandparent and 4,779 couple-grandparent households);

and Families (NT); Department for Families and Communities (SA); and Family & Community Services (formerly Department of Community Services) (NSW).

3 This section is based on Brennan et al. (2013), pp. 32–65.

- 35,926 families that included grandparents and grandchildren but in which no parent–child relationship was identified (which could be families where grandparents have responsibilities for grandchildren); and
- a further 27,594 families where a lone parent was living with a grandparent of their child.

Future researchers will need to interrogate the 2011 Census in order to analyse the most recent demographics relating to grandparent care.

Grandparent carer survey⁴

The centrepiece of the study reported here was an Australia-wide survey of 335 grandparents raising their grandchildren; the largest such survey yet conducted. The survey provided insights into many aspects of grandparents' experiences in raising grandchildren. It explored household location and composition, details of the grandchildren and relationships with their parents, income and financial support, changes to grandparent employment, the health of grandparents and grandchildren, and the effects of raising grandchildren on the survey participants' family relationships and social life. It asked about access to support services and concluded with evidence of grandparents' strength and resilience.

Survey participants were recruited in various ways, including through advertisements placed in national media, such as *The Senior* and *The Voice* publications. Research partners and various grandparent support groups distributed information about the survey and made paper copies available to their members. Respondents could elect either to fill in a paper-based form or an online version of the survey. Given our recruitment methods, it is likely that our respondents were more connected to government agencies and formal and informal services than their peers; however, we did not seek to be representative but rather to tap into a range of views and experiences. The fact that our respondents may be more strongly connected to support groups than other grandparent carers highlights the critical importance of all such families having access to information and support.

Demographic characteristics and family circumstances

Most respondents (87%) were women; more than 90% were born in Australia or the UK; and just under 5% identified as Indigenous Australians. Almost half (43%) had a post-school qualification, while a similar proportion (46%) were educated to Year 10 or below. Respondents came from all states and territories except the Northern Territory and from different types of locations (major cities, regional and remote areas). The majority were home-owners or paying off a mortgage, while close to one-third were renting.

The 335 grandparents were raising 576 grandchildren, an average of 1.7 per family. The grandchildren were comparatively young, with the majority being of primary school age or younger, and a further one-third of high school age.

The dominant reason for raising grandchildren was parents' substance abuse (in more than two-thirds of families), followed by child neglect, parents' mental illness and domestic violence. Often a combination of factors existed, coupled with complex family relationships. Many grandparents said they were motivated to take in the grandchildren to keep them out of the foster care system.

Three out of four of the families had a formal arrangement for at least one of the grandchildren in their care. Contact arrangements with the birth parents varied widely;

⁴ This section is based on Brennan et al. (2013), pp. 74–131.

however, the proportion of children in the sample whose parents were largely or completely absent from their lives was much higher than in the national Census data.

Financial disadvantage, employment and housing

The grandparent households in the survey were, as a group, financially disadvantaged. More than 70% had incomes below the national average, and a majority relied on government payments such as income support payments, allowances and age pension. Only one-third lived mainly on employment income. Many had to raise additional funds to pay for the grandchildren's needs, by selling investments, drawing down savings, increasing their hours of employment or re-entering employment.

More than 90% of households received some financial assistance with raising their grandchildren. Most often this was a Centrelink payment and/or a care allowance provided by a state/territory government (McHugh & valentine, 2011). A small number of grandparents received cash support from the children's parents. More than one-third of respondents stated they had difficulty accessing government financial assistance, often due to administrative hurdles, perceived disrespect from staff, lack of information, and complexity of intra-familial relationships. Financial stress was widespread. Two out of three said they were just getting along or feeling poor, and this was mostly as a direct result of raising their grandchildren.

Age accentuated financial disadvantage. The younger grandparents were more likely to have higher incomes and were much more likely to hold a job than the older grandparents, who generally had lower incomes and relied on government benefits. Even among the 21% who were "self-funded" retirees, many struggled to meet their financial obligations, with investment losses during the global financial crisis adding extra stress. A sense of financial deprivation was high across all age groups.

Almost two-thirds of grandparents in the survey had to make changes to their employment because they took on care for their grandchildren. This sometimes caused significant upheaval within the families. Mostly, grandparents reduced their working hours or gave up work altogether, and those changes were frequently borne by grandmothers rather than grandfathers. Loss of income and superannuation ensued, adding to financial stress. Others increased their working hours, came out of retirement or struggled on in their jobs, causing considerable emotional and physical strain.

Grandparents in the younger age group (under 55) were almost twice as likely to change their employment as those in the oldest group (65 years plus). Even among the latter, who might be expected to be retired, more than one-third changed their employment; that is, they worked more, worked less or came out of retirement. The effects of such employment change also varied with age: younger grandparents tended to be concerned about loss of career prospects and superannuation. The middle age group (55–64) often had to delay retirement, while the older grandparents might need to work longer or re-enter the workforce.

Assuming responsibility for the care of grandchildren necessitated changes to housing for four out of five respondents. More than half had modified their housing or moved, often resulting in significant financial expense and upheaval. Close to 20% of grandparents wanted to change their housing but were unable to, usually due to the cost, and so they continued living in what they saw as unsuitable accommodation. Housing changes were more frequent among the younger grandparents than the older groups, probably reflecting better financial circumstances.

Physical and mental health

Health issues presented a significant problem for grandparent-headed families, with almost half of all the grandparents reporting they had a long-term illness or disability. In addition, raising grandchildren negatively affected both the physical and mental health of the grandparents: 62% stated their health had deteriorated due to raising their grandchildren. Younger grandparents tended to be healthier than the middle and older age groups, although more than one-quarter of grandparents under 55 years old had a long-term illness or disability.

More than half of the survey respondents said at least one of their grandchildren had physical problems, and more than 80% said their grandchildren had emotional or behavioural problems. Health problems were often clustered; for example, a grandchild might have both physical and emotional/behavioural problems or there might be several grandchildren in the family with health problems. Abuse and abandonment by the parents were identified by the grandparents as the cause of many physical injuries and psychological symptoms.

In a significant proportion of families, the health problems of grandparents and grandchildren coincided. Almost half of the grandparents with a long-term illness or disability raised a grandchild with a physical health problem, three-quarters had a grandchild with a psychological problem, and more than one-third had a grandchild with both physical and psychological problems. This highlights the need for appropriate health care supports for both grandparents and grandchildren.

Relationship and social issues

Some grandparents' relationships with their partners deteriorated as a result of taking on responsibility for their grandchildren, but others remained the same. There was less deterioration in relationships with extended family members, but rarely did relationships with partners or with extended family improve. Major factors associated with relationship tension were the physical and emotional demands of parenting grandchildren, but also the loss of retirement freedoms, and an increase in work-related stress.

The social lives of many grandparents also suffered. More than half said that their friendships and community participation had deteriorated due to raising grandchildren, and even larger proportions said time for their own interests and their general wellbeing had declined. Social isolation was a strong theme in the grandparents' comments and stories. Not being able to share the interests and social activities of their empty-nested or retired friends was the main contributor to loneliness. However, a minority of grandparents relished mixing with younger parents and participating in children's activities.

The youngest grandparent age group (under 55 years) experienced more reduction in community participation and availability of time for their own interests than did the older groups, possibly due to the combination of work and child-rearing responsibilities. Both the youngest and the oldest (65 years plus) age groups reported more deterioration in their friendships than the middle group. For the older grandparents this was related to not being able to join their friends in their retirement pursuits.

Access to support groups

Among support and information services for grandparent-headed families, support groups were the most widely used by the survey sample. Almost two-thirds of grandparents in the survey belonged to support groups, and many commented on how valuable the

groups had been in increasing their strength, wellbeing and social connections. The next most common support services, which were available to around 30–40% of survey families, were child care/out-of-school-hours care, caseworker support, and respite.

The age of grandparents affected their support needs to some extent. Many younger grandparents found support groups unsuitable, as they met during working hours and most members were older and at a different life-course stage. Older grandparents expressed more need than younger respondents for support in dealing with teenagers.

Summary

While the grandparents in the study frequently struggled on a number of fronts, it is obvious that they feel deep love and devotion towards their grandchildren. Many grandparents expressed the great joy that their grandchildren had brought into their lives, as well as the rewards that came from the grandchildren's love and from seeing them blossom. Grandparents coped with their difficulties by using their resilience and humour.

Indigenous grandparents⁵

Demographic characteristics and family circumstances

Indigenous grandparents were a special focus of this study because Indigenous children are significantly overrepresented in out-of-home care compared with non-Indigenous children.⁶ Approximately 5% of respondents to the survey were Indigenous grandparents, which roughly reflects their proportion in the population as a whole but is far lower than their representation among all grandparent-headed families. In order to increase understanding of the issues facing Indigenous grandparents, we conducted in-depth interviews with 20 grandparents in New South Wales, South Australia and the Northern Territory.⁷ The Indigenous interviewees were diverse in terms of their demographic characteristics, housing and residential arrangements, income, employment status and access to financial support and services.

The number and ages of the grandchildren also varied considerably, ranging from infants and toddlers (1–3 years) to young people aged 17 years or more. Participants were evenly divided between those who had formal kin care agreements in place and those who cared for their grandchildren under an informal, family arrangement. While many grandparents preferred to raise grandchildren under informal arrangements because of the perceived difficulties of dealing with the judicial system or fear and reluctance to contact child protection authorities, some preferred the stability of formal legal custody.

The grandchildren had come to live with their grandparents for a variety of reasons, most commonly because of drug or alcohol misuse and other socio-emotional and financial problems of the parents, including mental illness and imprisonment. Most had little or no contact with their parents, even if they were still alive.

5 This section draws on Brennan et al. (2013), pp. 132–161.

6 In June 2012, Aboriginal and Torres Strait Islander children were almost ten times more likely to be the subject of care and protection orders than were non-Indigenous children. In all jurisdictions, the rate of Indigenous children on orders was higher than the rate for non-Indigenous children, with ratios ranging from 3.3 in Tasmania to 15.2 in Western Australia (AIHW, 2012).

7 These jurisdictions are the home states/territories of the non-government organisations and government departments that supported the research.

Financial disadvantage

While a small number of participants said that raising their grandchildren had little or no effect on their financial situation, many reported that it had caused them considerable financial stress and hardship and at least three of the 20 participants were not receiving government payments to which they may have been entitled. Many participants also reported changing their employment situation after taking care of their grandchildren, with many moving to working part-time or stopping working altogether as a result of their care commitments.

Physical and mental health

Participants commonly reported that both they and their grandchildren faced physical and mental health problems, although most were reluctant to attribute their own physical health problems to their care commitments. They more readily attributed mental health problems to their caring role and frequently reported frustration and stress associated with raising their grandchildren. Similarly, participants commonly attributed their grandchildren's mental health and behavioural problems to the abuse or neglect they had experienced while under their parents' care or due to the trauma of being separated from their parents.

Cultural continuity

Almost universally, Indigenous grandparents believed that continuity of cultural and kinship knowledge was of paramount importance for them and their grandchildren. Many highlighted the importance of Indigenous kinship systems and relished the opportunity to spend time with grandchildren to instil traditional Indigenous values. Many also reported that they and their grandchildren took part in cultural and community activities, including traditional dancing and Elders groups. Although several participants noted the importance of being supported by their extended family to raise their grandchildren, some reported that they had little support from family or friends.

Summary

Like the other grandparents who took part in the survey, the Indigenous grandparents interviewed for this study demonstrated high levels of resilience. They provided stability, love and care to their grandchildren, often in the face of considerable challenges. However, a lack of support services was an issue raised by many participants and there are gaps in the information, support and services provided to Indigenous grandparent carers. Several grandparents were not receiving the Parenting Payment and Family Tax Benefit for which they might be eligible and were unaware of services available in their areas, or believed that they did not qualify for services or respite care. Most said that they would like additional financial and practical support or respite if they were available.

Perspectives of policy makers and service providers⁸

In addition to our survey and interviews with grandparents, we conducted focus groups with policy makers, service providers and support groups in order to better understand the policy and practice issues they saw as being significant for grandparents, grandchildren and parents. Focus groups were held in New South Wales, South Australia, the Northern Territory and the Australian Capital Territory. Some were conducted in

8 This section draws on Brennan et al. (2013), pp. 66–73.

metropolitan areas and some in rural areas. While discussion was free-flowing, it tended to focus upon child protection, legal matters, family and children's services, income support, care allowances, health services, education services for children and young people, and housing policies.

The key support needs identified by policy makers and service providers included:

- assistance with the complex negotiations of family relationships across generations (including with adult children);
- support to deal with the complex needs of many children and young people being cared for by their grandparents; and
- information about changing parenting practices; and assistance with the grief and loss experienced by all generations.

Respite and crisis support were widely identified as priorities, as was case management. The focus groups identified a range of barriers to accessing payments and services. Some grandparents are reluctant to use services or apply for payments to which they are entitled because they do not want to disclose their circumstances to government agencies. Many do not claim family payments to which they may be entitled for fear of repercussions (including intimidation and violence) from their children (the parents of the grandchildren). Actual and perceived differences in support provided for foster carers and kinship carers are a source of resentment for many.

The focus groups identified the financial and non-financial costs incurred by some grandparent carers as being a major issue. Financial costs included foregone employment, the expense of adding bedrooms or making other modifications to the home, educational expenses (including extra tutoring or remedial classes) and the legal costs of seeking formal custody. Non-financial costs included the loss of former social networks and friendships, the difficulty of participating in social activities, and grief about the loss of the "normal" grandparent role.

Service providers and support groups emphasised the strength, resilience and capabilities of grandparent carers and urged that these be recognised and built upon by policy makers.

Issues for policy and practice

The key policy and practice issues to emerge from this study are as follows:⁹

- Grandparents need accurate and timely information regarding financial and social support services to be provided to them through state/territory and Commonwealth government departments as well as non-government support groups.
- Multiple channels should be used to distribute information. These could include: websites, face-to-face meetings, support groups, hotlines, flyers and newsletters.
- Many grandparents prefer face-to-face contact rather than simply printed information, such as handbooks and information kits. While the latter are essential, they must be constantly updated to remain relevant.
- Staff in government agencies should treat grandparents with respect, provide consistent, clear and correct information, bear in mind their diverse circumstances and needs, and understand that grandparents almost always seek to act in the best interests of their grandchildren.

⁹ The ideas presented here emerged at a forum organised by the Centre for Children and Young People at Southern Cross University and the Social Policy Research Centre at the University of New South Wales as part of the Collaborative Research Network that links the two centres. The Academy of the Social Sciences in Australia and Southern Cross University funded the forum.

- Parity of payment between kinship carers and foster carers was raised by many individuals. Grandparent carers argued that they should receive the same support and entitlements as foster carers; however, most do not wish to be registered as formal; that is, statutory carers of their grandchildren (which could then entail supervision of their “parenting” role). Also, grandparent carers indicated that they need more information when the children come into their care, such as an information pack that goes with the child and contains their legal records, education and medical history.
- A key issue for health and community services and education providers is the insufficient resources available to maintain the health and wellbeing of grandparents and the grandchildren they are raising, as well as ensuring appropriate and effective educational experiences for their grandchildren.
- Some grandparents, service providers and policy makers are of the view that significant numbers of grandparent carers do not claim, and are not supported to claim, payments and benefits to which they are entitled. Future research might examine this issue.
- Very few cases involving grandparents are heard by the Family Court or Federal Circuit Court. Between 2001 and 2009, only 62 such cases were heard. In approximately half of these, child protection issues were raised. These included physical, emotional and sexual abuse; neglect; concerns about the safety of children as a result of the parents’ mental health issues or the negative influence of parents’ behaviour relating to drug and alcohol abuse; exposure to criminal activity; and antisocial behaviour. Two cases were referred to the Family Court’s Magellan list, a case management model implemented by the court for responding to cases where one (or both) parties have raised serious allegations of sexual abuse or physical abuse of children in a parenting dispute (Coggan, 2010).
- The legal system for grandparents raising their grandchildren can be confusing and it is often by chance that some grandchildren fall under the jurisdiction of a state Children’s Court rather than the Family Court. Grandparents who become primary carers may have stronger rights in relation to parenting decisions than those with informal arrangements, but these grandparents are unlikely to receive the same kind of support, financial or otherwise, as grandparents who become primary carers through a state Children’s Court.

Conclusion

Based on evidence drawn from an analysis of national data sources, a large survey of grandparent carers, interviews with Indigenous grandparent carers and focus group discussions with policy makers and service providers, this study of grandparents who have primary responsibility for the care of their grandchildren yielded significant issues for the design of socio-legal policies that sensitive to the circumstances of grandparents and their grandchildren. These include the following matters:

- statutory recognition of the relationships and responsibilities of grandparents entailed in maintaining the wellbeing of grandchildren and the capacity of the grandparents to maintain their caring;
- adequacy of financial resources, which have salience for Commonwealth and state/territory jurisdictions (Department of Social Services, Centrelink and child protection authorities);
- recognition and support in education and health services systems; and

- information services in the legal, child protection, income support, health and education systems that are timely, appropriate and easily accessible.

Above all, grandparents seek official and community recognition and respect, including adequate resources, for the very important roles that they play and the responsibilities that they bear for the health, wellbeing and development of their grandchildren, who have often been affected by traumas and troubles in their own young lives.

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PART B

Legal and statutory responses to families in difficulty

[13]

Contemporary issues in child protection intake, referral and family support

Leah Bromfield, Fiona Arney and Daryl Higgins

If we ... were assigned the task to deliberately design systems that would frustrate the professionals/para-professionals who staff it, anger the public who finance it, alienate those who require or need its services and programs, that would invest in reactive responses ... and bear the brunt of public criticisms should a child be harmed in any way, we could not do a better job than our present children's protection systems (Barter, 2005, p. 317).

Numerous inquiries into child protection services in Australia and internationally have concluded that failures in child protection service responses are in large part attributable to: rising demand on child protection services; a workforce suffering low morale who are ill-equipped for the role; families receiving too little too late in the form of intervention; and a rising population of children in care paired with a lack of suitable placements (Ford, 2007; Layton, 2003; Munro, 2011; Board of Inquiry Into the Child Protection System in the Northern Territory, 2010; Wood, 2008).

Data on children coming to the attention of state/territory child protection authorities show that, since collation of the data commenced, the workload of these departments has escalated in terms of the number of concerns raised about child welfare. Looking at patterns of notifications (reports of concerns relating to the abuse/neglect of children) over the past two decades, the scale of the increase can be readily observed in Table 1 (on page 122), whether considering the absolute number of notifications (which reflects the initial workload, as departmental staff need to screen and potentially respond to these), or the rate of notifications per thousand children in the population (Higgins, 2011).

A fairly consistent trend across Australia over the past decades is that around one in every five or six of the concerns notified to statutory child protection departments are substantiated (i.e., meet the threshold for a department to intervene due to the child/young person having been harmed, or being at risk of harm from abuse/neglect).

This leaves around four in every five cases where there is no legislative grounds for intervention, and yet some level of vulnerability, need or risk has been notified.

The growth has not just been at the referral of safety concerns; the number of children taken into out-of-home care has also seen similar levels of growth. For example, the numbers of children residing in non-parental care due to the intervention of the statutory authority on the night of 30 June in each year, have risen sharply over the past two decades (see Table 2).

Table 1: Child protection notifications in Australia, children aged 0–17 years, 1989–90 to 2009–10

Year	Notifications	Total population of children	Rate per 1,000
1989–90	42,695	4,188,795	10.4
1999–2000	107,134	4,766,920	22.5
2009–10	286,437	5,092,806	56.2

Sources: Australian Bureau of Statistics (2010); Australian Institute of Health and Welfare (AIHW; 2001, 2011); WELSTAT (1991)

Table 2: Number of children on care and protection orders living in out-of-home care in Australia on 30 June 1990, 2000 and 2010

Year	Children in out-of-home care	Total population of children	Rate per 1,000
1990	12,406	4,188,795	3.0
2000	16,923	4,766,920	3.6
2010	35,895	5,092,806	7.0

Note: While the number of children and young people *entering* care in the last five years has remained relatively stable (at just over 12,000 per year), the total number of children *residing* in out-of-home care at any one time has grown significantly due to the increased number of children entering the care system early in their lives and staying in it for longer.

Sources: AIHW (2001, 2011); WELSTAT (1992)

In this chapter, we briefly consider the historical origins that underpin the current approach to child protection in Australia, discuss the theory and intent underpinning current reforms, and discuss the promise of a public health approach and why it appears not to be delivering the desired outcomes.

Child protection services were originally established in the 1960s as a residual response to the problem of child abuse and neglect. In their seminal paper, Wilensky and Lebeaux (1958, as cited in Ife & Fiske, 2003) conceptualised the typology of “residual” compared to “institutional” approaches to social welfare. Under a residual approach to social welfare, people are expected to meet their own needs through the primary institutions of the market and the family. Welfare is a secondary institution, which only comes into effect where the primary institutions have failed. In comparison, an institutional approach sees welfare applied to all as a dominant institution with a preventative focus, under which the state is responsible for providing comprehensive and universal programs of health, education, housing, social security, personal services, and so on. Theoretically, under a residual approach, costs are kept to a minimum, as

selective services are provided only to those most in need; whereas the provision of universal services dictated by an institutional approach are seen to be very costly. The two philosophies are fundamentally opposed, and represent alternative views of the place of welfare (in the form of the welfare state) in modern society (Ife & Fiske, 2003). Child protection services are a clear example of a residual approach, whereby a welfare response is triggered when an individual suspects that a child has experienced, or is at imminent risk of, abuse or neglect. At that time they are required (often by law; see the Mathews & Walsh chapter in this book) to report their suspicions to child protection services, which then assess the allegation and investigate and intervene only when necessary.

When contemporary child protection services were established in the 1960s—catalysed by Kempe and colleagues' (1962) discovery of the “battered child syndrome”—child abuse was thought to be severe (i.e., multiple fractures), to affect a small number of children, and to be perpetrated by parents with some form of psychopathology. A forensic-legal response predicated on a residual approach to social welfare was a reasonable response to a problem of this nature.

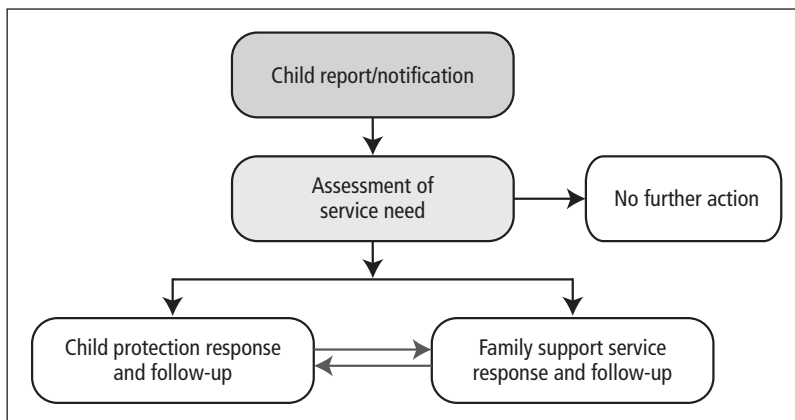
Over time, the growing evidence base regarding the effects of violence and adversity on children's outcomes saw both an expansion in the types of maltreatment acknowledged and a decrease in the threshold at which undesirable parenting behaviours were considered abusive or neglectful. Child protection services incorporated this evidence base through a corresponding expansion of scope.

More than 40 years on, child protection services have a mandate to respond to physical abuse, sexual abuse, emotional abuse, neglect and witnessing family violence; and the threshold for intervention now includes outcomes such as bruising, developmental delay and psychological harm, as well as “cumulative harm”—the cumulative effects of multiple events that might not individually reach the threshold for intervention (Bromfield & Holzer, 2008; Wood, 2008). The gradual evolution of this shift saw child protection services increase their scope of responsibility without conducting a critical appraisal of whether a residual response system continued to be the best fit to address the size and nature of the problem.

This is by no means the first time this expansion in scope has been documented, nor should senior executives in child protection services be characterised as being unwitting or passive victims of issues relating to demand. Many strategies and initiatives have been implemented to better respond to families known to child protection services. One of the major strategies implemented from the mid-1990s was the “differential” response (also referred to as a dual track, multiple track or alternative response; Merkel-Holguin, 2005; Schene, 2005). The differential response system directly relates to the broadened scope of child protection services as it pertains to children who are “perceived by members of the community as experiencing or being at risk of abuse and neglect and needing protection” (Schene, 2005, p. 4).

The rationale underpinning differential response is twofold: (a) responses to concerns about a child should be commensurate with the level of risk; and (b) non-accusatory assessments and responses to families are typically more effective than adversarial approaches (Merkel-Holguin, 2005). Differential response provides a process for less severe allegations to avoid being investigated and instead be referred to voluntary family support services. Connolly (2005) explained that while the language and systems vary between countries, differential response essentially comprises the following process: reports received by child protection services are assessed to determine whether a child

protection investigation or referral to voluntary family support services is warranted. This is presented pictorially in Figure 1. Connolly noted that though a team within the statutory child protection service may provide family support services, more typically these services are provided by non-government agencies.



Source: Connolly (2005), p. 15

Figure 1: Pathways of a differential response system

By itself, differential response is an “add-on” to existing child protection services, and does not fundamentally alter child protection as a residual response. Reports of concerns about a child are still referred to child protection services for an intake assessment, and where concerns meet the statutory threshold they are referred for an investigative response. For the majority of families, reports are either not investigated or no harm or risk of harm is substantiated, and these families are referred to alternate services and supports. The unintended consequence is that child protection services become the most visible entry point for mandated professionals and others concerned about a child and their family. For example, Justice Wood (2008) in his Inquiry into Child Protection Services in NSW found that the large volume of reports to its Helpline requiring a child protection intake and investigation response had become a bottleneck into the child welfare service system.

Differential response is a pragmatic and sensible addition to child protection services, but it does not resolve the problem of a traditional residual response system that is unable to appropriately respond to the vast population of vulnerable children whose families require support rather than coercive court-ordered interventions to meet their children’s needs. Indeed it cannot; a reality recognised in the mid-1990s when differential responses first emerged. Academics at the time envisaged differential response within a broader context of welfare reform, such as the seminal work by Jane Waldfogel (1998a, 1998b). Essentially Waldfogel proposed a differentiated level of response that extended across the service system (Maluccio, 1999; Waldfogel, 1998b). Specifically, she argued that child protection investigations should be applied to serious maltreatment allegations, that families be offered a customised response based on their individual needs and, critically, that child protection services should collaborate with community partners (professional and non-professional) to provide more supportive services to all families (Waldfogel, 1998b). In essence, she proposed a systemic reform to the residual response model of child protection services.

A public health approach also offers a conceptual framework for a systemic alternative that is more in keeping with the institutional approach put forward by Wilensky and Lebeaux (1958, as cited in Ife & Fiske, 2003) than with residual child protection response systems. It retains the forensic-legal role of statutory child protection services for the most serious of cases, but situates this response within a broader system of services and supports that provides differentiated pathways *into* the service system as opposed to merely a differential response by child protection services (i.e., “screen-in” vs “screen-out and refer”).

Adapted from work with preventable illnesses, a public health approach is used for severe and prevalent problems that are associated with significant detrimental effects on individuals and populations. Such an approach requires an understanding of the prevalence, causes and consequences of the problem, knowledge of interventions to effectively prevent and respond to the issue, and a detailed understanding of how these interventions can be implemented at scale for a population (Garrison, 2005). A public health approach strongly emphasises health promotion and disease prevention and incorporates a population focus, with increasingly targeted interventions based on recognised risk and protective factors (Baum, 1998; Garrison, 2005). Although typically characterised as having three levels of intervention (primary, secondary and tertiary), public health approaches incorporate a range of strategies based on the target of intervention efforts (see Box 1 on page 126).

A public health approach to child protection has garnered extensive support within Australia, culminating in the adoption of such an approach to underpin the National Framework for Protecting Australia’s Children, endorsed by the Council of Australian Governments (COAG; 2009). In Australia, public health is synonymous with prevention and has primarily been conceptualised as a system of primary, secondary and tertiary services. The major preventative strategy has been to increase investment in family support services. In some jurisdictions, new systems of intake and referral have been designed to divert families from child protection intake services. Implied in these strategies is that if we reduce the demand on child protection services, this would mitigate the practice problems within these services. In initial evaluative findings and service data trends, these initiatives appeared to be promising (Holzer & Bromfield, 2008; Thomas & Naughton, 2005); however, the rising number of children in care has proven intractable. Although there were signs—at least in some jurisdictions—of the increase in notifications plateauing, recent child protection activity data show a return to an upward trajectory of reports and investigations. At this juncture, some have queried whether a public health approach is indeed the right approach to child protection.

Central to a public health approach is a focus on prevention through addressing the underlying determinants of social problems (Baum, 1998; Garrison, 2005). A primary assumption underpinning contemporary child protection reform agendas has been that this can be achieved through improving the mechanisms for families to access “the right services at the right time” (Adamson et al., 2010). In Australia, over the last decade, this objective has primarily been enacted through two inter-related reforms: (a) improved intake and referral pathways (primarily into family support services) for highly vulnerable and at-risk families (e.g., Family Referral Services in NSW); and (b) increased investment in targeted family support services for highly vulnerable families (e.g., Child FIRST and Integrated Family Services in Victoria).

Family support services are designed to (a) prevent problems in highly vulnerable and at-risk families from escalating into child abuse and neglect; and (b) support

Box 1: Levels of intervention in a public health approach

Child wellbeing promotion interventions are usually targeted to the general public or a whole population, and aim to enhance children's abilities to meet developmental targets and enhance wellbeing.

Universal preventive interventions (primary prevention) are targeted to the general public or a whole population that has not been identified on the basis of individual risk and is desirable for everyone in that group. Universal interventions have advantages when their cost per individual is low, the intervention is effective and acceptable to the population and there is a low risk from the intervention.

Selective prevention interventions (secondary prevention) are targeted to individuals or a population subgroup whose risk of experiencing parenting difficulties is significantly higher than average. The risk may be imminent or it may be a lifetime risk. Risk groups may be identified on the basis of biological, psychological or social risk factors that are known to be associated with child abuse and neglect. Selective interventions are most appropriate if their cost is moderate and if the risk of negative events is minimal or non-existent.

Indicated preventive interventions (early intervention/tertiary prevention) are targeted to high-risk individuals who are identified as having parenting needs or concerns, but whose child is not at risk of significant harm. Indicated interventions might be reasonable even if intervention costs are high and even if the intervention entails some risk.

Treatment and maintenance are for high-risk individuals where child abuse and neglect has occurred and the child is or has been at significant risk of harm.

(Adapted from Committee on the Prevention of Mental Disorders and Substance Abuse Among Children, Youth, and Young Adults: Research Advances and Promising Interventions, 2009, p. 66)

families in which children have experienced abuse and neglect, to prevent re-abuse. The prevention rationale is therefore that family support services will prevent abuse and neglect, and in turn prevent reports to, and the need for a response from, statutory child protection services. In comparison, alternate highly visible pathways into services are primarily designed to divert families away from child protection into other services. A direct prevention strategy for reducing child protection notifications may additionally serve to prevent abuse and neglect by facilitating families accessing services earlier. Like differential response, these are sensible reforms for the detection of, and response to, highly vulnerable and at-risk families. However, we identify three issues that influence the potential effectiveness of these reforms in reducing the demand on child protection services.

First, the assumption is that the establishment of new intake and referral pathways will be accompanied by a change in reporter behaviour. However, the majority of reports are received from mandated reporters (e.g., police, teachers, health professionals) whose reporting requirements are prescribed by legislation (see the Mathews & Walsh chapter in this book). Child protection services, in turn, are required to assess these allegations in light of the legislative definition for what constitutes a child in need of protection

(Bromfield & Holzer, 2008). Existing regulatory frameworks may prevent reporters from effectively using new intake and referral pathways. Two notable examples of legislative change enacted in Australian jurisdictions aim to address this problem. Provisions made in Tasmania's *Children, Young Persons and Their Families Act 1997* (enacted in August 2009) provide that mandated reporters report their concerns about the care of a child to the non-government Gateways services (a community-based intake service), and that such a report fulfils their mandatory reporting obligations. From January 2012, amendments to the NSW *Children and Young Persons Care and Protection Act 1998* were enacted, which changed the threshold for reporting upward from "risk of harm" to "risk of significant harm". Both of these reforms aim to effect a reduction in reports to child protection services by re-establishing the remit of the agency to respond only to severe allegations of child maltreatment, where a forensic-legal response is more likely to be required.

Second, there is a limited number of family support service models and programs that have been found to be effective in addressing risk of abuse and neglect in highly vulnerable families (MacMillan et al., 2009). In Australia, there is a significant gap between "what we know and what we do", with many family support services being funded without a clear practice or program model and without being underpinned by an evidence base. These services run the risk of being ineffective and thus failing to aid in the prevention of child abuse and neglect. At worse, they may do further harm to highly vulnerable children and families. Paradoxically, it is in this area that we have some of our most promising evidence for intervention emerging. Parents Under Pressure is an evidence-supported, non-manualised program, which has been developed and trialled in Australia and shown to be effective for parents with complex problems, including substance misuse (Dawe & Harnett, 2003, 2007). Project SafeCare is an evidence-based program for child maltreatment developed in the US that is notable for its effectiveness in addressing neglect (Edwards & Lutzker, 2008), particularly since there are few evidence-based interventions available for neglect even though it is one of the most common forms of maltreatment.

Finally, there has been a tendency for a public health approach to child protection to be viewed as being synonymous with reforms to statutory intake and referral pathways and increased investment in secondary services focused on the provision of family supports to vulnerable families (COAG, 2009; Wood, 2008). These reforms have the potential to be key platforms within a public health approach, but by themselves fail to address core aspects of the public health model. Critically, neither of these reforms address the urgent need for preventative strategies to address the leading underlying social determinants of child abuse and neglect: domestic violence, mental illness, and substance misuse. Further, Australia continues to lack national data on the incidence or prevalence of child abuse and neglect in the community—a core component of a public health approach required to determine whether reforms are creating meaningful population change.

Fixsen and colleagues (2005), in their landmark synthesis of implementation literature, concluded that poor implementation can result in even the most promising systems reform being ineffective, and that failure to attend to implementation issues within evaluations of the effectiveness of programs or reforms may "lead to an incorrect conclusion that an intervention is ineffective" (p. 5). There is a risk of "throwing the baby out with the bathwater" if the public health approach were to be rejected due to its failure to deliver the substantial reduction in demand on child protection services that

might have been hoped for, as the failure to deliver could be attributable to a failure of implementation rather than a failure of the approach. The degree to which the rhetoric of Australia's public health approach to child protection actually equates with a public health model is debatable. Its apparent failure is a function of the limited forms in which a public health approach has been applied to child protection rather than the public health approach per se. The key elements of a public health approach need to be re-examined as it pertains to child welfare reform in Australia, and missing elements need to be systematically implemented to complement existing reforms if we are to continue to move closer to our goal of "a substantial and sustained reduction in the incidence of child abuse and neglect" (COAG, 2009, p. 11).

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[14]

Mandatory reporting laws

Ben Mathews and Kerryann Walsh

AS PART OF THE effort to protect children from significant abuse and neglect, each state and territory in Australia has enacted legislation commonly known as “mandatory reporting laws”. There is much confusion about the nature and effects of these laws, both generally and within each jurisdiction. Accordingly, the main aim of this chapter is to review and explain the legislative principles across Australia. In doing so, the chapter will identify differences between the state and territory laws and will situate the laws as part of a system of responses to the whole spectrum of child abuse and neglect. We will also highlight the need for effective reporter training and public awareness, especially given the tension between the widely perceived need for a community response to child abuse and neglect and the simultaneous concern to avoid unnecessary reporting of innocuous events and situations.

The legal context

Before explaining the legislative mandatory reporting duties, it is important to note that there are two other types of duties to report suspected child abuse and neglect, which can co-exist with a legislative duty, or which can exist even in the absence of a legislative duty. These are: the duty of care and duties under professional or industry policy.

The duty of care

A duty of care is a legal concept historically present in the common law of torts, and specifically in the area of tort law called negligence. In Australia, this duty of care is now recognised and operates within the context of civil liability legislation. While this area of law is extremely complex, the essence of liability in negligence is that a person must first owe another person a duty of care; second, the person breaches that duty (by act or by omission); and third, the breach causes damage. If a person owes another person a duty of care and fails to do something to avoid foreseeable, significant injury to the other person, when in the circumstances the person owing the duty could have taken

reasonably practicable steps to avoid that injury, the person owing the duty may be liable for injury that results from their failure to act.

Accordingly, where a person owes a child a duty of care, failure by that person to report a suspicion of abuse may produce liability in negligence for subsequent further injury suffered by the child. This liability will accrue whether or not a legislative reporting duty exists. It is possible, for example, for a teacher (and the teacher's employer, whether a non-state school authority or a government department of education) to be found to owe a child a duty of care, and to be held liable for injury caused to a child through the teacher's failure to report a suspicion that the child is being sexually abused, if a court finds the teacher had or ought to have had sufficient knowledge or reasonable suspicion of the child's abuse to require a report.

It is important to acknowledge that questions about the presence and scope of a common law duty of care will depend on the facts of the particular case. Even when present, the existence of a duty of care does not amount to a duty to prevent *all* possible injury. However, where such a duty exists, it marks a domain of duty prescribed by the common law as requiring certain acts to prevent injury being done to others. A case example demonstrates how the duty may operate in the context of child sexual abuse. In *AB v Victoria* (unreported, Supreme Court of Victoria, Gillard J, 15 June 2000), a former student successfully sued the State of Victoria in negligence for the failure by a government school principal and deputy principal to report what should have amounted to a reasonable suspicion that the child was being sexually abused. The child had demonstrated clear signs of being sexually abused. After the point at which the court found the school personnel should have developed and reported what amounted to a reasonable suspicion of the child's sexual abuse, the child suffered further abuse. The victim was awarded \$494,000 in damages for the contribution of the failure to report to her subsequent abuse and consequential injury. Many other similar cases have been settled out of court.

Duties under professional or industry policy

People who work in professions dealing with children often have, as conditions of their employment, the observance of various policies. In many cases, this includes a child protection policy. Child protection policies may duplicate the legislative duty, but in instances where the legislative duty is narrow, the occupation-based policy may impose a broader duty to report child abuse and neglect than does the legislation. In these situations, the occupational duty may closer reflect the common law duty of care. Failure to observe this type of policy may activate professional disciplinary consequences, and possibly breach the common law duty. In Queensland, for example, teachers have a relatively narrow legislative reporting duty (applying only to child sexual abuse) but have a broader policy-based duty (and common law duty) to report other forms of serious child abuse and neglect.

General nature and effect of mandatory reporting laws

Mandatory reporting laws are laws passed by Parliament that require designated persons to report certain kinds of child abuse and neglect to government authorities. The core principle motivating these laws is that many cases of severe child abuse and neglect occur in private, cause substantial harm to extremely vulnerable children, and are unlikely to be brought to the attention of helping agencies. Governments have chosen—as a social policy and public health measure—to enact these laws to draw on the capacity

of professionals who typically deal with children in the course of their work (such as teachers, police, doctors and nurses) and who encounter cases of serious child abuse and neglect, to report these situations to helping agencies. Generally, the primary aim is to protect the child from significant harm. The secondary aim is to assist the child's parents or caregivers to decrease the likelihood of recurrence. It is beyond the scope of this chapter to explore normative arguments about these laws, but it can be noted that the laws have been both criticised (see, for example, Ainsworth, 2002; Ainsworth & Hansen, 2006; Melton, 2005) and defended (Besharov, 2005; Drake & Jonson-Reid, 2007; Finkelhor, 1990, 2005; Mathews & Bross, 2008). Recent Australian state government child protection inquiries in New South Wales and Victoria have concluded that mandatory reporting laws are a necessary component of child protection systems (Cummins, Scott, & Scales, 2012; Wood, 2008).

The first mandatory reporting laws were enacted in the United States in the 1960s. They were driven by growing awareness of the existence and consequences of physical abuse, and the research and advocacy undertaken by the Colorado pediatrician C. Henry Kempe and his colleagues. Kempe et al. (1962) identified the “battered-child syndrome”, which referred to cases of intentional harm inflicted on children, generally those under three years of age, causing severe injury, including fractures and subdural hematoma. They also noted that many doctors were reluctant to believe that children's parents and caregivers would intentionally harm their children, and that even when they did so, were averse to reporting cases (Kempe et al., 1962). The first laws therefore were conceived to require medical practitioners to report physical abuse. Subsequently, the laws expanded to require other professionals to make reports, and then, with developing evidence of the prevalence and sequelae of different forms of abuse, the laws expanded to include other forms of child abuse and neglect. In general, the laws are only meant to apply to suspected cases of *significant* child abuse and neglect; a very important aspect of this field.

In Australia, reporting laws have developed since 1969. Each state and territory has the constitutional power to pass legislation about child protection, and has done so (see Table 1). In the absence of a coordinated national approach, and with states and territories having different priorities and preferences about child protection and family

Table 1: Australian child protection legislation, by jurisdiction

Jurisdiction	Legislation
ACT	<i>Children and Young People Act 2008</i> (ACT) ss 356, 357
NSW	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) ss 23, 27, 27A
NT	<i>Care and Protection of Children Act</i> (NT) ss 15, 16, 26
QLD	<i>Public Health Act 2005</i> (Qld) ss 158, 191; <i>Education (General Provisions) Act 2006</i> (Qld) ss 364, 365, 365A, 366, 366A; <i>Child Protection Act 1999</i> (Qld) ss 22, 186
SA	<i>Children's Protection Act 1993</i> (SA) ss 6, 10, 11
Tas.	<i>Children, Young Persons and Their Families Act 1997</i> (Tas.) ss 3, 4, 14
Vic.	<i>Children, Youth and Families Act 2005</i> (Vic) ss 162, 182, 184
WA	<i>Children and Community Services Act 2004</i> (WA) ss 124A–H
Cth	<i>Family Law Act 1975</i> (Cth) ss 4, 67ZA

welfare, each jurisdiction has enacted its own mandatory reporting legislation at different times, in different ways, and with occasional additional amendments that usually broaden but sometimes narrow the scope of the duty (Mathews & Kenny, 2008). Consequently, there are differences across Australian jurisdictions concerning who has to report, and what types of maltreatment must be reported.

Common approaches to legislative schemes across jurisdictions

Before pointing out these differences in the legislative duties, a common approach to the legislative schemes can be identified. The laws:

- define which persons must make reports (the duty is obligatory rather than discretionary);
- identify what state of mind a reporter must have before the reporting duty is activated;
- define the types of abuse and neglect that must be reported;
- define the extent of abuse or neglect that requires a report;
- state whether the duty applies only to past or present abuse, or also to future abuse that has not occurred yet but is thought likely to occur;
- state penalties for failure to report (which is meant to encourage reporting rather than police it);
- provide a reporter with confidentiality regarding their identity;
- provide a reporter with immunity from liability arising from a report made in good faith;
- state when the report must be made;
- state to whom the report must be made (usually the jurisdiction's department of child protection);
- state what details a report should contain;
- enable any other person (such as family members, neighbours, friends, and non-mandated professionals) to make a report in good faith, even if not required to do so, and grant confidentiality and legal immunity to these persons.

For a list of each jurisdiction's child protection departments, see Child Family Community Australia (2012).

Identifying legislative differences across Australia

State and territory laws differ in several ways. To begin with, there are differences in who is required to report (ranging from all citizens in the Northern Territory, to a small number of professions in Queensland, to a large number of professions in New South Wales). In this regard, it can be noted that the federal *Family Law Act 1975* (Cth) also imposes a reporting duty on members of court personnel. These differences in reporter groups are set out in Table 2 (on page 135).

Another major difference relates to which types of abuse and neglect (or, in the strict terms of some statutes, which types of injury or harm caused by these kinds of abuse or neglect) must be reported (see Table 3 on page 136). For example, most but not all states and territories require reports of neglect. The Australian Capital Territory, Victoria and Western Australia do not require reports of even life-threatening neglect. Some jurisdictions have relatively recently imposed a requirement to report the exposure of a child to domestic violence. This produces a high number of additional reports that would not otherwise be made: a point that will be returned to later.

Table 2: Mandated reporter groups required to report selected forms of child abuse and neglect, by Australian jurisdiction

Juris-diction	Teachers	Police	Nurses	Doctors	Others
ACT	Yes	Yes	Yes	Yes	Dentists; midwives; home education inspectors; school counsellors; child care centre carers; home-based care officers; public servants working in services related to families and children; the public advocate; the official visitor; paid teacher's assistants/aides; paid child care assistants/aides
NSW	Yes	Yes	Yes	Yes	A person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children (and managers in organisations providing such services)
NT	Yes	Yes	Yes	Yes	All persons
QLD	Yes	No	Yes	Yes	Nil
SA	Yes	Yes	Yes	Yes	Pharmacists; dentists; psychologists; community corrections officers; social workers; religious ministers; employees and volunteers in religious organisations; teachers in educational institutions; family day care providers; employees and volunteers in organisations providing health, education, welfare, sporting or recreational services to children; managers in relevant organisations
Tas.	Yes	Yes	Yes	Yes	Midwives; dentists; psychologists; probation officers; principals and teachers in any educational institution; child care providers; employees and volunteers in government-funded agencies providing health, welfare or education services to children
Vic.	Yes	Yes	Yes	Yes	Midwives, school principals
WA	Yes	Yes	Yes	Yes	Midwives
Cth	No	No	No	No	Registrar or a Deputy Registrar of a Registry of the Family Court of Australia, or of the Family Court of Western Australia; a Registrar of the Federal Circuit Court; ^a family consultants; family counsellors; family dispute resolution practitioners; arbitrators; lawyers independently representing a child's interests

Note: ^a In April 2013 the Federal Magistrates Court of Australia was re-named the Federal Circuit Court of Australia.

There are also differences in the state of mind that a reporter must have before the duty is activated (see Table 4 on page 137). Duties are never so strictly limited that they only apply to cases where the person is certain that the child is being abused or neglected; but nor are they so wide as to apply to cases where a person may have the merest inkling that abuse or neglect may have occurred. While this is a reasonable approach, there are differences between the jurisdictions in how this state of mind is expressed, which may cause confusion. The legislation variously uses the concept of

Table 3: Types of abuse or neglect that must be reported, by Australian jurisdiction

Juris-diction	Physical abuse	Sexual abuse	Psychological/ emotional abuse	Neglect	Exposure to domestic violence
ACT	Yes	Yes	No	No	No
NSW	Yes	Yes	Yes	Yes	Yes
NT	Yes	Yes	Yes	Yes	Yes
QLD	Yes	Yes	Yes	Yes	No
SA	Yes	Yes	Yes	Yes	No
Tas.	Yes	Yes	Yes	Yes	Yes
Vic.	Yes	Yes	No	No	No
WA	No	Yes	No	No	No
Cth	Yes	Yes	Yes	Yes	Yes

“belief on reasonable grounds” (four jurisdictions), and “suspects on reasonable grounds” (four jurisdictions). Technically, belief requires a higher level of certainty than suspicion.

There are differences in the extent of suspected harm that activates the reporting duty (see Table 4 on page 137). Especially for physical abuse, psychological abuse and neglect, the laws are generally not intended to require reports of any and all behavior perceived to be abusive or neglectful. Accidental injuries and trivial incidents of less-than-ideal parenting practices are not the intended object of the laws. Rather, the laws are concerned with acts and omissions that are significantly harmful to the child’s health, safety, wellbeing or development. The legislation differs in how these concepts are expressed, but generally uses indeterminate concepts such as “significant harm” or “detriment”, which beg the question of what constitutes these injuries. Except for cases that are clearly very serious, this ambiguity may cause confusion and uncertainty for reporters. For psychological abuse and neglect, especially, this indeterminacy may be particularly problematic.

As well, there are differences in whether the reporting duty is applied to past or currently occurring abuse only, or also to a perceived risk of future abuse to a child who is not suspected to have been abused yet (see Table 4 on page 137). In all jurisdictions, the reporting duty applies to cases of suspected past abuse and of suspected abuse that is currently occurring. However, four jurisdictions (New South Wales, Queensland, Victoria and the Northern Territory) extend the duty to cases where the reporter has a reasonable suspicion that a child is at risk of being abused in future, no matter who the suspected future perpetrator may be. South Australia and Tasmania require reports of suspicions that a child is likely to be abused in future, but only if the suspected future perpetrator is a person who lives with the child. In contrast, the Australian Capital Territory and Western Australia limit the duty to cases of past or current abuse. Australian jurisdictions generally have a strong approach to preventing future abuse, as well as responding to abuse thought to have already occurred.

Penalties for non-compliance also differ, although these are meant to encourage rather than police reporting. However, even these differences may be important, as without effective reporter training, severe penalties might influence hypersensitive or “defensive” reporting of minor incidents not intended to be covered by the law.

Table 4: Reporter's state of mind, extent of harm activating the duty, and application of duty to past or present abuse/injury, future abuse/injury, or both, by Australian jurisdiction

Juris-diction	State of mind	Extent of harm	Past/present or future
ACT	Belief on reasonable grounds	Not specified: "sexual abuse ... or non-accidental physical injury"	Past/present
NSW	Suspects on reasonable grounds that a child is at risk of significant harm	A child or young person "is at risk of significant harm if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence, to a significant extent, of ... basic physical or psychological needs are not being met ... physical or sexual abuse or ill-treatment ... serious psychological harm"	Both
NT	Belief on reasonable grounds	Any significant detrimental effect caused by any act, omission or circumstance on the physical, psychological or emotional wellbeing or development of the child	Both
QLD	Becomes aware, or reasonably suspects	Significant detrimental effect on the child's physical, psychological or emotional wellbeing	Both
SA	Suspects on reasonable grounds	Any sexual abuse; physical or psychological abuse or neglect to the extent that the child "has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's wellbeing; or the child's physical or psychological development is in jeopardy"	Past/present ^a
Tas.	Believes, or suspects, on reasonable grounds, or knows	Any sexual abuse; physical or emotional injury or other abuse, or neglect, to the extent that the child has suffered, or is likely to suffer, physical or psychological harm detrimental to the child's wellbeing; or the child's physical or psychological development is in jeopardy	Past/present ^b
Vic.	Belief on reasonable grounds	Child has suffered, or is likely to suffer, significant harm as a result of physical injury or sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type	Both
WA	Belief on reasonable grounds	Not specified: any sexual abuse	Past/present
Cth	Suspects on reasonable grounds	Not specified: any assault or sexual assault; serious psychological harm; serious neglect	Both

Notes: ^a Also if "a person with whom the child resides (whether a guardian of the child or not)—(i) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or (ii) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person". ^b Also if there is "a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides".

Mandatory reporting legislation as one element of a systemic approach to child protection and welfare

Mandatory reporting laws are part of a system of responses to child protection and family welfare concerns. The different components of this system are necessary owing

to the differences between types of maltreatment recognising that within the spectrum of circumstances, different responses are appropriate. A case of severe battering of a six-month-old infant, or of sexual abuse of a three-year-old, requires different responses than a case of mild neglect of a 14-year-old arising only from conditions of poverty in an otherwise healthy and well-functioning family. Different responses cater to the needs of children, families, communities and child protection systems. There is nothing to be gained from the inappropriate use of mandatory reporting laws for cases that are not their primary object. A medical analogy might be the inappropriate use of an ambulance to deal with a minor health complaint. It is important to avoid overburdening child protection systems wherever possible.

Some jurisdictions have formalised these different responses—commonly called “differential response”—to a greater extent than others. As previously noted, the aim is not to apply mandatory reporting laws to any and all cases of “abuse” and “neglect”, but to limit those laws to severe cases, and to enable referral to and deployment of supportive community agencies to situations of less severe problems. This applies especially in situations of neglect and domestic violence. Distinguishing between more serious and less serious cases of abuse and neglect can be difficult, but this is what differential response aims to achieve. At one end of the differential response continuum, in cases of serious abuse and neglect, statutory responses such as child protection orders can be made, which are dealt with elsewhere in this book. At the other end of the continuum, ideally, are supports such as assistance with housing, finance, employment, substance abuse, alcohol dependency, mental health conditions, domestic violence, respite care and parenting skills. Cases of serious abuse and neglect may require a blend of both statutory intervention and support to the family.

Examples include Victoria’s Child and Family Information, Referral and Support Teams (Child FIRST) system, which enable individuals who are not mandatory reporters but who are concerned about the child’s welfare to refer their concern to Child FIRST for help, rather than reporting to the department responsible for child protection. Families referred to Child FIRST are assessed and offered home-based family support or referred to other health and welfare services. Child FIRST may also forward reports to child protection services if the situation involves more significant harm or risk of harm. Equally, reports to child protective services may be redirected to Child FIRST if deemed not to require a child protection response (Government of Victoria, 2006).

The Child FIRST model was adopted in Tasmania under the name Gateways. Tasmania also amended its mandatory reporting laws to facilitate a preventative approach. Mandatory reporters can report their concerns about the care of a child to a “community-based intake service”, which would fulfil their reporting duty (*Children, Young Persons and Their Families Act 1997* Part 5B).

In New South Wales, to renew an emphasis on limiting mandatory reporting to cases of significant harm, the 2010–11 annual report of the Keep Them Safe action plan (NSW Department of Premier and Cabinet, 2011) set out the new system requiring mandated reporters to report to the department only cases of suspected significant harm. Section 27A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) then enables mandated reporters to make reports to “child wellbeing units”, which were established in the four major state government departmental groups (health, education, police, and family and community services). These units provide support and advice to mandated reporters on whether a situation warrants a mandated report, and on local services that might be of assistance. The focus of the units is on ascertaining what the

family needs to minimise or overcome their present situation and on facilitating the most appropriate assistance.

The need for reporter training

Effective reporter training is essential to ensure that the objectives of mandatory reporting laws can be attained. Training is needed to enable reporters to identify and report those cases that can reasonably be expected to be detected (accepting that child abuse and neglect is often not easy to detect and that reporters are not expected to be perfect). It is also required to help reporters avoid making reports that are clearly unnecessary.

A lack of sufficient and effective training—and relevant knowledge, attitudes and skills—has been shown to influence both failure to report, and clearly unnecessary reporting. Research with teachers has shown that effective reporting is influenced by the teacher's awareness of the duty to report (Crenshaw, Crenshaw, & Lichtenberg, 1995), their knowledge of the content of that duty (Kenny, 2004), and their attitude towards the duty (Goebbels, Nicholson, Walsh, & De Vries, 2008; Hawkins & McCallum, 2001). Research also indicates that the effectiveness of teachers' reporting is influenced by the extent and nature of the training they have received in recognising abuse (Hawkins & McCallum, 2001), as well as their confidence in their ability to recognise abuse (Crenshaw et al., 1995; Goebbels et al., 2008). Among nurses, positive attitudes towards the reporting duty have been shown to influence more effective reporting (Fraser, Mathews, Walsh, Chen, & Dunne, 2010).

Yet, numerous studies, some conducted in Australia, have found that professionals who are required to report child abuse and neglect indicate they have not had the training required to equip them to fulfil their role (Abrahams, Casey, & Daro 1992; Christian, 2008; Hawkins & McCallum, 2001; Kenny, 2001, 2004; Mathews, 2011; Reiniger, Robison, & McHugh, 1995; Starling, Heisler, Paulson, & Youmans, 2009; Walsh, Bridgstock, Farrell, Rassafiani, & Schweitzer, 2008). Studies have also found low levels of knowledge about the nature of the duty (Beck, Ogloff, & Corbishley, 1994; Mathews, Walsh, Rassafiani, Butler, & Farrell, 2009), indicators of abuse and neglect (Hinson & Fossey, 2000), and how to make a report (Kenny, 2001). Members of mandated professions may hold beliefs or attitudes that may not be conducive to reporting, such as a belief that certainty is required (Feng & Levine, 2005; Kalichman & Brosig, 1993; Mathews et al., 2009; Zellman, 1990), a belief that child protective services may not respond (Jones et al., 2008), or attitudes that may influence a decision not to report (Fraser et al., 2010).

The lack of effective training can be remedied by developing and delivering multidisciplinary programs tailored to professions and jurisdictions. While this requires investment, the downstream savings in enhanced reporting would likely offset this. Currently, South Australia is the only state to legislatively require training for mandated reporters.

The need for public education

There is also a need for education of the public about their role in child protection. Approximately two-fifths of all reports are made by non-mandated reporters, such as family members, friends and neighbours (Mathews & Bross, 2008). While “substantiated” reports are not the only useful reports (Drake, 1996; Kohl, Jonson-Reid, & Drake, 2009; Mathews, 2012), a proportion of these reports made by members of the public, are both unsubstantiated and unnecessary. The public, and mandated reporters too, may

understandably be confused by conflicting messages. Major national policy statements urge that child protection is “everyone’s business”, requiring individual and community responses (Council of Australian Governments, 2009). Yet, simultaneously, there is concern about over-reporting (Cummins et al., 2012; Wood, 2008). Although raising awareness is clearly very important, it appears that further steps are required in providing clearer and constructive guidance to the public about what governments expect within an approach where child protection is everyone’s business.

The need for research into reporting, responses, and outcomes

Variations in the laws across jurisdictions, different child protection systems as a whole, and different approaches to reporter training, raise questions about the influence of reporting laws and other relevant contextual factors on reporting practices and outcomes. A major question is whether some features of the laws, together with contextual factors (such as lack of training, or hypersensitive reporting due to fear of penalty or fear of missing the rare case of innocuous abuse that later becomes serious or fatal), are causing unanticipated outcomes or results that simply cannot be accommodated. Analysis has shown that particular subsets of reporting account for very large volumes of reports. In New South Wales, the volume of reports soared after children’s exposure to domestic violence was required to be reported. In 2006–07, for example, there were 74,283 reports of exposure of domestic violence (nearly three-quarters of these coming from police), which accounted for 26% of all reports made in that year, from any reporter group, for any kind of abuse and neglect (Mathews, 2012). In contrast, there were just over 20,000 reports of suspected child sexual abuse from mandated and non-mandated reporters. It is clear that vastly different reporting patterns can transpire for different reporter groups in different jurisdictions for different abuse types; reporting is not a homogenous or stable phenomenon. Some of these patterns may produce more desirable outcomes than others. Because these differences exist, rigorous research must focus on specific aspects of mandatory reporting to identify its strengths and weaknesses, issues to solve (for example, that may be modifiable in training), and areas where law and/or policy reforms may be required.

There are key questions for future research. Do other legislative differences produce different reporting outcomes? For example, does the use of “reasonable belief” as the mental threshold produce different reporting practices than “reasonable suspicion”, and if so, in what ways, and for which types of abuse and neglect? Research has indicated that the ambiguity of concepts like “reasonable suspicion” and “significant harm” cause problems for reporters in knowing when a report should or should not be made (Deisz, Doueck, George, & Levine, 1996; Levi, Brown, & Erb, 2006). There is broad agreement that clarification of these concepts is possible, which could assist reporters, and reduce the reporting of cases that clearly do not require it, easing the burden on child protection systems.

From a training perspective, key questions relate to the components of optimal child protection training for mandatory reporters. What is considered “best practice” and how does this compare to what can be empirically justified as being effective? When should training begin and what specific components should be part of pre-service and in-service professional education programs? Finding out more about what works in training mandatory reporters will require the use of rigorous experimental methods, hitherto neglected in training evaluation.

Conclusion

All states and territories in Australia have enacted mandatory reporting laws as part of their strategy to respond to cases of serious child abuse and neglect. Significant differences exist between jurisdictions, and there is a dearth of fine-grained research into the effects of legislative differences and contextual factors on reporting practices and outcomes and on systemic responses. The education of reporter groups can be improved to heighten knowledge of the indicators of abuse and neglect, when a report is and is not required, and how to make a report that provides useful assistance to child protection authorities, families, and children.

Reflecting these themes, the Victorian Government's Protecting Victoria's Vulnerable Children Inquiry (Cummins et al., 2012) recommended the development and implementation of a training program and an evaluation strategy for mandatory reporting. It also recommended a national evaluation of mandatory reporting schemes for the purpose of identifying ways to harmonise the different statutory regimes. Such an evaluation should also attempt to identify the optimal ways of expressing the mandatory reporting duties to avoid confusion about the nature and application of the duty. Reform efforts must acknowledge that mandatory reporting laws are only one important component of child protection systems. The design of the law must be adapted to the jurisdiction's entire child protection system, and the most successful approach to child protection and family welfare requires coordinated efforts by the whole of government.

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Children in the out-of-home care system

Judy Cashmore

CHILD PROTECTION INQUIRIES AND reform processes of various types are a very frequent occurrence in Australia and other common law countries. Over the past decade or so, there have been at least 18 state-based inquiries into the operation of the statutory child protection systems, and several national inquiries concerning the care and protection of children, with some inquiring into policies and practices going back fifty years or more (Australian Institute of Health and Welfare [AIHW], 2013; Irenyi, Bromfield, Beyer, & Higgins, 2006; Kenny, Higgins, Soloff, & Sweid, 2012). These include the major national inquiries concerning the Stolen Generations, the Forgotten Australians, and Forced Adoptions. These inquiries concerned the widespread removal of Aboriginal and Torres Strait Islander children from their families and communities by state and church-related missions and agencies; the estimated 500,000 non-Indigenous children, child migrants and Indigenous children who spent some or most of their childhood years in institutions or “homes”; and the estimated over 210,000 infants and children who were adopted with their mother having little or no choice. The most recent and ongoing inquiry, established in early 2013, is the Royal Commission into Institutional Responses to Child Sexual Abuse. The focus of this inquiry is on “how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse”. The target institutions include “any private, public or non-government organisation that is, or was in the past, involved with children, including government agencies, schools, sporting clubs, orphanages, foster care, and religious organisations” (Royal Commission into Institutional Responses to Child Sexual Abuse, 2013).

While the Commonwealth Government is assuming increased responsibility for a national approach to children and young people,¹ the states and territories in Australia

¹ For example, the Council of Australian Governments (COAG), has developed and is implementing a National Framework for Protecting Australia’s Children, which aims to deliver a more integrated response linking supports and services across jurisdictions, thus “avoiding duplication, coordinating planning and implementation and better sharing of information and innovation” (COAG, 2009, p. 9).

carry the primary responsibility and power to make laws and decisions about the care and protection of children (previously referred to as “child welfare”). Despite some jurisdictional differences in legislation and implementation, the systemic issues are very similar. There are, for example, similar concerns in each of the recent state-based inquiries and reform proposals concerning the child protection and out-of-home care systems in NSW, Victoria, and Queensland. The primary concerns are twofold: preventing and intervening early in families where children are being subjected to “significant” harm as a result of child abuse and neglect, and providing the best stable care for the increasing numbers of children who cannot remain living safely with their parents. The focus of this chapter is on children in out-of-home care.

The number of children in out-of-home care has been increasing at a steady rate over the last 15 to 20 years, and has almost trebled from just over 14,000 in 1997 to 39,621 in 2011–12 (AIHW, 2013). Only a small proportion of children for whom there are substantiated concerns about child abuse or neglect are found to be “in need of care and protection”, necessitating a court order; even fewer are removed from their homes or have parental responsibility (sometimes known as guardianship) transferred from their parents. This is the most serious form of intervention the state can take and is increasingly a measure of last resort.

For some children who enter care, their stay in care is short-lived and intended to be so. For example, about 43% of the children *entering* care across Australia during the year 2011–12 were under the age of five years, but only 23% of those *in* out-of-home care as at 30 June 2012 were under five. About a quarter of the children *leaving* out-of-home care during that year were under five years of age. This is in line with the principle that children should, so far as possible, remain within their families and return to their families as soon as circumstances have changed to allow them to return safely and be cared for adequately. This is also consistent with the UN Convention on the Rights of the Child.

When children enter out-of-home care, they are most likely to be placed with a relative or a member of their kinship group (47% across Australia, with a high of 56% in NSW) or in foster care (44% across Australia). Relative care means that children live with a member of their family (often a grandparent, aunt/uncle or older sibling) or, particularly for Aboriginal children, another person in their kinship group. Aboriginal and Torres Strait Islander children are heavily over-represented in out-of-home care, at ten times the rate for non-Indigenous children across Australia. Foster care means that the child is living with “foster parent(s) who receive a foster care allowance from a government or non-government organisation for the care of a child (excluding children in family group homes)” (AIHW, 2013, p. 125). Despite the Aboriginal placement principle and the preference for Aboriginal children to be placed with kin and, if kinship carers are not available with Aboriginal carers, about a third of Indigenous children are not placed with Indigenous carers (AIHW, 2013).

The number of children placed with relatives has increased markedly in Australia over the last few decades for several reasons. Relative or kinship care fits with the importance of children maintaining connections with their families. It is also cost-effective and practical because there is a shortage of foster carers, making it difficult to find suitable placements for children in need of care. It also has particular advantages for Indigenous children and is consistent with traditional practices of caring for children within their kinship groups. While there are benefits for children living with relatives, there are also concerns that relative carers are not always properly assessed for their capacity

to look after the children or given adequate support to help them do so (Winokur, Holtan, & Valentine, 2009). Many relative carers, especially in Aboriginal communities, are grandmothers who are older, single and not well off, and are often called on to care for young children with little financial and practical support.

Few children in out-of-home care in Australia now live in residential care, apart from children with serious disabilities, in marked contrast with the period up to the 1970s. In 1961, for example, the figure was close to 46% (Scott, 2006). By comparison, in 2012, only 6% of children and young people in out-of-home care across Australia and 3% in NSW were in group homes or residential care. This is somewhat lower than in other countries such as England (12% in 2012; Department for Education, 2012) and the United States (15% in 2011; US Children's Bureau, 2012). The strong shift from residential care to family-based placements such as foster and relative care in the 1970s and 1980s occurred across the Western world. This was a result of the increasing cost, the recognition of children's needs for family-type relationships, and the exposure of abuse and neglect in many institutions and children's homes—as powerfully depicted in the *Stolen Generations* and the *Forgotten Australians* inquiries in Australia, and in England in the 1997 Utting report (see also Berridge, Biehal, & Henry, 2012).

Where it is decided that there is no prospect that children can return to live with their parents, and living with a relative within their extended family or kinship group is not a realistic option, the aim is to place children in a permanent “home” or placement; hopefully, though not often enough, with a family that can become a “family for life”. A significant number of children and young people remain in care until they are 18; they “age out of care” when they become adults at age 18.

What are the outcomes for children in out-of-home care?

Children in care face a number of difficulties arising from the circumstances and inadequate care that led them to being removed from their parents, as well as the aftermath and emotional effects of being separated from their parents and family. For some children, their time in out-of-home care is spent in a long-term stable placement, and this may become “home” for them. A number of children who feel safe and secure in their foster home or with relatives do quite well in care, but a considerable number who experience a series of “broken” placements—involving numerous workers; changes of school; and little contact with their parents, siblings and other relatives—do much less well (Barber & Delfabbro, 2003; Cashmore, 2014; Cashmore & Paxman, 2006).

Understanding children's experiences in different types of out-of-home care and the factors that lead to better and to poorer outcomes is critical to developing better policies and practices. A large-scale longitudinal study in NSW of children entering out-of-home care for the first time on orders, *Pathways of Care*, and another in Victoria on young people leaving care, *Beyond 18*, are both very important studies and will fill a gap in Australian research on the outcomes for children in care and beyond.² Of crucial importance, both studies include the views of children and young people and their direct reported experience of what life is like for them “in care”.

² See the websites for *Pathways of Care* <www.community.nsw.gov.au/pathways> and *Beyond 18* <www.aifs.gov.au/beyond18>.

Leaving care

The risks for children and young people in out-of-home care continue beyond childhood and their time in care. Young people who may have had little continuity or stability in out-of-home care are often discharged from care at the age of 16 or 18, with little financial or social support, and with poor prospects for employment or good stable accommodation. By contrast, young people in the general population living with their parents now often remain at home until they are in their mid-20s, and they may leave and return several times before they finally live independently. While increasingly parents are expected to be responsible for their children's post-secondary education fees and living expenses into their twenties, there is minimal support from governments to similarly assist the young people for whom the state has assumed guardianship to make their transition to independent adulthood. Young people leaving care as a group have low levels of educational attainment and high rates of unemployment, mobility, homelessness, financial difficulty, loneliness and physical and mental health problems.

A small-scale longitudinal study of young people leaving care in NSW found that young people who had spent at least three-quarters of their time in care in one long-term placement were better off than those who had not, even if they were not living in that placement when they left care (Cashmore & Paxman, 2006). This group attended fewer schools, were happier, were more likely to have completed at least Year 10 at school, to report being able to "make ends meet", to be satisfied with what the department had done for them, and were less likely to say they missed out on affection and "things other kids had", or to have thought about or attempted suicide. Young people who indicated that they had felt secure and that they were loved while they were in care were also doing significantly better five years after leaving care than those who had never felt there was someone who loved and cared about them. Young people who reported that they could call upon a range of other people (family members, former carers and other networks) for social and emotional support, and financial support, were faring significantly better four to five years after leaving care than those whose level of perceived support was less. This was also related to the level of "felt security" in care; young people who had felt more secure in care also felt they had more supports available to them after leaving care.

Adoption

A major challenge is how to ensure that children who cannot live safely with their parents or with other family members or kin have stable, permanent and caring living arrangements with a "family for life". In countries such as the UK and US, adoption is encouraged as the preferred option for children who cannot return home, with the use of adoption targets and financial incentives for local authorities in the UK and the states in the US. In Australia, adoption by carers is much less common, though NSW and other state governments are considering ways to encourage the use of adoption for children in out-of-home care. Only 70 children across Australia were adopted by their carers in the year 2011–12, a tiny proportion of the 39,621 children in out-of-home care at 30 June 2012.

There are several possible explanations for the very low adoption rate for children from care in Australia. First, severing legal ties with the biological family is seen as inappropriate, given the lessons from past adoption practices, especially within Indigenous communities and their history with the Stolen Generations. Adoption is therefore not seen as an appropriate option for Indigenous children, who comprise

about a third (34%) of the children in care, nor for children in the care of relatives or kin (47%).³ Secondly, the adoption process is quite complex and it takes considerable time and skills for workers to take it through the Supreme Court, especially if the parents are not contactable or not willing or able to give consent. Thirdly, carers in Australia, and also in the UK, are anxious about the level of continuing financial and practical support following the adoption of the child (Sinclair et al., 2007). Many, possibly most, foster carers are not well off and may well not be able to afford to lose the money from the foster care allowance, even though as adoptive parents in Australia they may pick up other welfare benefits, such as Family Tax Benefit B. The \$1,500 annual adoption allowance paid by the NSW Government, for example, falls well short of the amount of financial support from a foster care allowance. This is not to suggest that adoptive parents and foster carers are motivated by payments, rather that some may not be able to consider the loss of significant amounts of financial support, particularly with the uncertain care needs and outcomes for some children who have been subjected to pre-natal substance exposure and neglectful or abusive early care.

Adoption has the benefit of providing three elements of permanency, as the British Association for Adoption and Fostering pointed out in their submission to the House of Lords Select Committee on Adoption Legislation. These are: a sense of belonging and security in being connected to a family for life; the physical space called home and community, and the legal framework that secures both of these with parental responsibility. On the other hand, the research evidence is not conclusive that adoption necessarily provides for better outcomes for children than long-term stable foster care *per se*. As the recent review of adoption research by Thomas (2013) concluded:

Both adoption and long-term foster care can provide children with security and permanence. However, the disruption rate of foster placements is higher than that of adoptive placements, although this may be explained in terms of the children's age at placement rather than the nature of the placement itself. Most of the children in *stable* placements reported a strong sense of belonging and permanence, but some in foster care expressed more uncertainty about their future relationship with carers ... However, few differences were found between children's levels of emotional and behavioural difficulties, and participation and progress in school, for those in *stable* long-term foster care and those in adoptive placements. (p. 31)

The two main predictors of stability in both adoptive and foster placements were the child's age at placement and their level of emotional and behavioural disturbance. Further, research also indicates that adoptive parents need to be well prepared, given accurate information about the child, and have realistic expectations and good social support to increase the chances of stable adoptive placements and positive outcomes for both the child and the adoptive family (Quinton, 2012). Adoption is not necessarily a cheaper or

3 In both the UK and US, the proportion of children in out-of-home care with relatives is considerably lower: 11% in England and 27% in the US. In England, relatives and kin are encouraged to apply for special guardianship orders as a way of exiting children from the care system, and in the US, unlike the UK and Australia, relatives are encouraged to adopt children placed with them (June Thoburn, personal communication, 18 June 2013). Children older than about five years in both the UK and US are unlikely to be adopted by non-related adults unless that is by their carers after the arrangements are settled and working well (Sinclair, Baker, Lee, & Gibbs, 2007). Where children have been freed for adoption and parental rights terminated in the US, many older children are in legal limbo, with no legal parents and no prospect of ever being adopted (Cashmore, 2001; Lewis, 2004). This is a completely unacceptable position to leave children in.

certain solution for children leaving the care system. The major advantage, however, is that children who have been adopted may feel a greater sense of security and do not face the prospect of “leaving care” at age 18 (or earlier). One of the major problems with long-term foster care is what comes after it—whether or not it offers continuing support and lifelong relationships. In many cases, it does not.

Shared family care

Most of the options and much of the thinking in out-of-home care rely on moving the child—removing them from their parents or returning them home, placing them with relatives, using long-term guardianship orders, or placing them in adoptive families. In addition to the need for greater flexibility in the ordering and use of these four main options, a greater array of models and innovations might be allowed and funded.

One alternative model is shared family care, which involves fostering the family rather than just the child, so the child does not need to be moved away from their family. This has been explored in the US, UK and also previously by Barnados in NSW under their Temporary Family Care model. Price and Wichterman (2003) described shared family care as involving “the placement of whole families in the homes of community members who act as mentors and work with a team of professionals to help the families achieve these goals. By simultaneously protecting children and preserving families, Shared Family Care fills a critical service gap between traditional family preservation and out-of-home care” (p. 197).

Shared family care may be useful in providing another pool of carers, using the time and skills of older parents and professional carers, without requiring them to take over the full-time care of the child. This provides another option when there is a shortage of foster carers and adoption is unlikely to be an option. These “shared care” or “mirror family” arrangements may be suitable in some cases, especially for teenage and young mothers who do not have the skills or means to care for their child and need longer term supportive relationships themselves. It could also be used to support parents when children are returned home.

There has been limited evaluation and trialling of this approach, but Barth and his colleagues have outlined several examples that have been used in various US states by private agencies, as well as an evaluation by a public agency. Barth and Price (2005) examined the benefits of a shared care program, as reported by some of its “graduates”, finding that it was “‘very good’ at locating housing and assisting them with making the transition to independent living situations. They also noted that the program helped them to budget and save money, become more stable and independent, get their children back, find employment, become better parents, maintain their recovery, get back on their feet, and start a new life” (p. 205). Sinclair et al. (2007) also described how one of their case studies in their UK study provided an outstanding example of how such an arrangement can work.

Shared family care builds on a number of principles for engaging with families in a less adversarial way, using individualised mentors in a relationship-based community approach. Barth and his colleagues (2005) do not deny the challenges of providing such a service but argue that it is a positive cost-benefit program for a limited number of parents. It could also provide a very good means of assessing the capacity of parents to provide adequate care for their children on a longer term basis, probably with considerably more validity than office-based assessment procedures.

There may be some value in trialling such approaches in Australia as another option in combination with child care for vulnerable children, along with appropriate evaluation to provide a solid evidence base. The shift from a binary “rescue-the-child” approach would call upon a different kind of foster carer who would do just that—foster care. But, if successful, it could diffuse some of the tension between “protecting” these children and providing for “permanent” relationships that maintain their identity and family ties.

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Justice and the protection of children

John Faulks

THIS CHAPTER IS ABOUT how the Family Court of Australia deals with matters involving children where there are allegations of abuse.

The balancing of the interests of the children and the parents, and frequently of other people associated with the children, is at the centre of what is *just* in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Critics of the Family Court have suggested using a tribunal or a court of experts to deal with child abuse cases. This chapter analyses such systems and suggests that even if the current legal system is not ideal (and no one would suggest that it is), it is preferable to the alternatives.

Child abuse cases in the Family Court of Australia

Under the *Family Law Act 1975*, there are two courts in Australia with jurisdiction to hear parenting disputes in family law matters—the Federal Circuit Court of Australia¹ and the Family Court. Only the Family Court and how it deals with child abuse cases will be discussed here.

The Family Court deals with the most complex family law disputes. In relation to child abuse cases, the Family Court hears matters involving serious allegations of sexual abuse of a child warranting transfer to the Magellan case management system (see details below), and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.

From 2007 to 2011, the number of notices of risk of child abuse or family violence (Form 4) filed in the Family Court decreased from 460 to 334.² However, the percentage

1 Formerly the Federal Magistrates Court of Australia.

2 Records of the Family Court of Australia.

of parenting applications that contain a Form 4 has remained about the same over that period (about 5%). This is in part a statistical rather than a substantive change because the work of the Family Court has become more concentrated in the most complex end of the spectrum of disputes and, at the same time, the court is handling a smaller number of applications overall.

Child abuse and evidence in the Family Court

Before the Family Court of Australia can do anything about questions of violence or child abuse it must be made aware that allegations exist.

The *Family Law Act 1975* (Cth) has recently been amended (s69ZQ(1)) so that the Family Court is required to:

- (aa) ask each party to the proceedings:
 - (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
 - (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence.

This provision was introduced because it was thought that:

Victims of family violence are often reluctant to share their experiences but are more likely to do so if directly asked. Courts can play an active role in drawing out family violence and abuse concerns, and ensuring that child welfare authorities receive early notice of allegations of child abuse. (Attorney-General's Department, 2010, p. 18)

It does *not*, however, provide any guidance as to what the Family Court should do in response to a party's answer that he or she does have concerns about child abuse or family violence. The Family Court cannot determine whether there has been child abuse or family violence without details of the allegations being put as *evidence* before the court, and it depends on a variety of sources to provide that evidence.

Evidence from children

In almost all cases of child sexual abuse, there are only two witnesses—the child and the alleged perpetrator. In criminal cases, children may become witnesses in court, which can become fraught with difficulties. The courts dealing with those matters often provide “safeguards” to try to protect the child witness; for example, erecting curtains between the child and the accused, arranging for the child to give evidence by remote video conferencing and the like.

Rarely will the Family Court countenance the direct involvement of children as witnesses in court, especially on questions of fact like abuse. Instead, children's views are expressed by the family consultants and single experts who interview them, and their best interests are represented by an independent children's lawyer (ICL).

Evidence from the person to whom a child reports abuse

If a child suffers abuse, there may or may not be physical manifestations of it. Physical marks may, in themselves, be consistent with some assault or may be equivocal. There may be DNA evidence, but rarely.

More often than not, the assault comes to light because the child *says* something about it to someone. Usually, although not universally, that someone is one of the parents of the child. Upon being made aware of any disclosures of child abuse, the parent may either bring proceedings in the Family Court or, if proceedings are already afoot, file a Form 4.

There may be numerous issues with the reporting parent's evidence about the allegations to the Family Court. To hear that their child has been abused is most parents' worst nightmare; they may, understandably, become emotional, worried or anxious and stressed about the safety of their child. This means that frequently the parent to whom the report is made is not ideally prepared or equipped to "record" (in whatever way) what is being said.

At the same time, the child, depending on his or her age, probably does not have the context or maybe even the language to effectively report what took place. In addition, abuse, particularly sexual abuse, by a parent of a child is an extremely difficult thing for the child to disclose and discuss with another parent. This situation is complicated by the sort of response the child receives from the parent. In many cases, especially with young children, the child is dependent on the parent for his or her emotional security, and expressions of alarm, horror, disgust or anger from that parent are likely to confuse the child and the process of reporting.

No parent wants to believe that abuse could have happened. This can lead to the child's being asked what lawyers call *leading questions*—questions that suggest the answer the questioner wants—and the process of the metamorphosis or transmogrification of the evidence begins. These issues arise not only in relation to a parent's questioning of the child, but also in relation to other interviewers, including police, child protection officers, health professionals and counsellors.

Typically, and reasonably, the parent seeks assistance or reassurance from another or others. Those persons may be the parent's own parent(s), a doctor, the police, a priest or a minister, a counsellor, a psychologist, a child protection agency, or all of these.

The police, for example, will be concerned among other things to assess that there will be evidence that will, or may, be sufficient to establish the guilt of the alleged perpetrator *beyond reasonable doubt*. On the other hand, child protection agencies are concerned (properly within their remit) with the *safety* of the child/victim, and determining the truth or otherwise of any allegation is, to some extent, secondary. Accordingly, the evidence of the child is filtered through different persons who may have different objectives for interviewing the child.

This is not to suggest that any of the factors affecting the accuracy or veracity of a child's evidence are necessarily carried out consciously, maliciously or malevolently by the parent or other interviewer. The process of reporting things from one person to another is a very human process that requires consideration in a context of human nature and an appreciation of the way people record and recall things.

Evidence from the alleged abusive parent

The other witness to the alleged incident, the alleged perpetrator, may indeed concede that something like the alleged event occurred. He or she may assert that although an event occurred, it did not occur as was reported by the child, the police, the other parent, the counsellor, child protection agencies—whomever—but was rather an innocent act misconstrued.

For example, a child may report to her mother that the father put his finger in her bottom. The father admits that he put his finger around the child's bottom, but denies that this was sexual abuse. He puts forward the explanation that the child had nappy rash and he was applying soothing cream to the affected genital areas. If the accused father puts this forward as an explanation, he or she can be cross-examined about this evidence and to that extent his evidence can be "tested", subjected to scrutiny and compared with the "evidence" of the child and, importantly, any corroborative evidence.

If the alleged perpetrator denies that *anything* of the sort suggested happened (and this is frequently the case in matters before the Family Court) what can be done? It is impossible to prove something did not happen, except by demonstrating that the alleged perpetrator was not there at the time, or that the event asserted to have occurred could not have occurred as the child has reported (or as the child is *reported* to have reported) because there were others present, or other physical circumstances were such that it could not possibly have happened.

This brings us back to the starting point—this is the dilemma. How do society and the parent(s) ensure the safety of the child and the child's physical integrity, while at the same time providing the person who is accused of the abuse with an opportunity to have his or her situation fairly judged.

The short answer is that there is *no* complete answer to these questions. Because of the difficulties associated with the collection and presentation of evidence referred to above, any person, whether a judge, a tribunal, an expert, a parent, a king, a president or a dictator, will have difficulty in coming to an absolute conclusion about whether the abuse occurred.

Evidence from an expert

In cases of child abuse and to some extent in cases where violence is asserted, it is common for a suitable expert—normally a psychiatrist, psychologist or social worker with expertise in dealing with children—to be appointed to provide assistance to the court.

The Family Court pioneered in Australia the concept of a *single expert* in court proceedings. This was designed to avoid what were referred to (unkindly) as "hired gun" experts for each of the parties. The single expert is jointly appointed by agreement between the parties.

Under *Family Law Rules 2004* r15.59 (which any expert is obliged to certify that he or she has read and understood), the expert must approach the matter impartially and present his or her opinion to the court together with any other matters that the expert considers to be appropriate.

Once a suitable expert is appointed, he or she is provided with terms of reference. In cases where a child has made allegations of abuse, the following matters are often included:

- Is the language used by the child in reporting the incident consistent with the development of the child at that age?
- Does the child show responses consistent with the alleged acts or not?
- What is the nature of the relationship between each parent and the child? (And, in some cases, what is the relationship between the parents themselves?)
- What is the psychological profile of each parent (including the personality traits and psychological or psychiatric health of the parties that may have influenced either making the allegations or the possible perpetration of the acts asserted)?

- Does the child show signs of being influenced or coached, either consciously or unconsciously, by the reporting parent?

The function of an expert in this regard is *not* to be a finder of fact nor to make a determination about whether abuse has happened or not. The expert may or may not interview the child about any abuse that is alleged. What the child says may be crucial to the determination of proceedings before the court in due course; however, essentially the role of the expert is to provide a *framework* for the fact-finder who, in this instance, is the judge. Nevertheless, there may be cases in which the expert does form an opinion about whether abuse has occurred, either negatively or positively, and the expert is always free to express that opinion.³

It is also helpful if the expert makes recommendations about what should happen if abuse has or has not occurred. This will involve drawing on the expert's experience and knowledge about the sort of assistance that might be needed to restore a highly fractured relationship between the parents, between the child and a parent, or possibly between the child and both parents.

There are practical limitations on the use and availability of expert evidence. The first of these is an increasingly difficult issue of cost. It is not uncommon now for a report from a highly qualified expert to cost the parties in the order of \$12,000. If the parties are meeting this from their own resources, and many are, this may put a very substantial drain on the parents. It is a factor that cannot be disregarded when considering whether an expert report is required.

In addition, there are, by every measure, too few experts in what is regarded by many as a field that is both fraught with difficulty and, to some extent, unrewarding. Their opinions may be called into question. They may be criticised and cross-examined. It might be thought, understandably, that there are easier ways to earn a living.

In addition, the constraints of cost and the limited number of experts available also affect the time that an expert might have available to provide for the consultation, observation of the parties, and subsequent preparation and writing of the report. An expert in this context may see the parties and the children for quite a limited time and be obliged to make a decision or recommendation or to give an opinion based on that relatively limited exposure.

Expert evidence is not blindly accepted in court, but is subject to what might be regarded as fairly common-sense principles. These principles are set out in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*) and *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 (*Red Bull*).

In *Makita*, Heydon JA (as his Honour then was) set out the principles to which expert evidence must adhere to be admissible:

- The expert must have appropriate or demonstrated expertise in the particular area referred to by reason of his or her training, study or experience.
- The expert must identify the facts, information and data that he or she is relying upon.
- The expert must identify and *evaluate* any research that the expert is relying upon.
- The expert must demonstrate the pathway of the expert's reasoning in coming to a particular opinion, including identifying any presumptions.

³ *Evidence Act 1995* (Cth), s 80. Also see Odgers (2012), who said "The term 'fact in issue' should be understood in the sense in which it is used in s 55—a matter in issue in the trial as determined by substantive law and pleadings" (p. 385).

- The expert's opinion must be wholly or substantially based on his or her expert knowledge.

When interviewing the parties and the children, and viewing affidavit material or subpoenaed material, the expert should be aware that some of the “facts” obtained from those sources may not subsequently be proved as facts in the proceedings before the Family Court. A careful identification of the material that the expert has relied upon in forming his or her opinion enables the expert to adjust that opinion if required during the course of the proceedings, with proper dignity and professionalism. This process is not about catching an expert out. It is about ensuring that the expert's opinion is presented in an open and transparent way and that the application of expertise is where it should be—on facts properly proved in court.

Strict adherents of the *Makita* principle would argue that a failure to satisfy the criteria set out above should make the evidence of the expert inadmissible. However, in the Family Court—where the issues between the parties and the issues of fact are multifaceted and many—it would be a rare case in which the expert's opinion is disregarded altogether (that is, inadmissible). Generally, the Family Court adopts the approach of the High Court in *Red Bull* [2002] FCAFC 157. In that case, the High Court said:

It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA [in *Makita*]. However many of those qualities involve questions of degree, requiring the exercise of judgment ... The various qualities described by Heydon JA are then assessed in the course of determining the *weight* to be given to the evidence. [emphasis added] [87]

Thus, in the Family Court, if an expert has failed properly to fulfil the criteria enunciated by Heydon JA in *Makita*, then his or her opinion may be given *less weight* in the overall determination by the fact finder rather than being deemed inadmissible.

The judge's particular ability is *not* to be the expert in the proceedings but rather to be the person to analyse and evaluate the evidence, including the evidence of experts before him or her.

The independent children's lawyer

The child's voice is presented in a number of ways to the Family Court. The child's views are heard by the Family Court's family consultants and/or by the single expert appointed. The child's *best interests* are frequently represented by the ICL (*Family Law Act 1975* s68L).

The court may appoint an ICL “if it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer” (s68L(2)(a)). This often occurs in cases where there is intractable conflict between the parents, the child is apparently alienated from one or both parents, there are allegations of child abuse that have not been reported to the welfare authorities or the police, or there are issues of significant psychological illness in relation to the mother, the father or another person spending significant time with the child. These are examples of situations where an ICL might be appointed and are by no means an exhaustive list.

The ICL does not represent the child, but rather the child's best interests; is not the child's legal representative; and is not obliged to act on the child's instructions in relation to the proceedings (s68LA(4)). The ICL's specific duties are given in s68LA(5).

Evidence from child protection agencies

There is a division between federal and state governments of responsibility for children. The *Family Law Act* is federal legislation that deals with children from a family law perspective, the states have jurisdiction in and are responsible for legislation relating to child welfare. The *Family Law Act* provides that state child welfare orders are not affected by the Family Court's jurisdiction (s69ZK(1)).

While the Family Court does not have any investigative powers, it can make an order "requiring a prescribed State or Territory agency to provide the court with the documents or information" relating to any notifications to the agency of suspected abuse of a child or of suspected family violence affecting the child, any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations, and any reports commissioned by the agency in the course of investigating a notification (s69ZW(1)–(2)).

This division of responsibility means that parties involved in cases before the Family Court concerning child abuse may also be involved in child protection proceedings under state or territory child welfare laws. This often involves duplication of information and evidence in each set of proceedings.

The Family Court has developed memorandums of understanding with state child protection agencies to ensure that the children and young people who are the subject of proceedings are protected, to clarify procedures, and to establish protocols to facilitate exchanging information and cooperating with each other.

The Family Court has also developed the Magellan program, a case management system designed to ensure that the cases that are the most resource-intensive, involving the most vulnerable children, are dealt with as effectively and efficiently as possible. The key strengths of the Magellan program are:

- there is early intervention;
- there is a singularity of judicial, registrar and family consultant involvement in the matter to avoid the parties having to tell their story to numerous people repeatedly;
- there is cooperation between all the agencies involved with families, including courts, police, legal aid, private lawyers, statutory child protection departments, hospitals and other counselling agencies; and
- an ICL is appointed.

These things mean that all the relevant evidence can be gathered at an early stage and a determination can be made as to how the matter should proceed and what additional expert evidence may be required to enable the matter to be finalised satisfactorily.

How does the Family Court deal with evidence of child abuse?

The legislative pathway

When determining disputes, a judge, under the oath of office, must apply the law "without fear or favour, affection or ill-will". When hearing parenting disputes in a family law context, the Family Court must apply the law as set out in Part VII of the *Family Law Act*.

Under the *Family Law Act*, the Family Court is required to "apply a presumption that it is in the best interests of the child for the child's parents to have equal shared *parental responsibility* for the child" (s61DA(1)). Parental responsibility means "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children" (s61B). Therefore, a presumption of equal shared parental responsibility is concerned

with the “duties, powers, responsibilities and authority” that a parent has in relation to children and does *not* impose a presumption that it is in a child’s best interests to spend equal *time* with each parent.

The presumption of equal shared parental responsibility is not applied in all cases. The presumption is rebutted if:

there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

- (a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or
- (b) family violence. (s61DA(2))

The presumption may also be rebutted “by evidence that satisfies the court that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child” (s61DA(4)).

Some provisions of the *Family Law Act* relating to family violence and child abuse were recently amended by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). Of particular relevance to this chapter is the broadening of the definition of abuse to include acts that cause the child to suffer serious psychological harm, and serious neglect of the child.

The definition of family violence was also amended. The new definition of family violence includes conduct such as assault, sexual assault or other sexually abusive behaviour, stalking, repeated derogatory taunts, and intentionally damaging or destroying property. Importantly, the definition of family violence was broadened to include behaviour such as intentionally causing death or injury to an animal, unreasonably denying a family member the financial autonomy that he or she would otherwise have had, unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, preventing the family member from making or keeping connections with his or her family, friends or culture, or unlawfully depriving the family member of his or her liberty (s4AB(2)).

The broadening of these definitions means that the scope for rebutting the presumption of equal shared parental responsibility in circumstances of child abuse or family violence may also be broader. If, after considering the evidence, the Family Court is satisfied “on the balance of probabilities” that child abuse has occurred, then the presumption of equal shared parental responsibility is rebutted.

The presumption may also be rebutted if the Family Court determines that it is not in the best interests of the child for the presumption to apply. The *Family Law Act* sets out factors that the Family Court must consider in determining what is in a child’s best interests. The primary considerations that must be taken into account are:

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. (s60CC(2))

Before the recent family violence amendments, the court was at large in determining how much weight to give to each of these factors. However, the amendments have now changed that position.

The primary considerations set out in s 60CC(2) represent competing interests. On the one hand, the Family Court must consider the benefit to the child of having a meaningful relationship with both parents (s 60CC(2)(a)). On the other hand, the Family Court must take account of the need to protect the child from harm, as set out in s 60CC(2)(b). However, the legislation now makes it clear that the Family Court is to give *greater weight* to the need to protect the child from harm. Depending on the case, this may well mean that the presumption of equal shared parental responsibility is rebutted and the Family Court is at large in determining the time a child spends with each parent.

The debate leading up to the introduction of the recent family violence amendments highlighted that there were still difficulties in persuading (particularly) women who had been the victims of violence to raise such allegations in cases before the Family Court. This was asserted, in part, because of the (so-called) “friendly parent” provisions. These provisions meant that “the willingness and extent to which one parent has facilitated the child having a relationship with the other parent is taken into account in determining the best interests of the child and, ultimately, orders dealing with parenting arrangements and parental responsibility” (Neilsen, 2011, p. 21). It was thought that this provision dissuaded some from raising allegations that might be argued to show that they were in some way not prepared to support the children’s relationship with the other person. Chisholm (2009) stated:

It is appropriate, therefore, to consider whether some amendment would remove this undesirable consequence while retaining the value of the provision in encouraging parents in ordinary circumstances to facilitate the child’s relationship with the other parent. (p. 103)

The “friendly parent” provisions have now been repealed.⁴

It was also said that the previous cost provision, s 117AB, militated against the raising of allegations. Section 117AB provided that if the Family Court is satisfied that a party *knowingly* made a false allegation or statement in the proceedings, then the Family Court must order that party to pay some or all of the costs of another party to the proceedings.

Three reports, by Chisholm (2009), the Family Law Council (2009) and Kaspiew et al. (2009), argued that there was no evidence that s 117AB had achieved its purpose in relation to false allegations of family violence. And all three reports:

indicate[d] that provisions that direct the court to order a party to pay the costs of another party to the proceedings in certain circumstances have operated as a disincentive to disclosing family violence, with vulnerable parents deciding not to raise legitimate safety concerns for fear they would be subject to a costs order if their claims cannot be substantiated. (Neilsen, 2011, p. 29)

So far as matters that *actually* came before the court, these concerns were more perception than reality and very few matters appear to have been dealt with in a way that obviously some litigants and their lawyers feared they might be. However, it is impossible to know how many people might have been dissuaded from raising issues

⁴ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), Schedule 1, Part 1, Items 18 and 20.

with the court as a result of their perceptions. In any event, s 117AB has now been repealed.⁵

To the extent the “friendly parent provisions” and s 117AB impeded a proper disclosure by parents to the court of all the relevant information relating to best interests of children, including allegations of child abuse, the amendments may contribute to a more complete picture.

The standard of proof

When trying to determine whether or not there has been child abuse, a judge must listen to the evidence impartially, allow the evidence to be tested by cross-examination and weigh the evidence. The judge may only make a finding that a parent abused a child if satisfied on the balance of probabilities that child abuse did occur. The rules of evidence in civil proceedings, and hence in proceedings under the *Family Law Act* (s 69ZT(1)), require that the proof of something must be in accordance with the balance of probabilities (*Evidence Act 1995* (Cth), s 140(1)).

When the phrase “balance of probabilities” is used, most people mentally envisage a set of imaginary scales where evidence is put on either side until some sort of balance or imbalance is achieved and a determination is made. However, the High Court said in *Briginshaw v Briginshaw* (1938) 60 CLR 337 that the court must feel an “actual persuasion” that something has happened:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an *actual persuasion of its occurrence* or existence before it can be found. It *cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality*. [emphasis added] (per Dixon J)

The process is not just mechanical because all the weights in the scales are not of equal value. Legitimately, there may be differences of opinion about the weight to be attributed to any particular piece of evidence in the scales. Overall, there must be in the mind of the determiner, some *satisfaction* that the event that is alleged to have occurred *has in fact occurred*. The High Court said in *Briginshaw*, that the court may have regard to a number of things:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (per Dixon J)

These principles are now set out in the *Evidence Act*:

Without limiting the matters that the court may take into account in deciding whether it is so satisfied [on the balance of probabilities], it is to take into account:

⁵ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), Schedule 1, Part 1, Item 43.

- the nature of the cause of action or defence; and
- the nature of the subject-matter of the proceeding; and
- the gravity of the matters alleged. (s140(2))

A decision must not be made from a position of prejudice that something has or has not occurred, but must rather be a careful, dispassionate, impartial weighing of the relevant information to come to a conclusion.

Unacceptable risk

If a judge is able to find, on the balance of probabilities, that child abuse has occurred, it is often the case that the Family Court would not order the child to spend time with the parent found to have abused the child. However, this is not necessarily *always* the case. The best interests of the child may in some circumstances mean that the child should spend time or communicate with that parent where the child's safety is ensured. This might be in circumstances where there is no direct communication or, alternatively, where the time the child spends with the parent is supervised.

On the other hand, if a judge determines that the abuse has not happened, it is sometimes nevertheless very difficult to repair a seriously fractured relationship between the child and the parent who is accused. The child is almost certainly likely to be confused and resentful about the processes and possibly about the parent who brought the matter to court *as well as* the other parent. In an extreme case, even if no abuse is found to have occurred, a judge may nevertheless consider that it is inappropriate for that child to spend time with or live with the parent who had been accused, because to do so would cause serious emotional damage to the child, who may genuinely believe that he or she has been abused.

It is in that context that the advice of the experts is crucial to a proper consideration of what is in the best interests of the children. But there are cases in which the court is unable to come to a conclusion about whether the events happened or not. The reported allegations might be believable. The denial of the allegations might be equally believable. There may be no corroborating circumstances and no physical effects of the alleged abuse that would assist a determination one way or the other. In such circumstances, the court is obliged, in accordance with the High Court's determination in *M v M* (1988) 16 CLR 69 and *B v B* (1988) FLC 91-978 to make orders about the children that would *not* impose an *unacceptable risk* on the child (lawyers love double negatives).

Here is a conundrum. If the court were satisfied that the events alleged had occurred, then there must necessarily be some risk for the child in spending time with that parent, at least unsupervised. If the court is satisfied that the events alleged had not occurred, is it not reasonable that the parent and the child should have the opportunity to develop a proper relationship?

If the court is unable to decide properly whether the event has happened or has not happened, then how is risk in these circumstances to be determined and what constitutes, in the words of the High Court, an "unacceptable risk"?

In some ways, it is easier to approach the matter indirectly rather than as a direct philosophical or jurisprudential question. If a court has made no determination about whether the alleged abuse has occurred or has not occurred, at one extreme there would be *no* risk to the child if the child never saw the alleged abuser again. The child would then be preserved from any risk of further abuse *but* would be subject to difficulties in

the development of his or her relationship with that parent (obviously), and possibly with other people in later life. These are matters upon which experts can be asked for an opinion.

At the other end of the scale, if the child were to spend unsupervised, unqualified time with the parent who was alleged to have carried out the abuse and that person had abused the child in the past (even though the court was not able to make a finding that he or she had), that child is at risk for the future.

If the parent only ever sees the child with his or her partner, with someone from his or her family, with a person who is a friend, or a professional supervisor, or the other parent, then the level of risk is diminished.

In the end, in abuse cases it can be seen that it will not be only about whether or not the alleged abuse occurred, but also about a detailed examination of all of the relevant information arising in a controlled environment.

This is not to say that judges are the only people who can make decisions about these sorts of things. However, in circumstances where we are talking about one of the most serious allegations anyone can make about another adult, and about the safety and protection of our children, it is crucial that the processes are the product of what has been found to work over a long and critical period and that we are not experimenting with the lives, or at least the safety, of our children. Judges are qualified and have expertise in making findings of fact in a legal system that was developed to provide a procedurally fair manner in which evidence can be presented and decisions made.

An alternative way?

It has been suggested by some that children's cases, especially those involving allegations of abuse:

should be heard in a special court staffed by experts in child development as well as child abuse [because] Family Court Judges are trained in family law and I suggest it is difficult for them to decide what is in the best interests of the child if they do not fully understand the effects of trauma and abuse and they rely on others who may also be inadequately educated. (Briggs, 2011)⁶

It has also been suggested that:

Family Court judges and magistrates [are] experts in law but unqualified to rule on abuse cases and should be replaced with a tribunal of experts on child abuse and child development. A legal adviser should be employed to advise the tribunal on issues of law. (Briggs as cited in McGregor, 2012, p. 3)

While these suggestions sound reasonable, it is difficult to know, given these generalised statements, how exactly such a specialist tribunal or court of experts would operate. As the Chief Justice of the Family Court said:

there has not been any discussion in a public or informed way about the efficacy of a tribunal, how it would operate, its strengths or weaknesses, and how it would compare with our existing system. (Bryant, 2009, p. 3)

6 "My view is that all legal matters involving children should be heard in a special court staffed by experts in child development as well as child abuse. Family Court Judges are trained in Family Law and I suggest it is difficult for them to decide what is in the best interests of the child if they do not fully understand the effects of trauma and abuse and they rely on others who may also be inadequately educated" (paper delivered by Professor Freda Briggs in May 2011 regarding the Family Court and child protection issues).

The suggestions by Briggs are similar in their opinion that judges of the Family Court and the Federal Circuit Court are not suitably qualified to make decisions in child abuse cases because they are experts on family law, but not experts in child development and child abuse. However, there are two different proposals put forward about how child abuse cases should be dealt with. One is a “special court staffed by experts in child development as well as child abuse”, the other is a “tribunal of experts on child abuse and child development.”

Special court staffed by experts

The suggestion that there should be a special court “staffed by experts” is somewhat ambiguous. Does this mean that:

- the people who sit on the court—the judges—must *be* experts in child abuse and child development; or
- judges will be *assisted* by child abuse and child development experts employed by the court?

At present, s 22(2) of the *Family Law Act* requires that:

A person shall not be appointed as a Judge unless:

- (a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and
- (b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law. (*Family Law Act 1975* (Cth), s 22(2))

These requirements under the Act mean that the Judge must be qualified in law and qualified to make decisions by applying the law and by analysing the evidence, as well as being suitable to deal with *family* law “by reason of training, experience and personality”.

If the first proposal applies—that is, judges must be experts in child development and child abuse—does this mean judges should be experts in some (or all) aspects of child development and psychology *as well as* meeting the requirements of s 22(2)? If so, what qualification is enough? Should judges have an undergraduate degree, a Masters, or perhaps a doctorate in the areas of child development and child abuse? If judges are qualified in both the law and in child development and abuse, should the judges make decisions as judges based on the evidence and applying the law “without fear or favour, affection or ill-will”, or as experts in child abuse and child development? The roles are different.

Or perhaps the first proposal means that judges need *only* be experts in child development and child abuse, but not experts in the law. If that is the case, then how can such “judges” be qualified to analyse evidence to determine whether or not child abuse occurred and apply the law accordingly?

If the second proposal applies—that is, that judges will be assisted by child abuse and child development experts employed by the court—this also raises questions. What qualifications should these experts have? In the Family Court, the qualifications of the experts appointed (as suggested by the parties) vary from qualified psychiatrists with expertise in child psychiatry to clinical psychologists with qualifications in counselling

child sex offenders and treatment of sexual abuse. Should the experts in this special court be qualified in some other way?

If the experts are to assist the judges, how will this occur? Will the experts make recommendations to the judge based on interviews with the parents and the child? If this is what is envisioned, then it begs the question how this special court “staffed by” experts will differ from the present family law system. As described above, in child abuse cases, the judge of the Family Court makes decisions based on evidence, including expert evidence, but has the skills to analyse the expert’s evidence in accordance with the principles in *Makita* and *Red Bull* to come to a conclusion.

Perhaps proponents of this special court intend that judges of the court be bound by the recommendations and “findings” of the child abuse and child development experts. A judge’s role is to be an impartial decision-maker, to find facts based on the evidence before him or her and to apply the law to those facts. A proposal that a judge *must* accept recommendations by a panel of experts raises serious questions about justice.

Tribunal of experts

The suggestion here is that a tribunal of experts in child abuse and child development be established to “rule on” child abuse cases. The words “rule on” suggest that the tribunal would act as a judicial officer does in family law and make findings of fact about whether or not child abuse occurred.

In 2003, the Standing Committee on Family and Community Affairs presented a report on the inquiry into child custody arrangements in the event of family separation entitled *Every Picture Tells a Story*. In that report, the Standing Committee recommended:

the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about *shared parenting responsibility* ... with respect to future parenting arrangements that are in the best interests of the child/ren ...

The committee recommends that after establishment of the Families Tribunal, the role for courts in disputes about parenting matters should be limited to:

Cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse which parties will be able to access directly once the issues have been identified. (House of Representatives Standing Committee on Family and Community Affairs, 2003, pp. 104–105)

The Families Tribunal recommended by the Standing Committee on Family and Community Affairs was intended to be a tribunal that made *administrative* decisions in circumstances where parents agree they should have shared parental responsibility. It is important to note that the committee recommended that cases involving family violence and child abuse remain the jurisdiction of the courts. It is also important to note that the recommendation for a Families Tribunal was not accepted by government.

There are constitutional limitations that may apply to the tribunal of experts proposed. Such a tribunal is not a court vested with federal jurisdiction and so would not have judicial power to act as the Family Court does in family law proceedings, including in child abuse cases. A tribunal of experts to “rule on” child abuse cases as a judge does may not be constitutionally valid.

Even if you did have such a tribunal, there is the question of how the tribunal’s decisions will be reviewed. Decisions of the Family Court at first instance may be

appealed and the appeal is heard by the Full Court of the Family Court. Thus, if a tribunal such as that suggested were to be established, its decisions may necessarily be subject to review by a higher authority, perhaps the Family Court. In that case, the person reviewing the decision of the tribunal is a judge. In these circumstances, the tribunal may only be adding *another layer* to the existing system and may only result in adding to the cost and time already expended by parties in the Family Court.

Even if such a tribunal was established, was constitutionally valid and was integrated into the legal system, there are other issues which arise.

Experts do not always agree. (I acknowledge judges do not always agree either.) However, when experts disagree it is the judges' judicial skills that are required to examine the basis for the expert's opinion, to listen to the expert's line of reasoning, to consider the experience and credibility of the expert and at the end to make a decision. It is not known how a tribunal of experts would make a decision if some of the experts disagree about whether child abuse happened, how the child's relationship with the alleged abusive parent should be restored and what time the child should spend with each parent.

It is also a matter of some interest to know where we would find these particular experts. It may be possible to have some form of government-accredited panel, but there may be disagreement about the appropriate criteria for expertise in this area. In any event, who would be appropriate to accredit the experts and what qualifications should such accrediting people have?

The issue of costs in relation to experts in family law proceedings is also an issue in relation to a tribunal of experts. Experts who are qualified psychiatrists or psychologists with expertise in child psychiatry or psychology may charge up to \$12,000 for one report in Family Court proceedings. If there were a tribunal of such qualified experts, the cost of employing such experts may be very high and it is difficult to know where such funding of experts would come from. If the parties are the ones to bear the cost of the experts in a tribunal, it may be that the cost will be equal to if not more than the cost of paying one expert to complete a report in family law proceedings.

In the end, it is about justice. If all society wanted was a rubber stamp on a pre-determined result, the existing system is unnecessary. If, however, we wish to acknowledge children's best interests as the paramount consideration, it is still necessary to "do right to all manner of people according to law without fear or favour, affection or ill-will".⁷ The system is far from perfect. There must be a continual striving for improvement. But let us have a better system up and running before we abandon a process that has justice as its goal.

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PART C

Relationship breakdown and family policies and practices

[17]

Children, families and the law

A view of the past with an eye to the future

Helen Rhoades

OVER THE YEARS A great deal of scholarship has been devoted to scrutinising the interaction between family law reform and social change. As John Dewar has noted, family law is peculiarly sensitive to its social environment, due in no small part to the constantly changing nature of its subject matter: family relationships (Dewar, 1998). This observation is particularly pertinent to Part VII of Australia's *Family Law Act 1975* ("the Act"), which provides the legal framework for resolving disputes about children's care arrangements. However, despite the many amendments to Part VII over its 38-year history, recent reports suggest that it has failed to keep pace with the growing diversity of families in Australia, and that its original concern for children's developmental wellbeing is in need of restoration.

This chapter explores the current challenges for family law in relation to children, and how they might be met, by examining the background to the introduction of the *Family Law Act* in the 1970s and its modern resonances in Australia today. The first part of the chapter uses material gathered for a legal history project about the early operation of the Family Court of Australia to describe the ground-breaking changes to the law that were realised by the Act's passage, and the problems with the existing laws at that time that prompted these reforms. The second section draws on the Australian Institute of Family Studies *Evaluation of the 2006 Family Law Reforms* ("the AIFS Evaluation"; Kaspiew et al., 2009) and the author's current research on decision-making about children's care arrangements ("the Children's Needs study"; Rhoades, Sheehan, & Dewar, 2013) to evaluate the present state of the law and the possibilities for change.

The introduction of the *Family Law Act*

A new approach to marriage breakdown

The *Family Law Act* was passed by the Australian parliament in May 1975 and came into operation on the 5th of January 1976, two months after the fall of the Whitlam

Government that was responsible for its development. It is best known for two significant reforms that changed the approach to marriage breakdown in Australia: the introduction of no-fault divorce and the establishment of a specialist multidisciplinary court for the resolution of family disputes, the Family Court of Australia.

The first of these reforms was the centrepiece of the Act. Its passage replaced the long list of “matrimonial offences” (such as adultery and desertion) that had characterised the *Matrimonial Causes Act 1959* with a single ground for divorce based on evidence of 12 months’ separation. As a consequence of this change, spouses wanting to end their marriage no longer needed to engage in litigated contests to prove or defend allegations of matrimonial misconduct. Instead, they simply had to wait out the 12 months and apply for their divorce decree, which most couples secured without ever setting foot inside a courtroom (Swain & Thornton, 2011). Apart from the cost savings associated with this reform, it also generated a significant cultural shift, effectively recasting divorce, which had previously carried shameful connotations, into little more than an administrative process in the transition from marriage to single life. It is not difficult to imagine the benefits of this development for the unhappily married—including deserted wives and women trapped in abusive marriages—many of whom saw this transformation as a “godsend” (Rhoades, Frew, & Swain, 2010).

The second important change wrought by the *Family Law Act* was the creation of a dedicated family court with an inhouse counselling section. Staffed by psychologists and social workers with child welfare expertise, the role of the counselling section was twofold: to conciliate parental disputes about children and to prepare reports that would assist the court’s judges to make decisions about the children’s care arrangements (Marshall, 1977). Although the main legal principle governing (what were then called) custody disputes remained the “welfare of the child”, just as it had been under the previous legislation, the way in which decisions were made by the courts shifted dramatically with the passage of the *Family Law Act*. Under the fault-based system, decisions made about children tended to be influenced by the judge’s findings on the divorce petition. Hence, a wife who had committed adultery or deserted her marriage was likely to be regarded as unfit to have custody of the children. In contrast to this approach, the *Family Law Act* cast a “positive duty on the Court to investigate the circumstances of children”, and to shape arrangements for the children’s care around the evidence of their needs (Asche, 1975, p. 387). In doing so, judges relied heavily on the expertise of the court’s counsellors, who drew on their knowledge of children’s development and their observations of the family’s interactions to provide an expert assessment of the child’s attachments, relationships and needs (Marshall, 1977). In this way, the *Family Law Act* created for the first time in Australia a genuinely child-focused model of decision-making.

What prompted these changes?

Underlying the passage of the *Family Law Act* was a complex mix of forces. Perhaps the most significant factor, as Swain (2012) noted, was the widening gap between the fault-based approach to divorce and the changing social mores of Australian society. At the heart of this disjunction were the significant evidentiary hurdles that couples were subjected to in order to secure a divorce under the *Matrimonial Causes Act*. As well as a thoroughgoing examination of their married life, petitioners faced the very real possibility that the judge might excuse their spouse’s behaviour and refuse to grant the divorce. For example, a woman who sought to dissolve her marriage on the grounds of

her husband's adultery might see her petition fail if the judge regarded her "nagging" or lack of interest in sex as justification for her husband's conduct (Rhoades et al., 2010). Adding insult to injury, divorce trials were closely followed by the tabloid press, who made a "public sport of marital breakdown" (Swain, 2012, p. 11).

This moralistic approach was designed to deter divorce applications and preserve the institution of marriage, even if this sometimes posed significant hardship for the partners. The burden in this respect was often borne by women, who tended to shoulder the responsibility for holding the marriage together (James, 2006). By the early 1970s, however, this view of married life was increasingly at odds with the shifting values of Australian society. Alongside rising numbers of married women working outside the home was the advent of the women's liberation movement (Margarey, 2009), which saw demands for free child care, paid maternity leave and family-friendly workplaces (Sawer, 2008). At the same time, the widespread availability of reliable contraception had created a "sexual revolution", in which the former stigma attached to unmarried cohabitation and unwed parenthood was beginning to wane (Finlay & Bissett-Johnson, 1972). The 1970s also saw a growing rejection among the post-war generation of their parents' values and choices, and an increased emphasis on individualism and "personal satisfaction" (Edgar, 1986, p. 9). In this changing social climate, fault-based divorce began to look decidedly out of date.

A second sign that reform was needed were the increasingly liberal interpretations of the fault-based legislation by divorce judges. Conscious of the widening gap between the law and social attitudes, and sensitive to the plight of spouses trapped in "intolerable" marriages by the need to prove a matrimonial offence, a number of progressive judicial officers in the late 1960s began to soften the evidentiary requirements for the most commonly used divorce grounds (Toose, Watson, & Benjafield, 1968). In the case of *Ainsworth v Ainsworth*, for example, Justice Selby held that it was sufficient to make out the ground of cruelty if the husband's conduct had caused the wife to have a "reasonable apprehension of injury", effectively overruling the existing obligation to prove the respondent had intended to inflict harm ([1968] 1 NSWLR 68, 72). Similarly, in *Colamaria*, Justice Jenkyn decided that the legal requirement to show physical injury could be satisfied by evidence of a general deterioration in the wife's mental health ([1968] 3 NSWLR 231). These shifts provided another clear signal that the existing legislation was no longer performing its job.

A third important factor underlying the *Family Law Act* reforms, and particularly the establishment of the Act's child-centred model of custody decision-making, was a growing recognition of the relevance of social science expertise to the resolution of family disputes (Enderby, 1975). This development was fuelled by the emerging child development research of the time, and by the increasingly prominent role played by marriage counsellors within the divorce system (Swain & Thornton, 2011). Based on their experience and knowledge of the developmental research, which showed that ongoing parental conflict can be destructive of children's wellbeing (Rutter, 1971), these practitioners began to challenge the view embedded in the existing law that unhappy spouses should stay together for the sake of their children.

Together, these factors—the widening gap between the fault-based law and family practices, the increasing evidence of "creative" decision-making by the courts, and the growing calls by social science professionals for a more child-focused approach to custody decisions—helped to inform the development of the *Family Law Act's* key reforms. The enduring legacy of these changes is manifest. Although marriage

remains a popular aspiration in Australia, the belief that unhappy spouses should be free to end their marriage has continued to enjoy majority support (de Vaus, 2004), and the modern family law system is still very much a multidisciplinary environment, where social science professionals play a key role in managing the separation process (Rhoades, Astor, & Sanson, 2009). Sustaining a decision-making framework shaped around children's developmental needs, on the other hand, has proved to be more difficult.

Forty years on: A new case for family law reform?

Much has changed since the passage of the *Family Law Act*, both in Australian society and the Act itself. This includes significant amendments to Part VII in the 1980s to extend its coverage to ex-nuptial children, a move that recognised the growing numbers of unmarried parents. Further reforms in the 1990s added provisions dealing with family violence, reflecting a growing awareness of its prevalence and consequences for children (Rhoades, 2007), while shared parenting amendments in 2006 were designed to encourage more “cooperative parenting” between separated parents in the interests of children (Ruddock, 2005).

Given this level of reform activity, it is tempting to think that the present legislation reflects the current state of social practices in Australia when it comes to family life. Yet there is much about Part VII and its approach to children's care arrangements that looks as though it was drafted some time ago. In this part of the chapter I want to explore two concerns in this regard: the Act's limited recognition of family diversity and the need (once again) for the law to focus on supporting children's development.

Family diversity

While the traditional family (where children are raised by two biological parents in a nuclear family arrangement) remains dominant in Australia, around 27% of families with resident children do not fit this description (Hunter & Price-Robertson, 2012). Along with increasing numbers of step-families, blended families, sole-parent families and same-sex families (Qu & Weston, 2012), kinship care arrangements are a fast-growing family form in Australia (Boetto, 2010), a phenomenon that is increasingly visible in the family courts (see, for example, *Maxwell v Finney* [2013] FMCAfam 131). Recent reports also highlight the considerable cultural diversity of families who use the family law system. Although there is a wide variation of practices within Indigenous communities, it is not uncommon for Aboriginal children to have multiple caregivers drawn from the wider family, while Torres Strait Islanders practise a form of customary adoption, in which children are “grown up” by relatives within kinship networks (Family Law Council, 2012a). Along similar lines, the Family Law Council has noted the increasing number of new and emerging communities in Australia, including families from Africa and the Middle East, many of whom take a collectivist approach to child rearing (Family Law Council, 2012b).

In addition to these changes, the past decade has seen a growing use of assisted reproductive technologies (Victorian Assisted Reproductive Treatment Authority, 2013) and surrogacy arrangements (Millbank, 2013) to form families, increasing the number of potential parents a child may have. These various reviews indicate that for a large number of Australian children, their family includes carers who are not their biological or legal parents. Moreover, a considerable body of research evidence shows that children's

understandings of family do not always mirror the assumptions embodied in the law. As Pryor and Rodgers (2001) noted, “we cannot make assumptions about who belongs to an individual child’s family in his or her eyes” (p. 130). Yet despite the many amendments to the *Family Law Act* over the past decade, this social reality is not currently reflected in Part VII of the Act.

The most recent policy review of Part VII took place in 2003. It resulted in a suite of amendments to Part VII, including a number of new legal principles and a new framework for deciding children’s care arrangements (*Goode v Goode* [2006] FamCA 1346). Although the changes require the courts to consider the relevant customary practices where Aboriginal and Torres Strait Islander children are concerned (s 61F), the current definition of “parent” for the purposes of Part VII is limited to the child’s biological or adoptive parents (*Tobin v Tobin* FLC 92–848, [45]), and the Act assumes that children have two of these. This approach to what we might call “legal parents” is reflected in particular in the first object of Part VII, which is to ensure children have the benefit of “both of their parents” having a meaningful involvement in their lives (s 60B(1)(a)), and in the first primary best interests consideration, which requires the courts to consider the benefit to the child of having a meaningful relationship with “both of the child’s parents” (s 60CC(2)(a)).

As this might suggest, the current provisions of Part VII have created something of a problem for the courts when a child’s family does not conform to the model envisaged by the Act, a circumstance that is increasingly commonplace. According to the Act, even though an applicant may be someone on whom the child has depended for their care, the court is not required to consider “the benefit to the child of having a meaningful relationship” with that person. Given the evidence of family diversity described above, this narrow understanding of family life brings to mind the kinds of problems with the law that signalled the need for reform in the 1970s, and suggests that, once again, the legislation has not kept pace with social reality. A question that arises is how are the courts dealing with this limitation in practice?

One of the consequences of the present limitations of the Act is that the judges of the family courts, much like their counterparts in the early 1970s, have had to engage in some creative decision-making in order to meet the needs of children living in non-traditional families. In a series of recent cases involving applications by grandmothers, step-fathers, lesbian co-parents, and sisters and aunts, judges have carefully manoeuvred their way around the current legislative framework in an attempt to consider the substance of the provisions that apply to parents, if not their form, so that the children in question are not disadvantaged (Chisholm, 2010). As the judicial officer in one such case explained:

To exclude [the step-father] from those considerations that specifically relate to parents would in the circumstances be artificial and may have the potential to distort the decision making process leading to a decision that may not be in the child’s best interests. (*Vaughan & Vaughan & Scott* [2010] FMCAfam 863, 139)

However, some judicial officers have gone further, actively criticising the Act’s narrow understanding of family (*Knightley & Brandon* [2013] FMCAfam 148) and, reflecting the Full Court’s view that “it is not parenthood which is crucial to the best interests of the child, but parenting” (*Yamada & Cain* [2013] FamCAFC 64, [27]), suggested that it is time for reform.

Children's needs

A second area of recent critique suggests that the Act's historical focus on supporting children's development has been compromised by the complexity of the decision-making framework introduced in 2006.

The AIFS Evaluation of the 2006 amendments (Kaspiew et al., 2009) revealed complaints by legal advisers that this framework had impeded their ability to work with parents in a child-focused way, and suggested that it "did not facilitate the making of arrangements that were developmentally appropriate for children" (p. 229). Similar criticisms were made by family relationship sector professionals, who voiced their frustration with the law's narrow understanding of children's needs (Rhoades et al., 2009; Wright, 2008). These concerns suggest that despite the similarity of issues that families present within each sector, and that many clients use more than one service (Kaspiew et al., 2009), they may be receiving quite different messages about their children's care needs in different parts of the system (Kaspiew, Gray, Qu, & Weston, 2011), and that the law has played a role in creating this disparity.

In light of the concerns raised by practitioners, a recent research project has been exploring the possibility of developing a new decision-making framework, one that is structurally simple, supportive of children's developmental needs and capable of application by the range of practitioners across the system's different dispute resolution sites. The methodology for this project, which is described in detail elsewhere (Rhoades et al., 2013), sought in the first instance to gain insights into the ways in which professionals from the family relationships sector use their practice experience and knowledge of child development in working with parents, and how this approach differs from the decision-making process mandated by Part VII of the Act. Stage 1 of the project employed a series of dispute vignettes (case studies based on published judgments of the family courts) and recorded interviews with 39 experienced practitioners to elicit information about their approach to deciding developmentally sound arrangements for the children in those scenarios. The analysis of their responses was then compared to the decision-making process in the judgments from which the vignettes were drawn, to identify the areas of commonality and divergence between the two (the "comparative analysis").

The comparative analysis revealed a number of similarities of practice. In particular, it showed that many of the factors in Part VII that judges are required to consider—such as the child's views, age and cultural background, and the likely effect on the child of being separated from a parent or sibling—are likewise important considerations for family relationship professionals. However, the analysis also revealed some important differences that suggest the need to re-think certain elements of the current legislative framework. Three issues in particular are worthy of note.

One issue concerns the process of decision-making itself. The central difference here was the absence from the responses of the family relationships sector practitioners of anything that resembled the provisions in Part VII that require decision-makers to consider particular forms of care arrangement. Not surprisingly, it also involved a more organic and iterative method than the highly structured pathway contained in the legislation. Instead of testing presumptions about children's best interests, the process used by participants centred on the performance of three assessment tasks: identification of the children's needs, an assessment of the risks and protective factors affecting the children's safety and wellbeing, and an assessment of each person's capacity to support the children's development and protect them from harm.

A second notable distinction involves the way in which the decision-making exercise was framed. Like the legislation, family relationships sector practitioners were concerned to ensure the child's safety. Part VII currently couples this objective with a requirement to consider the benefit to the child of having a meaningful relationship with both parents (s 60CC(2)(a)). In contrast, the main concern for family relationship professionals (alongside their focus on safety) was to ensure the child's healthy development would be supported, a principle that is not currently found in Part VII of the Act.

The third important feature of the comparative analysis involved different understandings of harm to children. The present protective provision in Part VII is concerned with safeguarding children from harm caused by "being subjected to or exposed to abuse, neglect or family violence" (s 60CC(2)(b)). According to Richard Chisholm (2009), this formulation of harm has the potential to see decision-makers overlook the effects on children of other damaging behaviours, such as parental conflict and parental indifference. This concern was supported by the responses of family relationship professionals in our study, whose assessments of risk were more broadly concerned with harm to the child's future development. This included concern for children's moral development and identity formation, as well as their needs for security and stability. In light of this broader focus, practitioners identified a wider range of potential sources of harm to children, including exposure to destructive parental conflict, a factor that is missing from Part VII.

Conclusion

In 1975, the Whitlam Government responded to the growing evidence that the law governing divorce was out of step with changing social practices and the emerging child development research by enacting the *Family Law Act*. Almost four decades later, Part VII of this Act continues to provide the relevant legal framework for deciding children's care arrangements when their carers are in conflict. But once again there are indications that the law has failed to keep pace with shifts in Australian society, and that the courts have had to engage in some liberal interpretative practices to circumvent the legislative limitations and ensure just outcomes for children. And there is also evidence of a renewed need to harmonise the law with the practices and understandings of family relationship professionals. The challenge for current policy-makers is for them to be brave enough to accommodate these changes.

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[18]

The ties that bind **Separation, divorce and the indissolubility** **of parenthood**

Patrick Parkinson

Parenting after separation and the gender war

There can be few areas of law or public policy where there is as much conflict and turbulence as in the law concerning parenting arrangements after separation. Lobby groups abound—some representing single mothers, others representing non-resident fathers. These debates about family law are often presented in terms of a gender war (Bala, 1999; Kay 2002; Mason, 1999; Whitehead & Bala 2012) in which women's interests are pitted against the claims of "father's rights" groups (Collier, 2009; Kaye & Tolmie, 1998). Both sides claim to have children's interests in mind.

The conflict between the different lobby groups has resulted in a kind of trench warfare in which huge battles are fought over the text of the legislation on parenting after separation. Like the battles of the First World War, every hundred metres of gain by men's groups in altering the language of legislation—however symbolic or trivial—is seen as a loss by women's groups. Conversely, gains by women's groups are mourned as a loss to fathers. As a result of these conflicts, Western countries, at least, seem to be caught in an endless pattern of reform or pressure for reform in family law, with periods of fierce debate followed by periods when there is a temporary cessation of hostilities. The law is often being reformed, but less often improved.

Australia has not been immune from this turbulence. While advocates on one side of the debate or the other may be able to view this turbulence only through the prism of the gender war, there is another way of seeing it. The law on parenting after separation has shifted fundamentally and irreversibly to an acceptance that although the relationship between the parents may be at an end, their lives continue to be bound together by their continuing obligations as parents, and parliaments now seek to reconcile divergent interests and concerns within that context (Parkinson, 2011). Accepting that there will not be a reversion back to a norm of sole custody (with the custodian being almost invariably the mother) can open up possibilities for a new consensus about the law on parenting after separation, one in which there is a proper recognition that in certain

situations, including, but not limited to, cases involving serious safety concerns, a sole parental responsibility order will be appropriate. It is possible to move beyond the gender war, and to craft better legislation as a result.

The abolition of custody

The reason for this transformation in the law is that the model on which divorce reform was predicated in the late 1960s and early 1970s has irretrievably broken down. This model was based on the premise that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start afresh once decisions had been made about financial matters and custody. In the divorce law at that time, issues about property and custody were dealt with by a once-and-for-all process of allocation (Parkinson, 2011). If the parties could not reach their own agreement, then the court allocated the property. The court also allocated the children (Schepard, 2004, pp. 3–4). Typically, the courts would award “custody” to one parent, usually the mother, and grant “access” or “visitation” to the other.

There was little difference in this respect between common law countries and the civil law countries of Western Europe. “Custody” included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child’s education and religion. Both parents were legal guardians at common law, but this meant little, because the powers that were classified as powers of “guardianship” included only such matters as consent to marriage of a minor and inheritance rights in the event of his or her untimely death. Since maternal custody was the predominant pattern, fathers were frequently relegated to a peripheral role in their children’s lives.

The history of family law reform across the Western world in the last thirty years has been one of moving away from that model of parenting after separation. This has been for a variety of reasons, but not least what is known now about children’s wishes and needs in the absence of violence and high conflict (Parkinson, 2011).

In England and Wales, for example, a radical reconceptualisation of post-separation parenting occurred with the *Children Act 1989*. The philosophy of that legislation is that parental responsibility continues after separation as it existed before the relationship breakdown, subject to any orders to the contrary by the court (Smart, 1997). In France, the law is based upon a principle of *coparentalité* (Fulchiron, 2002; Vauvillé, 2002). By legislation passed in 1993 (*Loi 93–22*), the Civil Code was amended to replace the language of custody with “parental authority”. A similar approach was adopted in Germany in 1998, which amended its Civil Code to provide that parents have joint parental responsibility during marriage and unmarried parents may agree to joint parental responsibility by formal declaration. There is a similar position in the Scandinavian countries, with joint parental responsibility continuing unless there is litigation (Parkinson, 2011).

In North America, many jurisdictions still use the language of custody, though joint legal custody is the norm. However, some US jurisdictions have adopted an entirely different language to describe parenting after separation. Washington State led the way as early as 1987 (Ellis, 1990). The law in that state requires each of the parents on divorce to propose a parenting plan, and if agreement cannot be reached, a plan can be determined by the court (Wash. Rev. Code § 26.09.181). The plan needs to include a “residential schedule”, which designates in which parent’s home each minor child shall reside on given days of the year, including provision for holidays, birthdays and other special occasions (Wash. Rev. Code § 26.09.184(6)). Thus, the law avoids the assumptions

inherent in the language of custody that one parent has the primary responsibility, while the other is assigned a marginal, visiting role.

Tensions about law reform in Australia

Australia, in 1995, followed the emerging trends in Europe and elsewhere. It was particularly influenced by changes to the law in England and Wales. While there were differences between the *Children Act 1989* and the 1995 reforms (Dewar, 1996), broadly the concepts, language and architecture of the two laws were similar.

To a significant extent, the *Family Law Reform Act 1995* offered semantic rather than substantive change. The language of custody and access was replaced by “residence” and “contact”, following the *Children Act* formulation. As in the *Children Act*, the philosophy of the *Family Law Reform Act 1995* was that while separation and divorce terminated the relationship between formerly intimate partners, it did not affect their relationship as parents except to the extent that the practicalities of living apart required it, or that court orders diminished the responsibility of one of them. The language of the 1995 Act was carefully chosen to educate the parents in a different way of thinking (Chisholm, 1996). They had responsibilities; children had rights. Children were not to be seen as the possessions of their parents.

The 1995 reforms were very modest and relied to some extent on exhortation to bring about a change of hearts and minds (Chisholm, 1996). For example, parents were encouraged to agree rather than litigate. Even still, the reforms were mired in controversy, and critics made dark predictions of adverse consequences (Armstrong, 2001; Graycar, 2000). The legislation would create a pro-contact culture, it was said, and would place women and children at greater risk of violence (e.g., Behrens, 1996).

In fact there had long been a pro-contact culture in family law. Samuels JA, of the NSW Court of Appeal, wrote in *Cooper v Cooper* (1977) FLC 90–234, 76,250 that it was only in exceptional circumstances, and upon solid grounds, that a father should be denied contact with his child. Denying access, he noted, “may well have grave consequences for the child’s future development”. In a concurring judgment, the President of the NSW Court of Appeal (Moffitt P) quoted with approval a statement of an English judge in 1993 to the effect that access is a right of the child, “and that no court should deprive a child of access to either parent unless it is wholly satisfied that it is in the interests of that child that access should cease, and that is a conclusion at which a court should be extremely slow to arrive” (Wrangham J in *M. v M.* (1973) 2 All ER 81, 85).

Thus the case law anticipated the pro-contact and children’s rights focus of the 1995 legislation by 20 years. There was nothing at all revolutionary in the principles enacted in s 60B of the *Family Law Act* that children “have the right to know and be cared for by both their parents” and that they “have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development.” That restated longstanding judicial orthodoxy.

Shared parenting and family violence

One of the main arguments that has been recycled in various countries is that the more that legislation supports and encourages the involvement of non-resident parents, the more it exposes women to the risk of violence and abuse (Jaffe & Crooks, 2004).

However, the issue of protecting women and children from violence has not proved effective as an argument against laws that recognise the indissolubility of parenthood, nor against having *any* provisions in legislation that encourage the continuing involvement

of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children's lives, and an increased risk of violence. There is simply no evidence for a linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver. Another reason is that politicians have responded to concerns about violence and abuse—logically enough—by strengthening the provisions in the legislation addressing those issues.

That happened with the 1995 legislation in Australia, which had a great deal to say about violence. This contrasted with the complete absence of reference to family violence as a significant issue for parenting decisions in the pre-1995 law. The court was instructed to take account of any history of family violence in determining what parenting arrangements would be in the best interests of the child. It was also required to endeavour to ensure that parenting orders do not expose a parent or other family member to an unacceptable risk of family violence, subject to the paramountcy of children's best interests. Other provisions sought to deal with conflicts or potential conflicts between the terms of restraining orders and orders concerning contact between the non-resident parent and the children.

The 1995 legislation was thus a genuine attempt by the parliament to respond to the competing concerns of the different lobby groups. Those who had prophesied serious adverse consequences for women sought to demonstrate the negative effects from the law based mainly on their interpretation of qualitative data (Rhoades, Graycar & Harrison, 2000); but the evidence for any relationship between the 1995 reforms and adverse consequences for women was less than compelling. The most that could be said with confidence was that there was evidence of a greater reluctance to deny contact on an interim basis. For these reasons, perhaps, the research largely failed to gain traction with the government.

The 2006 reforms

Instead, the message that resonated most strongly politically was that the 1995 legislation had failed to make much difference to the prevailing norms concerning parenting after separation, and that further reform was needed. Consequently, the next reform to family law (which took place in 2006) further strengthened the emphasis in the law on the importance of both parents being in children's lives.

This was the consequence of a major report from the Standing Committee on Family and Community Affairs of the House of Representatives in 2003. It had been asked by the then Prime Minister to examine whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted. The committee, consisting of both government and opposition members, delivered a unanimous report (Standing Committee on Family and Community Affairs, 2003). Committee members favoured significant reform of the law in order to get away from what they saw as the standard pattern of contact for non-resident parents of every other weekend and half the school holidays. This they dubbed the 80–20 rule, on the basis that it gave non-resident parents approximately 20% of the time with their children. In the end, the committee concluded against a legislative presumption of equal time; however, it considered that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time” (p. 30).

The committee (2003) also heard very clearly the concerns of women's groups about the issue of family violence. It wrote:

The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse. (p. 26)

This was the basis for several recommendations. The committee (2003) proposed that in the statement of principles for the legislation, there should be a specific reference to a child's right to preservation of their safety (p. 28). The committee also recommended a winding back of the notion that parental responsibility should continue unaffected by separation unless the court decided otherwise. The committee recommended that there should be a presumption *against* shared parental responsibility in cases of entrenched conflict, family violence, substance abuse or child abuse (p. 41). The parliament implemented the spirit of that recommendation by stating that the presumption in favour of equal shared parental responsibility is not applicable in cases where there is reason to believe there is a history of violence or child abuse (s 61DA). Consequently, the 2006 amendments require the judge, in litigated cases, to turn his or her mind to the question of whether both parents should retain parental responsibility.

Shared care and the changes made by the 2006 amendments

The legislation amending the *Family Law Act 1975* was the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The legislation is not prescriptive, but it does encourage consideration of a greater level of time-sharing between parents in appropriate cases than the traditional norm of contact every other weekend and during school holidays.

One of the objectives of the *Family Law Act* now, is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child” (s 60B). This is importantly balanced by another object of the legislation, the need to protect children from physical or psychological harm due to being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent. These objects are translated into primary considerations in determining what is in the best interests of the child (s 60CC(2)). These two primary considerations have been called the “twin pillars” of the law (*Mazorski v Albright* (2007) 37 FamLR 518). Further amendments in 2011 have clarified the prioritisation to be made between these two considerations.

One practical expression of the requirement to consider the benefit to the child of a meaningful relationship with both parents is that when deciding cases in which it is appropriate to make an order for equal shared parental responsibility, judges must consider making an order for equal time if this is in the best interests of the child and reasonably practicable (s 65DAA). If that is not appropriate, it must go on to consider the option of “substantial and significant” time; that is, time that is not only at weekends and in school holidays but also during the school week, giving the parent an opportunity to be involved in the child's daily routine and occasions and events that are of particular significance to the child or the parent.

The duty on judges to at least *consider* whether some kind of shared care arrangement might be appropriate, together with misunderstandings of the new law in the media, may well have contributed to an impression among some members of the Australian public that there is a default presumption of equal time, or at least that fathers have a very high prospect of success in the courts if that is what they seek. That is not an impression that is justified by the legislation, but it undoubtedly led to some public confusion (Family Law Council, 2009; Kaspiew et al., 2009, pp. 304–305), and to some shared care arrangements that are not at all satisfactory for children (Fehlberg, Millward, & Campo, 2009).

The 2011 amendments to the Act modify the emphasis on the involvement of both parents only a little. The requirement to consider equal time and substantial and significant time remains, but in the evaluation of what arrangements are in the best interests of the child, greater weight is to be given to the need to protect children from harm than to the benefit to the child of a meaningful relationship with both parents. There is also a new, and expansive, definition of family violence (Parkinson, 2012).

The Australian reforms in international perspective

While, like the 1995 reforms, the 2006 changes aroused huge opposition—based again on the argument that encouraging non-resident parents to spend more time with their children would expose women to a greater risk of violence—the legislative changes reflected an emerging international trend. In most jurisdictions, to be sure, legislatures have resisted the temptation to be too prescriptive. Courts have retained the flexibility to try to discern what will be in the best interests of the child in each case. As Fehlberg, Smyth, Maclean, and Roberts (2011) noted:

Overall, the legislative trend has been more clearly and consistently towards encouraging both parents to be actively involved in their children's lives post-separation, including maximising contact, rather than specifically towards legislating for shared time. (pp. 319–320)

However, Australia is far from alone in requiring courts at least to consider shared care arrangements. A number of other jurisdictions now have legislation that gives some encouragement to consider shared care arrangements where there are no issues of violence or abuse.

France offers one example. Following amendments in 2002, Article 373–2–9 of the Civil Code provides that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option (Fulchiron, 2002).

In Belgium, the law of 18 July 2006 provides that when parents are in dispute about residency, the court is required to examine “as a matter of priority”, the possibility of ordering equal residency if one of the parents requests it to do so. If the court considers that equal residency is not the most appropriate arrangement, it may decide to order unequal residency. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless it is the first option that ought to be considered when parents cannot agree on the arrangements.

There are not dissimilar provisions in certain American jurisdictions. An example is Florida, where the law states the public policy of the state as being “to encourage parents to share the rights and responsibilities, and joys, of childrearing”, despite parental

separation (Fla. Stat. Title VI, 61.13(2)(c)(1)). The court must approve a parenting plan that includes provisions about “how the parents will share and be responsible for the daily tasks associated with the upbringing of the child” and “the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent” (Fla. Stat. Title VI, 61.13(2)(b)). In cases of violence or abuse, the court may make an order for sole parental responsibility. Arizona amended its laws in 2012 to provide that—subject to the best interests of the child, and in the absence of risk factors such as a history of violence, child abuse or substance abuse—“the Court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time” (Arizona Rev. Stat. 25–403.02B).

Finding the middle ground

There is no future in arguments that say encouraging the involvement of both parents in children’s lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence. The 2011 amendments to the *Family Law Act* were no different from the 1995 and 2006 reforms in this respect. The government retained almost all the essential elements of the 2006 reforms while making changes largely at the margins (Parkinson, 2012). The recognition in legislation of the indissolubility of parenthood appears to have strong recognition on both sides of the political spectrum in Australia.

The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence. As Chisholm has argued, good parenting can be compromised by other things in addition to violence and abuse (Chisholm, 2009, p. 128).

While marriage and other intimate relationships may be dissoluble, parenthood is not. Where the balance is to be found between competing considerations in determining the best interests of children remains a matter of legitimate argument; but there can be no return to the old norm of sole custody.

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[19]

Confidentiality and “family counselling” under the *Family Law Act 1975*

Richard Chisholm

SERVICE PROVIDERS WORKING WITH separated families are increasingly regulated by law. The *Family Law Act* provides a degree of confidentiality for “family counselling”, but not for other types of counselling.¹ This chapter reviews the relevant provisions to discover just what the law means by “family counselling”, and to what extent it protects confidentiality. It seeks to explain the legal rules, the reasons for them, and to indicate some of the underlying policies. The purpose is to help those in this sector work effectively within the law and, if they wish, make an informed contribution to issues of law reform.

Family counselling is traditionally confidential; but the law has a different tradition, namely that the courts should be able to receive any evidence that will help them determine disputes that come before them. In children’s matters, what the parties have said in counselling may be significant evidence. Parties may admit in counselling that they left a young child unattended, or that they would be willing to allow the other parent to take care of the children for particular periods, or that they leave the children in the care of a grandparent or relative. The making of such statements may be important evidence for the court, especially if they are inconsistent with what the party wants the court to accept. Thus the two traditions clash: if confidentiality prevails and the parties cannot give evidence of what happened in counselling, the court may have to decide the case without having the benefit of some important evidence; if the parties can give such evidence, and for example subpoena the counsellors’ notes, the confidentiality of the process will be undermined. There is room for debate about the merits and demerits of the various provisions that constitute the law. We can see the continuing tussle between these two policies as we examine the definitions of the key terms and the rules and the exceptions to them.

¹ Somewhat similar provisions relating to confidentiality apply to family dispute resolution, but this chapter is limited to family counselling.

But first it will be useful to review the general law, to discover what the position is in situations that fall outside the specific provisions of the Act.

The general law

Broadly speaking, the law allows parties to tender as evidence any material that is relevant to resolving the dispute.² In general, evidence can be given about what has been said and done, and subpoenas can require the production of the relevant records. The fact that a conversation was conducted on a confidential basis does not necessarily mean that evidence of the conversation cannot be given. People may seek assistance or treatment from therapists of various kinds, such as psychologists and medical practitioners, and both parties may treat the process as confidential. It may well be unethical, and perhaps a breach of the contract with the patient, for the therapist to disclose what has been said, except in some situations. Nevertheless, in general there is nothing to stop a party to litigation from calling a party, or the therapist, to give evidence, or issuing a subpoena requiring the therapist's records to be provided to the court. Indeed, it is a routine thing for medical and hospital records, and other such records, to be subpoenaed for the purposes of court cases, including children's cases under the *Family Law Act*, and to be used as evidence.

To this basic rule—that anything relevant can be admitted as evidence—there are numerous exceptions. For example, the court may decline to admit evidence that has been unfairly obtained, even if it is relevant.³ And confidential communications between a client and a lawyer, for the purpose of the lawyer giving legal advice, are normally confidential.⁴ It is not necessary to review all the exceptions, but one needs mention: s 131 of the *Evidence Act 1995*. It provides that evidence cannot be given of a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute. This rule applies to situations in which the parties are negotiating with each other and equally where they are negotiating with the help of a third party, as in mediation.⁵ It applies in children's cases as well as other types of cases.⁶ I am not aware of any helpful case law on the application of s 131 in counselling and therapy situations, but the section will apply if the communication can be said to be “in connection with an attempt to negotiate a settlement of the dispute”. The policy basis of this rule is well-established. As stated in a much-quoted passage:

parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should ... be encouraged fully and frankly to put their cards on the table.⁷

2 *Evidence Act 1995* (Cth) s 55.

3 *Evidence Act 1995* (Cth) s 138.

4 *Evidence Act 1995* (Cth) ss 118, 119.

5 *Lukies v Ripley* [No. 2] (1994) 35 NSWLR 283.

6 The “less adversarial” provisions of the Act (Division 12A of Part VI) do not change the position. Section 69ZT says that in children's cases *certain provisions* of the *Evidence Act* normally do not apply—(although the court can apply them in exceptional circumstances: s 69ZT(3)—but the provisions referred to do not include s 131.

7 *Cutts v Head* [1984] Ch 290, 306 (per Oliver L.J.).

There are some exceptions to the privilege, set out in s131. One, for example, is where the parties consent to it coming into evidence.⁸ Another is a statement made “in furtherance of the commission of a fraud or an offence”.⁹ Another one is of particular interest, and we will return to it later: a statement that would otherwise be inadmissible under s131 will be admissible if without it, *other* evidence would mislead the court.¹⁰ In each case, evidence can be given of the statement, even though it was made in the course of negotiations to settle a dispute.

Family counselling confidentiality

What we are loosely calling “confidentiality” actually comprises two distinct rules.

The first rule is that by s 10D, in general, family counsellors must not disclose what is said to them. There are detailed exceptions. To summarise the most important, the family counsellor *must* disclose the communication to comply with a law (e.g., when obliged to answer a question in court), and *may* disclose a communication if the person making it consents, or if the family counsellor believes that disclosing it is reasonably necessary for one or other of a list of purposes:

- to protect a child from risk of harm;
- to prevent a “serious and imminent threat” to a person’s life or health;
- to report or prevent an offence of violence;
- to report or prevent a serious and imminent threat to property;
- to report or to prevent an offence involving intentional damage to property; and, importantly
- to assist an independent lawyer for a child.

The second rule is that by s 10E, evidence cannot be given in any court or tribunal of what people say in the course of family counselling.¹¹ In contrast with s 10D relating to disclosure, the only exception relates to child abuse: an admission by an adult, or a disclosure by a child, indicating that a child “has been abused or is at risk of abuse”—language that now includes cases where a child has been severely neglected, or in some circumstances, has been exposed to family violence.¹²

Controversial policy issues underlie these provisions. Why can the court be told that a person has admitted severely neglecting a child, but not be told that one party has threatened to murder the other? Why must the statements made in counselling remain inadmissible even if both parties want them to be admitted in evidence? And suppose a person was subjected to covert threats during a counselling session, and on that basis agreed to certain outcomes. The other party could give evidence of the resulting agreement, but it seems that the victim of the threats or violence could not give evidence of the threats made during the counselling: a grossly unfair outcome.¹³ That problem is caused by the absence in s10E of something like s131(1)(g) of the *Evidence Act* (mentioned above), under which there is an exception to inadmissibility so the court

8 *Evidence Act 1995* (Cth) s131(1)(a).

9 *Evidence Act 1995* (Cth) s131(1)(j).

10 *Evidence Act 1995* (Cth) s131(1)(g).

11 Section 10E(1). The effect of the section is extended to professionals to whom the parties have been referred: s10E(1)(b).

12 See s4 defining “abuse”, and s4AB defining “family violence”.

13 The problem was discussed by Reithmuller FM (now Judge) in *Roux v Herman* [2010] FMCAfam 1369, in connection with s10J, the equivalent provision relating to dispute resolution rather than family counselling.

will not be misled. These important issues deserve a debate, although this is not the place for it.

It is also beyond the scope of this chapter to deal with the law on subpoenas, but briefly it can be said that documents can be obtained by subpoenas if they are required for a “proper forensic purpose”. If a subpoena is issued in relation to documents or parts of documents that are inadmissible because of s10E, the court might well find that the subpoena has no proper forensic purpose and set it aside.

As an overview, we can say, very approximately:

- the *Family Law Act* treats “family counselling” as confidential by limiting what counsellors can disclose (with various exceptions) and by preventing evidence being given of what is said (with the exception of child abuse); and
- other sorts of counselling¹⁴ are generally not confidential, although s131 of the *Evidence Act* provides for confidentiality (with exceptions) when parties negotiate to settle cases (which could happen in the course of counselling).

It is therefore important to know whether something is “family counselling” or another form of counselling or assistance.

Defining “family counselling”

The term “family counselling” is defined in the Act. There are two components: it is a certain kind of activity—“family counselling” (defined in s10B)—conducted by a certain kind of person—a “family counsellor” (defined in s10C). We will consider each of these components in turn, and then consider how the definition operates in practice, what problems it creates, and how at least some of those problems might be solved.

A preliminary point is that the words used in the definition are ordinary words rather than technical legal terms, and the courts’ general approach is to give the words their ordinary meaning. This means that the words will not necessarily be taken to refer to any special meaning they might have in the field of counselling. If, for example, the term “family counselling” had some special technical meaning for counsellors, the legal definition should not be treated as necessarily adopting that special meaning. This is because there is no evidence that the legislature intended to incorporate any technical or professional meaning of the term.

“Family counselling” is defined by section 10B of the Act as follows:

Family counselling is a process in which a family counsellor helps:

- (a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or
- (b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:
 - (i) personal and interpersonal issues;
 - (ii) issues relating to the care of children.

What we are calling the confidentiality provisions—s10D and s10E—apply only if the activity is shown to be “family counselling”. If the court cannot determine whether it is

¹⁴ As mentioned elsewhere, the provisions dealing with family dispute resolution—s10H and s10J—are somewhat similar to s10D and s10E relating to family counselling.

or is not, the confidentiality provisions do not apply.¹⁵ And it can be “family counselling” only if it is done by a “family counsellor”. Let’s look at the elements of this definition, starting with the activity of family counselling.

Paragraph (a): Help in relation to marriage

Paragraph (a) is limited to “marriage”, defined by s4 of the *Marriage Act 1961* as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.¹⁶ Anything done in relation to family units other than marriages does not fall under this paragraph.

“Personal and interpersonal” issues

The issues must be “personal and interpersonal”. There might be a theoretical issue about whether “and” is used conjunctively—that is, whether the issues must be both personal and interpersonal—or disjunctively—personal *or* interpersonal. In practice, though, issues troubling one or both parties will almost inevitably be properly described as both “personal and interpersonal”.

Family counselling may cover multiple issues

In practice, marriage and family problems are multiple, not single. Family counselling is likely to touch on a range of other topics: money, sex, employment, substance abuse, and so on. When the counselling does deal with such topics, does it then fall outside the definition of family counselling, because at that point it might be thought of as, say, drug counselling, and is therefore helping people with other problems, as distinct from issues in relation to marriage? There appears to be no case law on the topic, but it seems likely that so long as there remains a connection with the marriage, even though particular topics are mentioned the whole process would be seen as helping people with “personal and interpersonal issues in relation to marriage” and therefore within the definition. Suppose, for example, that there was a dispute in which the spouses were also partners in a business. If the family counselling could be said to be helping “in relation to marriage”, it would probably be considered “family counselling”, even though the discussion also touched on commercial matters, and would therefore be subject to the confidentiality provisions.

“In relation to” marriage

It is family counselling under paragraph (a) if a family counsellor “helps one or more persons to deal with personal and interpersonal *issues in relation to marriage*”.¹⁷ We do not yet have any case law that really analyses the definition. But the terms seem wide enough to include virtually any issue that has—to use the High Court’s language in another context—a “relevant” or “appropriate” association with the marriage.¹⁸ In

15 See *Smirnov & Turova* [2009] FMCAfam 1083 (in which the court was not told what was involved in “attachment therapy”).

16 Although Australian law recognises same-sex relationships and de facto and other relationships for various legal purposes, those relationships are not currently included in the *Family Law Act*’s definition of “marriage”.

17 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.

18 If it were necessary to explore the meaning of the words, the courts might well seek guidance from the case law on the constitutional scope of the word “marriage” (Constitution s51(xxi)).

practice, they would probably include virtually any problem that either party sees as being connected to the marital relationship. They would not include, however, problems unrelated to the marriage. If a married couple sought debt counselling, for example, or investment advice, and there were no problems between the two of them, the court might consider that the counselling was not in relation to marriage (but was rather in relation to debt, or investing). Similarly, if the married couple went to a counsellor to deal with their disagreements relating to the care of a drug-addicted child, that would no doubt be “in relation to marriage”, but if they were united and sought advice on the care of their 21-year-old son or daughter who had lost a job or had got involved with drugs, it might be arguable whether that was counselling “in relation to marriage”. However although there may be such borderline cases, in practice it will usually be clear whether married people who come for family counselling will be seeking help with “personal and interpersonal issues in relation to marriage”.

Helping other persons in relation to marriage

The section does not say “helps *a party* to a marriage”, but refers to helping “one or more *persons*”. Thus disputes or problems involving grandparents, parents-in-law, or other persons will be included if it can be said that the family counsellor is helping some person deal with personal and interpersonal issues in relation to marriage (but not, as mentioned earlier, other forms of family unions, such as *de facto* heterosexual or same-sex relationships).

Paragraph (b): Dealing with separation and divorce

Paragraph (b) deals with “separation” as well as divorce, and thus applies to separating parents who have not been married as well as those that have.¹⁹ But whereas paragraph (a) deals with marriage as such, paragraph (b) focuses on family breakdown. To illustrate the difference: counselling aimed at improving the relationship between a couple would be “family counselling” if the couple were married. But the same counselling provided to an unmarried couple would not be “family counselling” if they were unlikely to be affected by separation or divorce. Thus, in relation to non-marital families, the definition of family counselling focuses on the consequences of *family breakdown*, rather than the relationship as such.²⁰

The components of paragraph (b) might be broken down as follows:

- *a process in which a family counsellor helps persons, including children*—These words obviously include help to children, and to other family members, as well as to one or both parents.
- *who are affected, or likely to be affected, by separation or divorce*—The word “separation”, occurring in the phrase “separation and divorce”, obviously refers to

¹⁹ It seems clear that paragraph (b) is not limited to marriage. First, it does not mention marriage, and the word “separation” can apply to non-married parents who separate. Second, there is nothing in the Explanatory Memorandum to the Act of 2006 (which inserted the section) to support limiting it to marriage. Third—and surely decisively—by s13C a court may order “one or more of the parties to the proceedings” to attend family counselling, and it may do so when “exercising jurisdiction in proceedings under this Act”. Many proceedings under the Act involve parties to relationships other than marriage, and s13C contemplates that there can be “family counselling” in relation to those families. The constitutional validity of paragraph (b) is outside the scope of this chapter.

²⁰ The reason for this difference might be linked to the fact that under the Constitution the Commonwealth has legislative power over “marriage”—s51(xxi)—but does not have the same power over other family relationships. The constitutional issues are, however, beyond the scope of this discussion.

separation between the parents. However it is not explicitly limited to that situation, and probably it could also refer to a separation between a child and a parent,²¹ or, indeed a separation involving other family members (such as grandparents).

- *deal with personal and interpersonal issues*—Like paragraph (a), the paragraph refers to “personal and interpersonal issues”, and as in that paragraph, the issues will almost always be both personal and interpersonal.²²
- *deal with issues relating to the care of children*—The “care” of children probably includes virtually all aspects of parenting. The definition is not limited to children of the parties, and so, for example, family counselling might include issues relating to a foster child, or a child of one of the parties, and even where the child is not living in the household.

A convenient example of paragraph (b) of the definition is *Medeiros & Fink*,²³ which involved a dispute between two sets of grandparents after the death of the child’s father. The father and mother had been unmarried.²⁴ The mother had killed the father, and at the time of the hearing she was serving a term of imprisonment for manslaughter. The child had been seeing an “art therapist” in a confidential setting. The art therapist was taken to be qualified as a “family counsellor” within the definition in s10C.²⁵ All the court was told about the nature of the counselling was that the counsellor was “working with [the child] to assist her recovery from trauma”. The court upheld an objection to a subpoena addressed to the counsellor, holding that the process was “family counselling”:

Ms R was a person engaged in a process designed to help [the child], as a person affected by separation, to deal with personal and interpersonal issues and issues relating to her care. In these circumstances, the prohibition on disclosure contained in s 10D of the Act seems to me to apply.

Summary

We can say, very roughly, that family counselling comprises marriage counselling (paragraph (a)) and family breakdown counselling (paragraph (b)).

The second component of the definition: A “family counsellor”

The term “family counsellor” is defined in s10C. Under s10C(b) a family counsellor is “a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph”.²⁶ A list of designated family counselling organisations is available on the Family Relationships Online website.²⁷ It is a matter for

21 See *Medeiros & Fink and Anor* [2011] FMCAfam 1184 (Burchardt FM), mentioned further below.

22 For an unusual situation where there might be a personal issue that is not also an interpersonal one, see the discussion below of *Kidd & London* [2011] FMCAfam 1084.

23 *Medeiros & Fink and Anor* [2011] FMCAfam 1184 (Burchardt FM), [79].

24 The report of the case speaks only of a “relationship” between them.

25 This was agreed in the case, so the point was not discussed. However, we will see in the discussion to follow that whether the art therapist was a “family counsellor” might depend on the interpretation of the definition of that term.

26 Under s10C(1) it is theoretically possible for people to become “family counsellors” in other ways, but none of them seem to have been used in practice.

27 See the list of counselling services at <www.familyrelationships.gov.au/searchpages/searchpage.aspx?KEYWORD=COUN&RESOURCETYPES=Service>.

the designated organisations to authorise individuals to act on behalf of the organisation. No particular formalities are required by the Act, and whether an individual has been so authorised appears to be a question of fact.

We start with a “designated organisation”. No problem here—the organisation is either on the list of designated organisations or it is not. But the *organisation* is not a family counsellor.²⁸ The family counsellor is an *individual* who, in the words of the section, is “authorised to act on behalf of” the organisation.

The wording says nothing about the qualities or qualifications of the individual who is a family counsellor. This is left entirely to the designated organisation. In effect, by way of the definition, the legislature trusts the designated organisations to provide suitable people to work as family counsellors.

What is more surprising is that the wording does not even say that the individual is authorised to carry out family counselling. It just says the individual is “authorised to act on behalf of” the organisation. Does this mean what it says?

Suppose a designated organisation employed Alex, a person with counselling qualifications, to work exclusively in a drug and alcohol unit. Suppose Alex was never treated by the organisation as a family counsellor, and never described as such, but in the course of employment in the drug unit worked with clients’ family problems (as well as with drug issues). Alex might well be doing things that fell within the definition of family counselling (see the discussion earlier). Would Alex therefore be doing, without anyone realising it, “family counselling” within the meaning of the Act?²⁹ On the face of it, yes, because each element of the definition is satisfied. But the words could also be interpreted more narrowly, so the definition refers only to people who are authorised by the designated organisation *to conduct family counselling*. The scope of “family counselling” in the Act will be affected by whether the definition is taken to include anyone authorised to act on behalf of the organisation—what the words actually say—or whether it will be read in context as referring only to someone the organisation authorises to conduct family counselling. The courts are often willing to interpret a provision in a way that is sensible, treating the sensible meaning as the one that the legislature “intended”. But it is possible that they would stick to the literal wording of the section, and say that the definition includes anyone who is authorised to act (in any capacity) on behalf of the organisation.

My own view is that the second, narrower interpretation will be easier for the sector to work with. If a “family counsellor” means only a person authorised to conduct family counselling, it is less likely that drug or other specialist counsellors will find themselves in the position of “accidental” family counsellors.³⁰

When does family counselling begin and end?

The process of family counselling starts when the counsellor helps a person deal with personal and interpersonal issues in relation to marriage, or helps a person affected by separation or divorce deal with personal and interpersonal issues or with issues relating to the care of children. And it ends when the counsellor has ceased to do so.

28 In one case the parties agreed—wrongly, as a matter of law, although nothing turned on this—that the *organisation* was a “family counsellor”: *Smirnov & Turova* [2009] FMCAfam 1083.

29 *The facts of Kidd & London* [2011] FMCAfam 1084 (school counsellor) illustrate the problem, although the debate there was about whether the activity was family counselling, not whether the counsellor was a family counsellor.

30 I owe this nice term to Francesca Gerner.

Determining when the process of helping starts and stops might however be difficult in some cases. Does it include preliminary intake or assessment processes, when a staff member takes a client's details, or, say, screens for family violence issues? If this is done by someone who is not a “family counsellor”, it will surely not be family counselling. If a family counsellor does it, intake might be considered to fall outside the definition because the counsellor is not yet “helping” people, but determining whether family counselling will be undertaken.³¹ Similarly, it might be arguable whether measures taken at the end of the process are part of the counselling.³² If such measures fall outside the definition, the confidentiality provisions will not apply, and the admissibility of things said during those preliminary or subsequent steps would be governed by the general law, as indicated above.³³

Summary, and implications for agencies

In contrast with the general law, which does not protect the confidentiality of counselling and therapy, the *Family Law Act* has provisions that restrict the extent to which the family counsellor can disclose communications in family counselling, and prevent the communications being given in evidence.

The Act's definition of family counselling has two components. The first, the activity of family counselling, could include some activities that are not generally seen as family counselling. The second, the definition of “family counsellor” refers to a person authorised to act on behalf of a designated organisation.

Although in most situations it is clear whether a process is or is not family counselling, there are some situations in which the interpretation of “family counsellor” will affect whether the process falls within the definition. Much will depend on whether the courts interpret “family counsellor” to mean someone authorised to act on behalf of the organisation (without qualification) or a narrower meaning: someone authorised to *conduct family counselling* on behalf of the organisation. This narrower interpretation seems more sensible, but we can't be sure at this stage that the courts will adopt it.

How agencies can help clarify what is and is not “family counselling”

It seems obviously desirable that everyone involved should know whether what is being done is family counselling, and thus whether the confidentiality provisions of the Act apply. What might agencies do to achieve this?

The previous discussion suggests that if the narrow interpretation of “family counsellor” is correct, the solution to many of the problems will lie in the hands of the agencies. They could explicitly authorise some individuals, and not others, to *conduct family counselling on behalf of the organisation*. Or they could say, for example, that an individual is authorised to conduct family counselling on behalf of the organisation when working in a particular place, or in relation to a particular program. If the courts favour

31 In a case dealing with family dispute resolution (not family counselling), Reithmuller FM considered—rightly in my view—that family dispute resolution did not include the preliminary assessment phase: *Rastall & Ball & Ors* [2010] FMCAfam 1290.

32 In a case dealing with family dispute resolution, not counselling, Reithmuller FM held that an agreement reached in family dispute resolution is not itself part of the process: *Roux v Herman* [2010] FMCAfam 1369.

33 Thus in *Smirnov & Turova* it was held that a statement made by a counsellor to a solicitor after the process was not protected by the confidentiality provisions.

the literal meaning—any person authorised to act on behalf of the organisation—it will be more difficult for agencies to determine what is and what is not family counselling; but it might help if they do their best to ensure that all job descriptions, names of tasks, appointment documents and the like make explicit whether what is happening is or is not considered to be family counselling.

In short, in my view agencies might help to clarify the situation by:

- making it explicit which activities are considered to be family counselling;
- taking any suitable opportunity to obtain a court ruling on whether the literal or the narrower interpretation is correct (and, if they agree with me, trying to persuade the court to adopt the narrower version); and
- seeking an amendment to the section; for example, so it reads “a person authorised by an organisation designated by the Minister for the purposes of this paragraph *to conduct family counselling*”.³⁴

³⁴ The existing wording of s10C(1)(b) is “a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph”.

[20]

Has confidentiality in family dispute resolution reached its use-by date?

Tom Altobelli and Diana Bryant

THE CONFIDENTIALITY OF CONSENSUAL dispute resolution processes, such as mediation and counselling, has long been considered one of the defining features of dispute resolution and to be essential to its effectiveness. This chapter will briefly explore those claims and assert that there is little, if any, empirical evidence to support them. Indeed the Family Consultants Confidentiality Survey 2012, the results of which will be presented and discussed in this chapter, suggest quite to the contrary.

While many of the points made here can apply to consensual dispute resolution processes generally, the context here is primarily family law under the *Family Law Act 1975* (Cth). As the focus of this chapter is consensual family dispute resolution, the two statutory concepts of family dispute resolution (or mediation) and family counselling will be treated in the same way (despite their obvious and important differences in other contexts). For practical purposes, the terms “mediation” and “family dispute resolution” will be used interchangeably. The Act also distinguishes between confidentiality and admissibility, two very different concepts. Here, the authors will use the more generic term, “confidentiality”, conscious that this chapter may have a non-legal audience, but also desiring to elevate the discussion to a theoretical and policy level without distancing too far from practice.

The present discussion about confidentiality of consensual dispute resolution processes takes place in a particular context. The 2012 amendments to the Act,¹ commonly known as the family violence amendments, are the result of much research (e.g., Chisholm, 2009; Family Law Council, 2009; Kaspiew et al., 2009). The family law system in Australia continues to struggle with managing and responding to allegations of family violence. One of the important findings of the research was about the critical importance of sharing information about families with other people and institutions within the family law system who are working with that family. Indeed, this chapter will contend that

1 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011.*

existing confidentiality rules and practices act as an artificial barrier to the sharing of that information, particularly about violence and abuse, and that this is contrary to the interests of families, and the best interests of children.

A particular perspective of the authors is, unsurprisingly, judicial decision-making. If family law litigation is properly understood as being what it really is—a process rather than an event—there are particular problems caused for decision-makers early in the process as a result of artificial confidentiality rules. Some of the most important decisions about families are made very early in the litigation process at an event, or series of events, often described as an interim hearing. The context of these interim hearings is often one of urgency; of risk to a child or a parent; of highly conflicted, hastily prepared, irrelevant and often inconclusive evidence; and of highly partisan, subjective, uncorroborated assertions. This chapter contends that confidentiality rules impede better decision-making at a critical time in the lives of parents and children. Ironically it's not that better information to inform risk assessment does not exist—rather it is not made available to the court in a timely and efficient manner.

No research is perfect or conclusive. The Family Consultants Confidentiality Survey 2012 has obvious limitations, foremost of which is that it is not a survey of those who participate in family dispute resolution, but rather of those who deliver it in a particular context. But in the kingdom of the blind, the one-eyed man is king.² This is not an area where there is much, if any, empirical research. The authors call for more research on the topic of confidentiality and urgently call for a reconsideration of the existing dogma that seems to pervade professional and even academic writings and practice about confidentiality in family dispute resolution.

Benefits of and reservations about confidentiality

Most of the literature on confidentiality focuses primarily if not exclusively on mediation. Very briefly, in the large amount of mediation literature reviewed for the purposes of this chapter, there was almost universal consensus about the benefits of confidentiality. Brown (1991), after reviewing the literature, concluded that it “reveals an almost universal agreement that confidentiality is necessary to the survival of mediation” (p. 308).³ More recently an Australian author, Harman (2012), asserted: “It has long been accepted that confidentiality is inherently important to mediation” (p. 179). Charlton (2000), also from Australia, stated that confidentiality in mediation has taken the status of “an almost holy untouchable tenet” (p. 15).

There is much less literature that expresses reservations about confidentiality in consensual dispute resolution processes. Nevertheless, some of it could be described as being quite strident. Reich (2001) called for “intellectual honesty” in discussions on the topic. In articulating a strong argument against statutory mediation privilege, he said that such a privilege “substitutes convenience for intellectual honesty” (p. 198), that “there is no empirical support” for the creation of such a privilege, and that there is “no demonstrable utilitarian societal justification” for such a privilege (p. 199). He plainly called the orthodox view about confidentiality dogma, was highly critical of the limited debate that has taken place on the topic, and warned about the dangers of adopting “the everybody knows its important standard” (p. 207) because of its subjectivity. Reich's concern about the creation of mediation privilege was that it was “nothing more or less

2 A quote attributed to the Dutch philosopher Desiderius Erasmus, 1466–1536.

3 Having conducted their own literature review, the authors concur with Brown.

than privilege to suppress the truth” (p. 203). Using analogous empirical research drawn from psychotherapist-patient privilege research, attorney-client confidentiality and privilege research, and therapeutic communication confidentiality and privilege research, he contended that none of the orthodox policy assertions in support of mediation’s need for confidentiality are justified.

The authors of the present chapter have sought balance in articulating the arguments for and against mediation confidentiality. It seems to us, however, that the absence of any empirical research justifying the benefits of confidentiality makes the claim problematic. A utilitarian argument for mediation confidentiality cannot be made on available empirical evidence. Indeed, the survey data presented below tend to confirm this, notwithstanding its limitations.

Even the autonomy argument for mediation confidentiality—that participants should be able to decide how their information is used—is problematic. The autonomy argument is related to a fundamental tenet of mediation; that is, it is a process that empowers the parties to take control of and resolve their own dispute (Pardy & Pou, 2011). What makes these justifications for mediation confidentiality so problematic, indeed quite ironic, is that participants in family dispute resolution in Australia are rarely, if ever, consulted about whether they would like confidentiality, and if so to what extent. Confidentiality is presented to them as an integral party of the process they are participating in.⁴ To not include the participants in mediation in discussions about the nature and scope of confidentiality is hardly fostering their autonomy or empowerment in relation to the resolution of their dispute.

What does the empirical research say?

Briefly, the main finding about empirical research in relation to mediation confidentiality is that none could be found. There is, however, research on other analogous and thus informative contexts.

Reich (2001) referred to research in a number of different contexts. He cited research conducted by Shuman and Weiner (1987) that found no support for the contention that in therapeutic contexts patient disclosure is facilitated by confidentiality. For example, they found that patients’ willingness to disclose information to their psychotherapist was not in any significant way influenced by no mention of privilege, mention of privilege, or statements of no privilege.⁵ Reich concluded in this regard:

The premise that mediation needs confidentiality implicitly holds that the existence of confidentiality is important to parties contemplating or using mediation and that confidentiality causes parties to reveal information they would not reveal in the absence of confidentiality. These enormous and fundamental assumptions are not supported by the previous empirical evaluation in psychotherapist-patient research. (p. 216)

⁴ This statement is based on Dr Altobelli’s personal communications with scores of family dispute resolution practitioners at many seminars and conferences throughout NSW. Indeed Dr Altobelli’s observation is that most family dispute resolution practitioners were surprised if not confronted by the idea of asking participants in mediation whether they wanted the confidentiality so zealously ascribed to their process.

⁵ Reich discussed these findings in more detail at pp. 213–216. His footnotes contain references to further research on confidentiality in the therapeutic context, all of which are broadly consistent with the Shuman and Weiner research.

Reich (2001) then considered attorney-client confidentiality and privilege. A 1962 study published in *Yale Law Journal*, “Functional Overlay Between the Lawyer and Other Professionals”, indicated that a substantial majority of lay persons would continue to use lawyers even if secrecy were limited. Thus, Reich submitted:

at least in terms of fostering client disclosure of information, the Yale study certainly challenges the assumption that the attorney-client relationship needs privilege protection. If the attorney–client relationship does not need privilege to foster client disclosure ... it follows that mediation may not need privilege to foster disclosures either. (p. 217)

In 1989, Zacharias published the results of the Tomkins County Study on Confidentiality and found that clients said they wanted a firm obligation of confidentiality but one was seldom offered, and thus clients were either not disclosing to lawyers because no confidentiality was promised, or disclosing even without the firm commitment of confidentiality that they wanted. While the value of confidentiality presupposes that people will reveal information if they believe that such disclosures are protected, the reality is that people do not act in accordance with that principle. Thus, for example, 11% of the respondents admitted that they did not disclose information to their attorneys even when there was a privilege, and almost 80% of those clients knew that there was a privilege. Reich (2001) thus suggested that, assuming that mediation party beliefs are similar to the attitudes shown in the Tomkins County study, it is likely that mediation parties would also withhold information even if a privilege existed. From the present authors’ perspective, the fact that 11% admitted non-disclosure in a privileged context is a sobering reminder that truth is not guaranteed in any context, formal or informal, adversarial or non-adversarial, therapeutic or legal. The only real truth is that sometimes the parties we work with do not tell us the truth.

Confidentiality in family dispute resolution in Australia

The Family Consultants Confidentiality Survey 2012 needs to be considered in the statutory context of Part II of the *Family Law Act*, even though family consultants operate under Part III of the Act.

Family counselling is defined in s 10B⁶ and family dispute resolution in s 10F⁷ of the Act. Both are described as a process in which help is provided to people. With family counselling the help relates to personal and interpersonal issues, including issues relating to children. With family dispute resolution the practitioner’s role is to help people resolve some or all of their dispute. There are obvious parallels to mediation. Both in theory and in practice, the present authors contend that these two processes are not mutually exclusive except in the strict legal sense. In reality, experience indicates that, for example, family counselling also helps people to resolve some or all of their dispute, and family dispute resolution helps people to deal with their personal and interpersonal issues,

6 “Family counselling is a process in which a family counsellor helps: (a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or (b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following: (i) personal and interpersonal issues; (ii) issues relating to the care of children.”

7 “Family dispute resolution is a process (other than a judicial process): (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all of the parties involved in the process.”

including issues relating to children. One process might use a therapeutic approach, and the other a facilitative approach, and in reality both approaches might be used in both processes some of the time. Both are voluntary consensual processes in the sense that whether attendance is mandated or not, there is no compulsion to resolve or agree. The qualifications and accreditation requirements of those who provide family counselling and family dispute resolution are quite different (see s10C and s10G respectively).

Contrast at this point the functions of family consultants, which are set out in s11A of the Act.⁸ Their role is diverse and arguably embodies elements of the roles of both family counsellors and dispute resolution practitioners, but with the specific additional role of assisting, advising and reporting to the court. The definition of a family consultant is also quite specific and distinct from family counsellors and family dispute resolution practitioners.⁹

Confidentiality of communications in family counselling is governed by s10D, and of family dispute resolution by s10H. These two sections are not identical, but are very similar. Chisholm (2011) described these provisions as the “statutory non-disclosure rule”. In other words, these two sections require family counsellors and family dispute resolution practitioners not to disclose certain things said to them.

The other important provisions in this regard are sections 10E and 10J dealing with the admissibility of communications made in both processes. Chisholm (2009) described these as the “statutory inadmissibility rule”, the effect of which is that evidence cannot be given of what people say in the course of the process, and is to be distinguished from the ordinary rule of evidence law, excluding evidence of settlement negotiations.

By contrast, but only since 2006, the admissibility dynamic with family consultants is totally different. Section 11C provides that “anything said, or any admissions made by or in the company of a family consultant” is admissible in proceedings under the Act, provided that the person has been informed of the effect of this, and even then not when the admission relates to a child at risk.

There are some significant differences and inconsistencies within and between sections 10D, 10E, 10H and 10J that need to be explored. The authors submit that some of these inconsistencies are illogical and demonstrate, for example, the complexity permeating any discussion of confidentiality that is not adequately dealt with in the Act.¹⁰

Family consultants and confidentiality

Section 11A of the Act sets out their functions and s11B provides a definition (see footnotes 8 and 9). They are employed internally by the family law courts.¹¹ All

8 “The functions of family consultants are to provide services in relation to proceedings under this Act, including: (a) assisting and advising people involved in the proceedings; and (b) assisting and advising courts, and giving evidence, in relation to the proceedings; and (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and (d) reporting to the court under sections 55A and 62G; and (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.”

9 “A family consultant is a person who is: (a) appointed as a family consultant under section 38N; or (b) appointed as a family consultant in relation to the Federal Circuit Court of Australia under the *Federal Circuit Court of Australia Act 1999*; or (c) appointed as a family consultant under the regulations; or (d) appointed under a law of a State as a family consultant in relation to a Family Court of that State.”

10 The inconsistencies referred to, and the consequences thereof, are discussed in other, fuller versions of the present chapter.

11 “Family law courts” is the generic term used to describe the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, who between them are

family consultants have a degree in social work or psychology and a minimum of five years' experience working with children and families. As previously indicated, all communications with family consultants, and referrals from family consultants for medical or other professional consultation, are admissible (s11C). In other words, all communications are *not* confidential and procedures are in place to ensure that clients understand this before the family consultant becomes involved.

In the present context, where the focus is on the early stages of the litigation process, the most common form of intervention by a family consultant is through a court-ordered appointment under s11F of the Act.¹² These are known as s11F conferences and may involve parents, children and other persons concerned about the welfare of children. The conference is usually a form of early intervention but can in fact occur at any time in the proceedings. A conference is often ordered immediately following an application—sometimes at the first court event, but even earlier in some cases as a result of an order made in chambers. From the family consultants' perspective, the conference is regarded as a preliminary assessment and screening opportunity (Karen Gabriel, senior family consultant, personal communication, 3 June 2012), and are child-focused and might involve parents only or children as well. From a judicial perspective, the memorandum produced at the end of a conference provides useful information about issues, admissions and recommended interventions that is then taken into account, together with all the other evidence, in making interim orders as well as case management. Often the memorandum is in writing, but the information may also be conveyed orally.

The Family Consultants Confidentiality Survey

The stage has been set so that this research may be presented and discussed. The electronic Family Consultants Confidentiality Survey 2012 was emailed to all 94 family consultants in Australia on 27 March 2012.

Summary of results

A total of 49 (52%) family consultants responded to the questionnaire nationally. Of these, 21 (49%) had commenced work as a family consultant prior to the 2006 *Family Law Act* amendments (when their work with families had been confidential).

The survey found that among the respondents:

- 94% reported that parents “never” or “rarely” expressed concerns about the lack of confidentiality in s11F conferences;
- 80% reported that children “rarely” or “sometimes” expressed concerns about the lack of confidentiality in s11F conferences;

responsible for all of federal family law in Australia. The Australian states have jurisdiction in relation to child welfare and protection matters.

12 “Court may order parties to attend, or arrange for child to attend, appointments with a family consultant. (1) A court exercising jurisdiction in proceedings under this Act may make either or both of the following kinds of order: (a) an order directing one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant; (b) an order directing one or more parties to the proceedings to arrange for a child to attend an appointment (or a series of appointments) with a family consultant. Note: Before exercising this power, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E). (2) When making an order under subsection (1), the court must inform the parties of the effect of section 11G (consequences of failure to comply with order). (3) The court may make orders under this section: (a) on its own initiative; or (b) on the application of: (i) a party to the proceedings; or (ii) a lawyer independently representing a child's interests under an order made under section 68L.”

- 94% thought there were *benefits* in relation to the lack of confidentiality in s11F conferences, including:
 - the ability to provide information to the court early in the process, particularly in relation to risk factors;
 - the transparency of the process;
 - the ability for the family consultants to exchange information between parties; and
 - the family consultant role being more professional;
- 55% thought there were *drawbacks* in relation to the lack of confidentiality in s11F conferences, including:
 - concerns about potential negative repercussions for children and other family members;
 - potential lack of openness of parents; and
 - reduced negotiability of matters;
- 61% thought there were *benefits* in confidential conferences within the court setting, including:
 - the greater negotiability of matters; and
 - fewer potential negative repercussions for children and family members;
- 57% thought there would be *benefits* to community-based family dispute resolution being admissible, primarily related to:
 - the early provision of information to the court, particularly in relation to risk factors;
 - avoiding duplication, particularly in interviewing children;
 - a greater transparency in the FDR process; and
 - better collaboration across the family law sector;
- 77% thought there would be *drawbacks* to community-based family dispute resolution being admissible, primarily in relation to:
 - the loss of a confidential space for families to resolve issues;
 - the need for extensive training/education in relation to assessment, report-writing and cross-examination for FDR practitioners; and
 - a potential for parents to withhold information.

Confidentiality before and after the 2006 reforms

In the present context, only one aspect of these data will be explored in further depth: the reports of those family consultants who experienced the change from confidential to non-confidential conferences, before and after the 2006 reforms.

As previously indicated, the 2006 amendments to the Act brought about many changes, one of the most significant of which was changing the role of the court-employed family consultants so that all of their work was non-confidential. Bearing in mind that about half of the respondents to the survey had commenced work as a family consultant prior to 2006, this group was well placed to comment on their experiences about a fundamentally different way of practising.

Of the family consultants who had been working in family law courts prior to the 2006 amendments, 57% ($n=12$) expressed that they had had some concerns prior to the implementation of the amendments. These concerns were primarily that parents and children would *not* talk openly and therefore risk factors may not be reported, and that the family consultant role would become restricted. Of those family consultants who had had concerns, two-thirds ($n=8$) did *not* find their concerns justified. The other

third ($n=4$) expressed concerns about the shift in their role from dispute resolution to assessment and reporting to the court, or that parties withheld information.

In answer to the question: “Did you have concerns about the legislative changes in relation to the loss of confidentiality prior to implementation?”, 19% (4) said “yes”, 38% (8) responded “somewhat”, 38% (8) said “no”, and 5% (1) did not answer. All 12 respondents who answered “yes” or “somewhat” detailed their concerns, which have been summarised in themes in Table 1.

Table 1: Themes of family consultants’ concerns prior to 2006 amendments

Themes	Number of respondents
Parties and children would not speak openly/would create environment not conducive to dispute resolution	6
Would restrict the role of the family consultant or lead to change of role	2
Potential for family violence/other risk factors to be under-reported	2
General anxiety about change	1
Lawyers may advise parents not to disclose certain information	1

Note: There may have been more than one theme per answer.

The respondents’ comments about their pre-2006 concerns include:

That parties might be more circumspect in the information they provide and in how prepared they might be to join in open discussion and negotiation. There was a concern that lawyers might advise their clients to say nothing so as not to prejudice their cases.

That the counselling process would be focused on evidence gathering and not attempting to assist the parties to resolve their conflict.

Feminist theory predicted that this would cause [domestic violence] victims to under-report violence.

Participants were then asked: “Did your experience justify your concerns?” One-third (4) responded “yes” and the remaining two-thirds (8) said “no”. Two of the respondents who said their concerns had been justified said that there has been a significant shift from dispute resolution to providing information to the court:

The current process focuses on gathering evidence (he said/she said) rather than assisting the parties to resolve their dispute. Counsellors’ work is now preoccupied with writing reports and gathering statistics instead of working with clients.

Another consultant felt that information had been withheld in some matters:

I’ve had examples where a lack of confidentiality has been a hindrance, as some information had been deliberately withheld during discussion with clients.

On the other hand, among those who said their concerns had *not* been borne out, five provided further comments, including:

My concerns proved to be quite wrong, and irrelevant. Immediate experience was, and has remained, that the issue is irrelevant to clients. To some the whole concept appears to be irrelevant. Many others appear to me to accept and welcome the assess-and-advise role.

My anecdotal experience has been the opposite. Victims are typically only too willing to discuss the violent behaviour of their former partners, in the knowledge this information will be available to the ultimate decision-maker.

In 2006 I thought there would be drawbacks, but I haven't become aware of any yet.

Discussion

Family consultants are well-placed observers of the role and importance of confidentiality in family law consensual dispute resolution processes. They provide a key service for those families who need to transition into the family law system. Indeed, sometimes they are the entry point into the family law courts and the first person the family meets,¹³ and at other times it is the first key event in the litigation process where someone sits down with them personally, in a private setting, to discuss their case for any reasonable measure of time.

Those family consultants who practised before 2006 in a confidential context are in a unique position to comment on the role and importance of confidentiality. While the authors call for more research, and better research that involves surveying participants in both confidential and non-confidential contexts (randomised if possible), the present study provides a good window through which to discuss confidentiality.

The vast majority of respondents (94%) reported that parents either never or rarely express concerns about the lack of confidentiality of s 11F conferences. Unlike some of the research discussed earlier in this chapter, where there was some uncertainty about the level of awareness of clients in relation to confidentiality, there is no room for doubt here. Before an s 11F intervention commences it is made clear to the participants that the process is not confidential. Participants must therefore be deemed to know that what they say can be both recorded and reported and made available to the judicial officer dealing with their case. This is paradoxical and counter-intuitive. Why make admissions about, for example, family violence, drug and alcohol issues, and mental health issues,¹⁴ when these will be recorded and reported? One can understand why allegations and denials would be made, but why admissions? A reasonable inference is that confidentiality is not valued by the participants in s 11F conferences.

Most of the participants in an s 11F conference would have previously participated in some other form of intervention, including family counselling or family dispute resolution. The latter is more likely because of the effect of s 60I(7)–(9). In most cases an application could not have been made to a family law court without attempting family dispute resolution, though exceptions apply, as defined in s 60I(9). What is not known, of course, is whether those who made admissions in s 11F conferences *also* made admissions in those other pre-filing processes, which are confidential. The ideal research on this topic would be not just randomised, but longitudinal as well—in effect

¹³ When the s 11F conference occurs before the first court date.

¹⁴ All of these admissions often appear in the memoranda received following s 11F conferences that both authors have read.

tracking families as they move through the family law system, especially as they move from confidential to non-confidential arenas. While the authors concede there is an element of speculation in this statement, nonetheless it is reasonable to infer that those making admissions in non-confidential s11F conferences are likely to also make those admissions in confidential pre-filing processes. Research questions abound: If they did make those admissions, how were those admissions dealt with? If they did not make those admissions, why not?

The orthodox view about confidentiality reflected in practice would suggest that disclosure is more likely in a confidential setting, rather than in a non-confidential one. The family consultants in this survey reported a high level of indifference about confidentiality. The authors' practical experiences are that admissions are routinely made in s11F conferences. All of this casts doubts about the orthodox view. Of course it could be argued that participants' seeming indifference to confidentiality is *because* the s11F conference is a court-based reportable meeting. The inference is that in a confidential non-court-based setting their behaviour is different. It only takes a moments' reflection to dismiss this argument as unlikely. At its core is an assertion that participants are more frank and open in a non-confidential process than they are in a confidential one. That is not the orthodox view. These survey findings cannot lightly be dismissed because of the court context.

The seeming indifference about confidentiality by participants in s11F conferences challenges orthodox thinking about confidentiality. Moreover, if the participants in s11F conferences do not value confidentiality, and if this finding can be generalised to apply to consensual dispute resolution processes generally, then it is legitimate to ask whose interests are served by confidentiality rules? It does not seem to be the interests of the participants. If that is the case, then how is participant self-empowerment—a key philosophical basis of consensual dispute resolution processes—manifested when those participants are not even consulted about whether they want confidentiality, and if so to what extent and in which contexts?

Bearing in mind that the family consultants report parties as expressing concerns about lack of confidentiality either rarely (39%) or sometimes (6%), the concerns expressed are nonetheless significant. When concerns are expressed they seem to focus on detrimental or adverse repercussions for other persons, including children and themselves. This is entirely understandable. One hopes that being in court provides parties with the opportunity to seek protective orders. Thus, for example, it is not unusual in the authors' experience that following an s11F report, orders are made, usually by consent, that parties not denigrate each other, or discuss the proceedings with or in the presence of the children. Often an Independent Children's Lawyer is appointed, pursuant to s68L of the Act. Injunctions for the personal protection of children and parents are also sometimes made. Thus, while recognising the validity of concerns expressed, disclosure becomes an opportunity to frame orders that assist, restrict and protect when needed. The truism remains that if participants in the family law system do not articulate the existence of issues in respect of which they need help, no help can be given.

There is a significant difference in family consultants' experience of children expressing concerns about lack of confidentiality in s11F conferences compared to their parents. A significant proportion of the s11F conferences are child-inclusive. Children then become active participants, subject to their developmental capacity to be so. Children are reported to express concerns sometimes or regularly by nearly 41% of family consultants. They seem overwhelmingly concerned about the repercussions of family disputes on children,

and to other family members. Clearly children's needs and interests about confidentiality are different to those of their parents. A much smaller majority could be described as being indifferent about confidentiality. The significant minority cannot be ignored. In formulating confidentiality rules, the interests and needs of children may well need to receive different treatment compared to their parents. From the children's perspectives, the role of protective and restrictive orders that are raised as a result of s11F conferences (as discussed above) is doubly important.

An overwhelming majority of family consultants (94%) believed there are benefits to having a lack of confidentiality. Bear in mind that about half of these consultants had previously worked in a confidential environment and are therefore ideally, indeed uniquely, placed to make these observations. The reasons given emphasise the benefits of early intervention, risk assessment, transparency of process and information flow.

Conclusion

Family consultants have experienced significant changes since 2006, with communications at family dispute conferences no longer being confidential. A recent survey of family consultants, many of whom have practised in both confidential and non-confidential settings, canvassed them about their experience, perceptions and understandings in relation to confidentiality, and the results suggest that confidentiality in family dispute resolution may have reached its use-by date.

At the very least the findings represent a call for more research about confidentiality in consensual family dispute resolution processes. It is also a call for greater rigour and intellectual honesty when discussing this issue. A robust and open discussion needs to take place between the stakeholders in confidentiality, freed from the shackles of mantras and dogmas. The various participants in the family law system have diverse interests in relation to confidentiality. When the question is formulated from the child's perspective and the perspective of victims of violence and abuse: "Do existing confidentiality rules serve their interest?", the authors submit the answer is no. If that is correct, then whose interests *are* served by confidentiality rules?

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[21]

Family law

Challenges for responding to family violence in a federal system

Rosalind F. Croucher

From “private” problem to public responsibility

Family law has transformed over the past 200 years, moving from an essentially private space to a public one. Once it was the province of the ecclesiastical jurisdiction with respect to relations between husbands and wives, while questions of title and legitimacy of children with respect to real estate were played out in the courts of common law and equity.

The idea that the family is a “private” space has been a continuing theme in law—and especially family law (Altobelli, 2003; Graycar & Morgan, 2002; Thornton, 1995). But if it was treated as a private space outside the province of law, then violence within the family was also often lost from the legal arena (Schneider, 1994). A key area of reform energy has been directed towards ensuring that governments accept responsibility for preventing and dealing with violence as a serious infringement of women’s rights, and to move the issue of violence from the area of private action to that of public responsibility (Evatt, 1991).

The statistics on family violence are frightening. In January 2009, KPMG prepared a forward projection of the costs of family violence to 2021–22 and concluded that “an estimated three-quarters of a million Australian women will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion” (National Council to Reduce Violence against Women and their Children, 2009, p. 4). While the violence may begin in a private sphere, with figures like these it is very much a public issue and a national responsibility. The work of the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC)—comprising two reports (ALRC, 2011a; ALRC & NSWLRC, 2010) and 289 recommendations for reform—forms part of the public response.

The federal system

Any discussion about reform and family law in Australia has to begin with an understanding of where family law sits in the federal system. Legislative power is divided between the

Commonwealth and the states and territories, and neither the Commonwealth nor the states and territories have exclusive legislative competence in relation to families.¹ The Australian Constitution gives the Commonwealth Government the power to make laws with respect to: (1) “marriage” (s 51(xxi)); and (2) “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants” (s 51(xxii)). It also has the power to legislate with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament” (s 51(xxxix)). The power of the states to legislate in relation to family law is not limited in the same way, but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails (s 109).²

As a general principle, private rights were regarded as more appropriately a matter for the states, while questions of *status*—marriage and divorce—needed uniformity across Australia and hence were more appropriate for allocation to federal power (Young & Monahan, 2009). But it was not until the *Matrimonial Causes Act 1959* (Cth), followed two years later by the *Marriage Act 1961* (Cth), that the Commonwealth entered the field. This was only just over 50 years ago. These laws superseded the laws of the states and provided a uniform Commonwealth law on marriage and divorce. The *Family Law Act 1975* (Cth) and the establishment of the Family Court of Australia ushered in the current framework of federal family law.

The federal framework was later expanded by the referral of legislative power from the states to the Commonwealth.³ A major addition concerned the power to make laws with respect to the children of unmarried parents—“ex-nuptial children”.⁴ Between 1986 and 1990, all states (with the exception of Western Australia) referred their powers with respect to “guardianship, custody, maintenance and access” in relation to ex-nuptial children.⁵ The states did not, however, refer to the Commonwealth their power to legislate with respect to child protection and adoption.⁶ In 1996, the *Family Law Act* was amended to include a “welfare power” in relation to children.⁷ A further referral

1 The Family Law Council (2000) provides a useful discussion of the constitutional context of family law in Australia.

2 This section provides that: “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament’s legislative intent is to “cover the field” in relation to a particular matter.

3 A reference to the Commonwealth is not required from the ACT, the Northern Territory and Norfolk Island because s 122 of the Australian Constitution assigns to the Commonwealth plenary power to “make laws for the government” of the territories.

4 There was an attempt in 1983 to extend the categories of children covered by the *Family Law Act*, but this was held to be constitutionally invalid, necessitating the referral of power (Dickey, 2007). In *Re Cormick* (1984) 156 CLR 170 it was held that the marriage power could not extend to a child who is neither a natural child of both the husband and wife, nor a child adopted by them.

5 See *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic.); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); and *Commonwealth Powers (Family Law) Act 1987* (Tas.).

6 *Commonwealth Powers (Family Law—Children) Act 1986* (NSW) s 3(2); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic.) s 3(2); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld) s 3(2); *Commonwealth Powers (Family Law) Act 1986* (SA) s 3(2); *Commonwealth Powers (Family Law) Act 1987* (Tas.) s 3(2).

7 *Family Law Reform Act 1995* (Cth), introducing a new pt VII. The relationship between the *Family Law Act* and the child welfare legislation of the states and territories is considered in Chapter 14 of the ALRC and NSWLRC (2010) report.

of power led to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising federal and state jurisdiction.⁸ Given that Western Australia has kept family law matters within the state, it provides, in some respects, a “control jurisdiction” for a consideration of some of the issues generated by the fragmentation between the state and federal spheres in the other states and territories.

Where and how do issues of family violence arise in such a context? The primary mechanism exercised at state and territory level is that of protection orders under family violence legislation, variously described as: apprehended violence orders (AVOs), family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. They are essentially a response of the civil law to immediate concerns of safety, though the police get involved in many jurisdictions.

Family violence legislation was enacted in most states and territories in the 1980s and 1990s, largely as a result of two decades of feminist pressure and lobbying, highlighting in particular the inability of the criminal justice system to protect women from future violence (Fehlberg & Behrens, 2008). It was a response to the growing recognition that existing legal mechanisms failed to protect victims—predominantly women—from family violence.

A key area of intersection of federal and state jurisdictions is the way in which protection orders may interact with the *Family Law Act*. There is an inherent tension between the focus of protection orders and parenting orders. On the one hand, the protection order may direct a person to keep away from a named person and children. On the other hand, the parenting order is focused on time that children are to spend with or live with their parents—a focus on the longer term.

The boundaries between the various parts of the legal system dealing with families are not always clear, and jurisdictional intersections and overlaps are “an inevitable, but unintended, consequence” (Family Law Council, 2000, para. 2.3). The fragmentation of the system has a particular effect in relation to child protection issues. As the Family Law Council (2000) commented:

In essence, at least two court systems are potentially involved in any child protection dispute: the State and Territory children’s courts, and the federal Family Court. With the introduction of the Federal Magistrates Service,⁹ this fragmentation now extends to three courts. Further, if a dispute extends across State and Territory borders, more than one children’s court may be involved. Family violence issues are also often relevant when child protection issues are raised, but the State and Territory courts that deal with violence issues are usually the generalist magistrates’ courts. This can add a further layer of complexity. (para. 2.4)

Further, while state and territory child welfare laws take precedence over Family Court orders under s 69ZK of the *Family Law Act*,¹⁰ as there was no referral of such powers,

8 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA); see ss 35–36.

9 Now the Federal Circuit Court of Australia.

10 See the discussion of s 69K in Family Law Council (2000), paras 2.21–2.22.

in contrast, in the area of family violence, contact and residence orders made under the *Family Law Act* can be used to defeat state and territory family violence protection orders dealing with such issues (Family Law Council, 2000, para. 3.9). As noted in the Family Law Council's advice to the Commonwealth Attorney-General in December 2009 (Family Law Council, 2009):

The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse. (para. 7.2)

The result is a fragmented system with respect to children (Altobelli, 2003). There is a danger, moreover, that issues concerning violence may fall into the cracks between the systems (Family Law Council, 2002), described by Higgins and Kaspiew (2008) as being analogous to the London Underground warnings of “mind the gap” (see also Peel & Croucher, 2011). Where the relevant child protection authority may decide not to investigate, because the mother is behaving “protectively”, the Family Court does not investigate either, because it can't. As noted by the Family Law Council (2009), the division of powers means that “neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children” (para. 7.3.2).

Different planets

In the course of the first family violence inquiry, the ALRC and NSWLRC (2010) received the clear message that, from the point of view of parents and children engaging with legal frameworks in which issues of family violence and child abuse arise, the system should be as seamless as possible, so that whatever point a child and his or her parents encounter the legal system they should not feel lost in a maze or be blocked by frequent dead ends.

An example of some of the kinds of tensions that were presented is that a mother hears conflicting messages and meets divergent expectations at different points in the continuum of the broad “family law system”, including the concerns of child protection authorities. Marianne Hester (2009), describing the experience in the United Kingdom, referred to the different cultural histories of what she saw as the three “planets” of domestic violence, child protection and child contact:

Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must *not* be attempting to “aggressively protect” their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not adequately take into account that in some instances mothers and/or children may experience further abuse. (pp. 50–51)

So, for example, when a mother is experiencing family violence that may have attracted the attention of the relevant child protection authority, she is told that she

is expected to be “protective”, otherwise she faces the potential that the interest of the child protection authority may lead to her “losing” her children. And yet, if she is drawn into family law proceedings, she is faced by the allegation that she is not being a “friendly parent”, so, in order that her children have a “meaningful relationship” with both parents, she is faced with a parenting order that requires contact with the man she fears—particularly at moments of “handover” of the children to their father—and her fear continues.

Such dynamics, moreover, are compounded by other factors; for example, for Indigenous and migrant women. In a conference paper titled “Mothers, Domestic Violence and Child Protection”, Douglas and Walsh (2010) noted that:

For many Aboriginal people the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention ... Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes. (pp. 20–21)

Some answers

How can a bifurcated system overcome these fundamental problems? The Family Law Council (2009), in its advice to the Commonwealth Attorney-General, signalled that a referral of powers should be given so that federal family courts can have concurrent jurisdiction with state and territory courts “to deal with all matters in relation to the children including where relevant family violence, child protection and parenting orders” and that “achieving this goal would be the best outcome for people experiencing family violence and may circumvent the disparity between children’s, state and family courts” (para. 7.7). If this is not possible, other ways *through* the system need to be found. The Family Court has introduced a solution in the form of the Magellan case management program (see Higgins, 2007). In other parts of the system there are a growing number of other examples of agreements, protocols, memoranda of understanding and other ways of regulating relationships between agencies working with family violence. Consequently, an issue for the law reform commissions was to think about what the limits of the law might be and whether other forms of regulation could work as well, or better. There is much to be said for the simple mantra advocated by Professor Richard Chisholm (2009) in his review of the procedures and laws applying in the federal family law courts in the context of family violence—that family violence needs to be “disclosed, understood and acted upon” (p. 49).

The conceptual framework that the ALRC and NSWLRC (2010) developed to underpin the recommendations in the report was expressed as four specific principles or policy aims that relevant legal frameworks in this inquiry should reflect: seamlessness, accessibility, fairness and effectiveness:

- (1) *Seamlessness*—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.
- (2) *Accessibility*—to facilitate access to legal and other responses to family violence.

- (3) *Fairness*—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.
- (4) *Effectiveness*—to facilitate effective interventions and support in circumstances of family violence. (para. 3.10)

The overarching, or predominant principle was that of seamlessness, which was expressed in recommendations focused on improving legal frameworks and improving practice.

The commissions considered that the improvement of *legal frameworks* could be achieved through:

- a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence that may permeate through the various laws involved when issues of family violence arise;
- corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the *Australian Constitution*;
- improved quality and use of evidence; and
- better interpretation or application of sexual assault laws. (ALRC & NSWLRC, 2010, para. 3.52)

And the improvement of *practice* could be achieved through:

- specialisation—bringing together, as far as possible, a wide set of jurisdictions to deal with most issues relating to family violence in one place, by specialised magistrates supported by a range of specialised legal and other services;
- education and training;
- the development of a national family violence bench book;
- the development of more integrated responses;
- information sharing and better coordination overall, so that the practice in responding to family violence will become less fragmented; and
- the establishment of a national register of relevant court orders and other information. (ALRC & NSWLRC, 2010, para. 3.53)

By way of illustration of how the goal of “seamlessness” could be achieved, the idea of “corresponding jurisdictions” was aimed at implementing in law the concept of “one court”, through an expansion of the jurisdictions of federal, state and territory courts responding to family law, family violence and child protection issues. In particular, while the commissions concluded that the prospect of a single new specialist court to deal with all legal matters relating to family violence was not practicable, an effective way to achieve the *benefits* of “one court” is to develop corresponding jurisdictions, in which each of the jurisdictions of courts dealing with family violence correspond to an appropriate degree. Enhancing the ability of courts to deal with matters outside their core jurisdiction would allow victims of family violence to resolve their legal issues relating to family violence in the same court, as far as practicable, consistent with the constitutional division of powers.

So, for example, state and territory magistrates courts are often the first point of contact with the legal system for separating families who have experienced family violence. The commissions therefore considered that it would be important for state and territory magistrates courts to be able to deal with as many issues relating to the protection of victims of family violence as possible. Making an interim parenting order at this time might take the heat out of the situation by regulating how separating parents spend time and communicate with their children.

An important start in implementing the recommendations was the package of amendments to the *Family Law Act* in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), which commenced on 7 June 2012. The definition of family violence in the amended s 4AB(1) is not precisely the one recommended by the ALRC and NSWLRC, but it is essentially the same.¹¹ It will provide the foundation for the improved understanding that Professor Chisholm identified as being fundamental to the family courts' response to family violence. In the ALRC's second family violence report, the commission recommended that the definition be included in other Commonwealth laws that were considered in that inquiry.¹²

Conclusion

The first family violence inquiry was one of the biggest challenges for the ALRC to date, given its incredibly complex nature. There are many involved in trying to find the way out of this particular maze. The challenge is that it does not end up like a children's swimming party—lots of arms and legs and much thrashing in the water—with so many inquiries going on almost simultaneously. It is a metaphor that may also be applied to the contrasting, even clashing, and possibly contradictory, way in which the various laws concerning family violence operate in Australia. The goal is that we should end up as Olympic-level synchronised swimmers. The commissions consider that adopting the recommendations, including the idea of developing corresponding jurisdictions, will go some way in this direction.

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11 For a consideration of the differences see ALRC (2011b).

12 Other recommendations that are picked up in the *Family Law Act* amendments are noted at: <www.alrc.gov.au/inquiries/family-violence>.

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Families with complex needs Meeting the challenges of separation

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THIS CHAPTER IDENTIFIES SOME of the main challenges pertinent to program development in relation to family law parenting disputes. The basis of this discussion is evidence from a recent evaluation of a family dispute resolution program for matters involving a history of family violence. As the evidence base about the families who use family law system services has expanded in recent years, it has become clear that better ways of meeting complex needs are required. Families that have the most need for services are those affected by issues such as family violence, child safety, mental illness and substance abuse. The evidence highlights the need for holistic, multidisciplinary responses in meeting the needs of these families, whose engagement with the system often requires solutions that address both legal and psychosocial issues in parenting disputes. This analysis draws on evidence from a recently released evaluation of the Coordinated Family Dispute Resolution (CFDR) pilot program (Kaspiew, De Maio, Deblaquiere, & Horsfall, 2012) to reflect on the service requirements of families with complex needs and the challenges in meeting them.

Challenges at three different levels are discussed. The first is the systemic level, through a consideration of empirical evidence on unilateral engagement with relationship support services, where one member of a former couple engages with a service but the other doesn't. The evidence suggests the existence of potentially significant, but unmet, support needs in these circumstances. The second is at the interagency level, in the context of using collaborative partnerships to provide holistic services. The third is at the interprofessional level through a discussion of the complexities and tensions that arise for lawyers and support service professionals working with alleged perpetrators of family violence.¹

¹ The CFDR model uses the language "predominant aggressor" and "predominant victim". These terms will be used in the remainder of this chapter.

Background

The Australian Institute of Family Studies (AIFS) *Evaluation of the 2006 Family Law Reforms* (hereafter “the Evaluation”; Kaspiew et al., 2009) highlighted the prevalence of a history of family violence among separated parents. The Evaluation revealed that 26% of mothers and 17% of fathers surveyed for the Longitudinal Study of Separated Families (LSSF) Wave 1 reported a history of physical hurt before separation, and 39% of mothers and 36% of fathers reported emotional abuse before or during separation. About one-fifth of separated parents (17% of fathers and 21% of mothers) reported having safety concerns (relating to their child, themselves or both) as a result of ongoing contact with the other parent. Mental health problems were reported by 29% of mothers and 22% of fathers (the phrasing of the question was general and did not require the respondent to identify whether the respondent, the other parent or both had the concerns and whether the problem was diagnosed by health professionals). The Evaluation report concluded that the system had “some way to go in being able to respond effectively to these issues” (p. 364). The subsequent findings of the LSSF Wave 2 study (Qu & Weston, 2010) confirmed that family violence remained an ongoing problem after separation. Among parents who participated in Wave 2 ($n = 6,565$), 53% of mothers and 46% of fathers reported experiencing family violence between Waves 1 and 2 (mainly emotional abuse, with reports of physical hurt falling to 5% for fathers and 4% for mothers). Similarly, safety concerns were pertinent for close to a fifth of Wave 2 participants (20% of mothers and 16% of fathers), with a core group of about 10% of parents (11% of mothers and 8% of fathers) holding such concerns through both waves.

A number of different initiatives to improve the family law system’s response to family violence and child safety concerns have been implemented in the past three years. Most significant have been amendments to the *Family Law Act 1975* (Cth),² which introduced a wider definition of family violence (s 4AB(10)), and provisions specifying that where there is conflict between the aims of protecting children from harm and maintaining a relationship with both parents after separation, greater weight is to be accorded to protection from harm (s 60CC(2A)). Other measures included the development of a free family violence training package (AVERT) for use throughout the system³ and the formulation of a universal family violence screening tool.⁴ A third initiative was a pilot of a multidisciplinary process (CFDR) for addressing parenting disputes where there has been a history of family violence (Kaspiew et al., 2012; Women’s Legal Service [WLS], 2010). This pilot program was based on a model developed by the Women’s Legal Service in Brisbane (and other consultants) and was conducted from early November 2010 to 30 April 2013.⁵ It was implemented in five sites/lead agencies across Australia: Perth (Legal Aid Western Australia), Brisbane (Telephone Dispute Resolution Service [TDRS], run by Relationships Australia Queensland), Newcastle (Interrelate Family Centres), Western Sydney (Uniting Care Unifam) and Hobart (Relationships Australia Tasmania). TDRS made adaptations to the model to accommodate its telephone-based service.

2 The amending legislation is the *Family Law Amendment (Family Violence and Other Matters) Act 2011* (Cth).

3 See the AVERT Family Violence website: <www.avertfamilyviolence.com.au>.

4 The Detection of Overall Risk Screen (DOORS) framework (see McIntosh & Ralfs, 2012).

5 Data collection for the AIFS evaluation of the CFDR pilot was completed in August 2012 (see Kaspiew et al., 2012).

The CFDR pilot was developed in response to a perceived need in the family law system for a non-court based mechanism for resolving post-separation parenting disputes where there has been family violence. Recent empirical evidence demonstrates that a significant number of parents in this situation are using family dispute resolution (FDR; Kaspiew et al., 2009; Qu & Weston, 2010). In some circumstances appropriately delivered standard FDR may be adequate, and in other circumstances this approach appears to be falling short. Concerns that arise in the latter set of circumstances relate to whether the process itself maintains safety, whether it produces outcomes that reflect genuine (rather than coerced) agreements, and whether these outcomes are in the best interests of children. A further set of concerns relates to families who present with both previous and ongoing concerns about family violence and safety whose matters remain unresolved despite their engagement with Family Relationship Centres (FRCs) or similar services. The evidence suggests that some of these families may be experiencing difficulties over a protracted period of time, with limited assistance. A substantial proportion of respondents (53% of mothers and 45% of fathers) interviewed in Wave 2 of the LSSF reported that emotional abuse continued after separation (Qu & Weston, 2010). Furthermore, a number of studies have highlighted an association between separation and its aftermath and familicide against a background of family violence (e.g., Walsh, McIntyre, Brodie, Bugeja, & Hauge, 2012).

The CFDR model of mediation aimed to address the concerns arising from these circumstances. It was a process where parents were assisted with post-separation parenting arrangements where family violence had occurred in the relationship. Lead organisations were responsible for coordinating a partnership providing a range of services. The overall process involved a multidisciplinary team comprised of a case manager/FDR practitioner, a specialist family violence professional (SFVP) for the person assessed to be the “predominant victim” in the language of the model, a men’s support professional (MSP) for the person assessed to be the “predominant aggressor” (when they were male),⁶ a legal advisor for each party and a second FDR practitioner. Child consultants were part of the professional team and were called upon to feed into case management decisions and, in some cases in some pilot locations, were involved in providing services to clients and/or children. Specialised risk assessment and management took place throughout the process, which unfolded over several steps involving screening, intake and assessment, preparation for mediation, mediation (up to four or more sessions) and post-mediation follow-up. The approach recognised the multiple needs created by separation against a background of family violence and attempted to develop a coordinated approach where family violence support, and legal and dispute resolution needs could be met within one process, rather than placing families in the position of having to engage with multiple services in a splintered and potentially incoherent way.

An evaluation of the program, based on a number of data sources—including case management data, interviews and surveys with professionals, and interviews with parents—highlighted the complexities involved in delivering the service in a multi-agency,

6 The party assessed as the “predominant aggressor” was male in 89% of cases and female in 5%; the determination was missing or uncertain in 6% of cases. Given the ethical issues that arise in dealing with participants from groups that contain small numbers (see further discussion in Kaspiew et al., 2012, Chapter 1), the particularity of the experience of male “predominant victims” and female “predominant aggressors” is not explicitly explored in this report. However, where data were collected from individuals in these groups, it is reflected in relevant parts of the discussion.

multidisciplinary setting.⁷ Although a decision not to fund the program on an ongoing basis has been made, the evaluation provides valuable insights into the challenges involved in delivering such services. The first challenge—relevant at a systemic level—is considered in the next section.

Unmet service needs

As part of the CFDR evaluation, case management data relating to process and outcomes for all cases in the pilot ($N = 126$) were collected and analysed. Information was also gathered from a comparison group sample ($N = 247$) of standard/traditional FDR service users who were also identified as experiencing family violence. The differences between the CFDR and comparison groups highlight a significant gap when only one parent engages in a service (single-party cases). A significant number of cases (49%) dealt with in the CFDR pilot involved one partner in a former couple seeking assistance in circumstances where the other partner was not engaged with the process. These cases usually involved a mother ($n = 52$ cf. 10 fathers) who was also often considered to be a predominant victim. In contrast to CFDR, 31% of comparison group cases were found to involve a single party. The aim of the CFDR pilot was to provide dispute resolution services premised on an assumption of bilateral engagement from both members of a former couple. However, as practice in the pilots evolved, it became clear that the dynamics concerning the engagement of the non-initiating party were complex. Evaluation evidence showed single-party cases arose in two main ways: the non-initiating party refused to engage with the process (44%) or the CFDR professionals made an assessment that it was not safe to invite the other party into the process (36%).

In either of these circumstances, the initiating parties found that parenting arrangements were at issue but could not be resolved unilaterally. The implications of this are concerning, particularly in light of evidence indicating that single-party cases are more than twice as likely as two-party CFDR cases to involve a previous history of involvement with child protection departments (15% cf. 6% respectively) and just as likely to involve current allegations of child abuse or neglect (19% cf. 18%).

The evaluation evidence indicates that single-party cases received significantly more support in the CFDR process than such cases in the comparison group: 86% of single-party comparison group cases received no service beyond intake processes, against 19% of CFDR cases. Just over half (52%) of the CFDR single-party cases received multiple services as a result of their engagement with the process, compared with just 1% of comparison group cases. These services included advice and referral from the lead service in the CFDR process and services from pilot partners, including legal services

⁷ The evaluation methodology is set out in full in Chapter 1 of the report (Kaspiew et al., 2012). In brief, the samples for the different studies comprised: (a) analyses of case file data from all CFDR cases up to 30 June 2012 ($n = 126$), and a sample of comparison group files ($n = 247$) drawn from services run by each of the lead partners where CFDR services were not offered; (b) qualitative studies based on mixed-profession focus groups (participants: $n = 37$, August–November 2011), and interviews with professionals working in the early stages of the pilot implementation ($n = 37$) and near the end of the evaluation data collection period ($n = 33$, April–June 2012); (c) an online survey of professionals, conducted in June–July 2012 ($n = 88$, with a response rate of 68%); (d) a qualitative study based on interviews and surveys with parents who received CFDR services ($n = 36$, 29 interviews and 7 surveys; as there were a smaller than expected number of pilot cases, the seven online parent surveys were analysed qualitatively); and, (e) requests for information conducted at each pilot site towards the end of the evaluation period that examined how the model was adapted and implemented in each location.

and family violence support services. Over one-third (40%) of single-party cases were referred to legal aid, 15% to courts and 13% to post-separation support services.

Although the CFDR process did not facilitate the resolution of the concerns that triggered engagement with the service in the first place, the evidence indicates that the parents in single-party cases were assisted through CFDR in a range of ways that would allow them to understand their options and to access other services. The evidence of the number of single-party cases encountered in the CFDR pilot (49%) and the high level of service provided to them in comparison with single-party cases in the comparison group highlights an unexpected aspect of implementing and evaluating the CFDR pilot. It suggests a need for referral and support for complex cases at a level of intensity currently not available in services that are an initial port of call for parents experiencing difficulty with post-separation parenting arrangements.

Collaboration: Challenges and possibilities

As the preceding sections indicate, the CFDR pilot required collaboration between professionals in different agencies and from different disciplines in a way that meant optimum operation would occur when the professionals across the different agencies were able to operate effectively as a clinical team. Where appropriate, the perspectives of all professionals involved in CFDR fed into risk-assessment and case-management decisions, with some additional limitations for lawyers (see below). The evaluation found that the quality of the collaborative relationships established in CFDR was critical to the effectiveness of the service provided to clients in each location.

The evaluation findings indicate that the challenges in establishing and maintaining collaborative relationships between each of the partners in the five locations could be significant. The challenges were evident at several levels, to varying extents. At an agency level, some policies and approaches needed to be reconsidered. An example of this was the application of child-inclusive practice. In one location, a community-based organisation considered this should occur routinely, while the lead partner took a cautious approach. Protracted negotiations took place over the life of the pilot, producing an agreement reflecting a position in favour of applying child-inclusive practice, with some caveats.

Interdisciplinary engagement required reconsideration of professional practices to ensure that the engagement of each set of professionals was consistent with the aims of the pilot. Disciplinary practices and approaches had to be explicitly discussed and reconsidered in a range of ways (the specific example of information sharing is discussed further below). Other areas where interprofessional understandings had to be expressly developed included approaches to family violence. Evidence from the pilot indicates that differing views on family violence, including what behaviours constitute family violence and what implications they have for post-separation parenting involvement, were evident among the professionals involved in some locations. Varying approaches to risk assessment were also adopted. An example of efforts to develop consistent practices and understandings came from the SFVP and MSP in one location who embarked on a process of clarifying their own understandings and approaches and those of their services in order to set up a consistent understanding to apply in the pilot.

The format of FDR sessions also had to be reconsidered. The FDR sessions were generally conducted face-to-face, although “shuttle” sessions (where the parties were separate and the FDR practitioner moved between them) also occurred. The evaluation evidence indicates that in the location where the shuttle methodology was adopted as

the first choice, particularly for initial sessions, no predominant victims reported feeling fearful in FDR sessions. In locations where this approach was not applied, the accounts of some parents indicated that the face-to-face approach did result in some parents experiencing fear and intimidation in the FDR sessions.

A further indication of the need for “standard” approaches to be reconsidered when providing services for families with complex needs emerged from the evaluation concerning the number of legal, support and FDR sessions provided in the pilot in cases where both parties engaged with the process. Clients in these cases had multiple appointments with legal advisors and support workers. Nearly three-quarters of the CFDR cases that reached mediation had more than one mediation session (compared with 15% of comparison group cases), and 37% had four or more sessions (none in the comparison group had four or more). CFDR matters were dealt with over a significantly longer time frame than comparison group matters, with CFDR matters taking, on average, more than double the amount of time from intake to mediation (211 days cf. 99 days).

Interprofessional practice

The evaluation evidence demonstrates particularly clearly the complexity involved in developing holistic service responses to issues that have both psychosocial and legal dimensions. The tensions involved in working with predominant aggressors in CFDR exemplify these challenges, and information-sharing processes are critical to resolving them. There are a number of issues that are relevant to understanding the complexity in working with people who perpetrate family violence. It is well recognised in the family violence literature that frank disclosure is uncommon for a range of reasons, including shame, lack of insight that the behaviour constitutes family violence and lack of willingness to admit to committing what amounts to criminal conduct (e.g., Blacklock, 2001; James, Seddon, & Brown, 2002). Family violence practitioners and researchers recognise that denial is common, full admission is rare, and that, more commonly, some behaviour may be admitted and accompanied by exculpatory discussion, including blaming the victim, mutualising the violence, minimising what occurred, and attributing responsibility for the actions to external circumstances, including stress or substance use.

The CFDR model was premised on there being some acknowledgement from the predominant aggressor of past and/or current violence or safety concerns that were “relevant to future arrangements of their children” (WLS, 2010, p. 16). Such acknowledgement, however, has significant implications in a quasi-legal process since it involves admitting to potentially criminal behaviour. The absence of such acknowledgement compromises the aim of the process to achieve safe and child-focused parenting agreements. Professional approaches to addressing the issues arising from whether or not family violence is acknowledged illustrate the possibilities and challenges for professionals working together in support-based and legal roles.

Information-sharing was a critical aspect of collaborative practice in the pilot and was particularly important in working with predominant aggressors. The flow of information to and from lawyers was complex, since lawyers have an obligation to maintain client confidentiality and can encounter ethical difficulties in receiving information that contradicts what their clients have told them. Different approaches were adopted in various locations, but the practice of lawyers routinely obtaining client consent to share information, which applied in one location, had specific strengths. Where this occurred, each professional could develop a more holistic picture of the client’s circumstances and consequently an understanding of acceptable dispute resolution outcomes. Legal advice

and support services could thus be provided in ways that were consistent with differing professional roles but complementary to the overall aims of the pilot: to produce parenting arrangements that were safe and in the best interests of the child. A further practice related to information-sharing, and concerned with client management and collaborative practice more generally, was having SFVPs and MSPs attending legal advice appointments with clients. Where this happened, the teamwork approach appeared to strengthen the program's ability to manage client expectations in the CFDR process.

In the CFDR pilot, the professionals working closely with predominant aggressors, especially support workers and lawyers, faced particular challenges in ensuring complementary practice approaches to their involvement in the process. From the perspective of men's workers, one MSP explained the challenges involved in understanding the story:

I always feel as though I've arrived at something with the client that contributes to furthering the understanding of the team. I don't ever delude myself thinking I have the full picture. [MSP, Later Stage Interview]

The interviews with professionals, particularly with MSPs, highlighted the way in which working to build understandings of an alleged perpetrator's own behaviour, and its implications for ex-partners and family members, was a key part of their task in the CFDR process in many instances:

We're forcing them to consider their actions towards the other parent, at least in light of the children that they have and what the effect of that will be. [MSP, Later Stage Interview]

So one of the things that the counsellors would do would [be to] ask how the violence impacts on significant others, and this can sometimes gently—well, not gently—sometimes it is quite confronting for the client then to have to think about how their violence impacts others and how they talk about that. So the counsellor would also validate the difficulty in talking about violence but then gently encourage them to be more explicit so the counsellor gets an understanding of [the violence]. Because that is what this is about—they are assessing the degree of violence in this relationship. [MSP, Early Stage Interview]

Lawyers pursued a parallel set of objectives. They also faced significant challenges in providing advice that was supportive of the aim of maintaining client engagement in the process, in the face of the option of going to court. They were also providing legal advice on the client's position in relation to parenting arrangements, based on uncertain facts and client expectations of an entitlement to shared care. It was apparent that in some cases, this parallel engagement yielded results in circumstances where clients were able to develop insight and were susceptible to accepting lawyers' messages about parenting arrangements and best interests. In other cases, this parallel engagement could not produce the desired results, meaning clients disengaged from the process, and in some cases resolved to pursue what they considered a better outcome for them in court.

Lawyers who took part in the evaluation studies articulated a number of dilemmas involved in advising predominant aggressors. These included being unable to get honest instructions from their clients, and being involved in CFDR sessions where information at odds with the clients' instructions emerged. For example, some lawyers described

experiencing ethical dilemmas when becoming aware of a history of family violence that was unlikely to be provable in court (yet being concerned for the children) and being unable to convince a client that their history of perpetration stood in the way of achieving the parenting arrangements they wanted. Challenges in negotiating these issues are illustrated in the following quotations:

It becomes difficult when the alleged perpetrators have limited insight into their behaviours and become aggressive when their limited options are presented to them in terms of spending time with their children. The failure of the client in gaining insight into their violence is the biggest hurdle to being able to give effective legal advice. [Lawyer, Professionals Survey]

When working with one aggressor, I found he was not honest with me in disclosing what was going on. I felt quite disadvantaged not knowing what the history of the couple had been. My client initially portrayed himself as being extremely reasonable and very concerned for the welfare of his children. CFDR was stopped because the other client could not proceed because of my client, yet I was not aware of what was happening. From my experience in this [case], the family violence was not named. [Lawyer, Professionals Survey]

I haven't been able to get information about the DV [domestic violence]. He gave me the impression it was a one-off isolated incident, but the actions of the mother indicate otherwise ... It's hard to advise him. And then I thought, gosh, I'm advising him on spending time with them when possibly that's not in the best interests of the children. [Lawyer, Later Stage Interview]

The evaluation findings indicate that professionals working with clients who were predominant aggressors found this to be particularly intensive work and not all clients were amenable to hearing the messages being conveyed. One MSP, when discussing the difficulties of encouraging a father in the pilot to understand his behaviour, said:

Partly because he's a very rigid personality and he's got his view and he's not shifting from it. [MSP, Early Stage Interview]

Similarly, an FDR practitioner commented:

Those men are very reactive and can play out their abusive behaviour with us ... We have to really set strong boundaries, and at some point it helps you make a decision [about whether there is] any potential for change, even in this program. [FDR practitioner, Later Stage Interview]

There were many aspects of the interprofessional collaboration that were challenging in the CFDR pilot, but the work of lawyers and MSPs with predominant aggressors highlights particularly clearly the difficulties and advantages of close collaborative practice. Supported in some locations by information-sharing protocols, the collaborative nature of the process increased the potential for their practice in any given case to be complementary rather than compartmentalised or even conflictual. The evaluation data yielded examples of where this complementary practice produced results in contexts where clients were amenable to developing some level of insight into their behaviour

and consequently accepting advice about the limitations in their legal position. This achievement occurred even though the CFDR model was not intended to be what is known as a “transformative” model of family dispute resolution, aimed at shifting attitudes and behaviours (Women’s Legal Service, 2010). Other clients, however, were not amenable to developing insights, underlining the inherent limitations in professional practice in this context.

Conclusion

The insights from the evaluation of CFDR underline challenges at several levels that face the family law system when assisting families with complex needs. The intensive level of support absorbed by single-party cases, where one party engaged with the CFDR service and the other didn’t, raises questions about the unmet needs of single-party cases in the family law system generally. The level of service, including legal advice, support services and referrals, provided to CFDR single-party clients compared with this subgroup in the comparison non-CFDR sample, suggests that this is an area requiring further scrutiny. The need for such scrutiny is particularly acute in light of the issues pertinent to these families and the possibility that parents and children may be in difficult and even unsafe circumstances during their search for appropriate services. Outside of CFDR, such families would be engaging with multiple different services in a time-consuming and uncoordinated way. There is also potential for the cases of such families to be in abeyance when exempt from standard FDR due to family violence and if they are reluctant to enter further into the court process.

The CFDR evaluation data highlight the complex needs of families affected by family violence and child safety concerns, and underline the extent to which they have problems that are both legal and psychosocial in character. In attempting to provide a means of addressing these holistically, the agencies involved in the CFDR pilot faced a number of challenges. Frameworks and policies at agency level had to be re-considered, interdisciplinary practice had to be accommodated, and service delivery models required adaptation so that a more intensive level of service delivery could occur.

At a level more intimately connected with specific practice approaches, the work by MSPs and lawyers demonstrated how legal practice and support-based practice can be mutually supporting where close collaboration, such as information-sharing, occurred. The evaluation evidence yielded some examples where the legal and non-legal dimensions of the client’s circumstances could be addressed through intensive collaborative work that produced insight on the part of the predominant aggressor into the effects of violent behaviour on their family, and an acceptance of what this meant for their post-separation parenting status. Rather than treating these issues separately in potentially conflicting professional modes, the CFDR approach was based on complementary collaborative practice. The data also show this required a high level of resources and professional effort, and that not every case is amenable to resolution in this kind of process.

The lessons to be learned from the CFDR pilot indicate that finding effective ways to support families with complex needs requires approaches to be rethought at a range of levels, from the way in which the system is configured to the way in which practice approaches are managed. Complex needs demand collaborative approaches, which in turn require significant thought and effort to implement effectively.

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[23]

Post-separation parenting arrangements involving minimal time with one parent

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IN LIGHT OF THE longstanding policy aim of supporting parents to maintain contact with children after separation (see, for example, Parkinson, 2011), and strong social support for this notion (Kaspiew et al., 2009), the extent to which these principles are reflected in parenting arrangements is a question of significant interest. This chapter examines recent empirical evidence on post-separation parenting arrangements, with a particular focus on arrangements where children have little or no contact with one parent. It has been found, for example, that up to a quarter of children whose parents are separated rarely or never see their fathers (Australian Bureau of Statistics [ABS], 2011).¹

The discussion in this chapter is based on data derived from three different sources: (a) a near-nationally representative sample of separated parents;² (b) samples of families who used publicly funded, community-based family dispute resolution (FDR) services;³ and (c) Family Law Court files on court outcomes.⁴ The discussion illustrates the patterns evident among a sample of separated parents—minorities of whom used formal assistance in making arrangements—compared with more specific samples of families using family dispute resolution and courts. It demonstrates that a range of factors is linked with circumstances in which fathers have little or no contact with

1 Statistically, it is rare for children to live with their fathers and rarely or never see their mothers (Kaspiew et al., 2009; Renda, 2013). For this reason, the focus in this discussion is on families where children rarely or never see their fathers; that is, arrangements involving “little or no contact” with fathers. Definitions in relation to such arrangements vary somewhat in the studies referred to, but generally the term used here encompasses arrangements where children never see their father or have minimal, such as annual, contact.

2 The parents participated in the Longitudinal Study of Separated Families (LSSF) (see Kaspiew et al., 2009; Qu & Weston, 2010).

3 The sample were part of the Coordinated Family Dispute Resolution (CFDR) pilot evaluation study (see Kaspiew, De Maio, Deblaquiere, & Horsfall, 2012).

4 The data were gathered through the Legislation and Courts Project (see Kaspiew et al., 2009).

children, but that contact with services and courts is supportive of maintaining, and in some circumstances, increasing fathers' involvement with their children.

Broader context

Recent data confirm that the longstanding trend for substantial minorities of children to have rare or no contact with their fathers (Kaspiew et al., 2009) shows little sign of change. According to the Family Characteristics Survey 2009–10 by the ABS (2011), one in five children under 18 years had a parent living elsewhere, with about one-quarter seeing the parent living elsewhere less than once a year or never.⁵ When children rarely or never saw the parent living elsewhere, that parent in the majority of cases was the father. Analyses based on the Longitudinal Study of Australian Children (LSAC) reveal similar patterns, indicating nearly a quarter (23%) of children with separated parents had minimal contact with their father (i.e., once a year or not at all) at age 10–11, in 2010 (Renda, 2013).⁶

The 2006 amendments to the *Family Law Act 1975* (Cth) were intended to provide increased legislative support for children to maintain a relationship with both parents after separation (Kaspiew et al., 2009).⁷ In addition to the presumption in favour of equal shared parental responsibility (see further below), the amendments introduced provisions recognising that the children's right to a meaningful relationship with each parent and their need to be protected from harm from abuse or family violence are integral elements of best interests outcomes (s 60B(10(a)–(b)), s 60CC(2)). Much has subsequently been written about the tension between these two principles (see, for example, Chisholm, 2009), and legislative amendments that became effective in mid-2012 specified, among other things, that the protection-from-harm principle should be given greater weight in circumstances where a conflict arises with the meaningful-involvement principle.⁸ The research findings discussed in this chapter pertain to the family law environment prior to the 2012 amendments.

Characteristics of families where children spend little or no time with the father

The main characteristics of families where children rarely or never see non-resident fathers may be understood on the basis of findings from the LSSF.⁹ In LSSF Wave 1, 11% of the focus children were reported to have no contact with their father, and 23% saw

5 These statistics are based on the reports of parents who had at least one child living with them at least half of the time. In other words, the results were based on the reports of the child's main carer. In most cases, the main carers were mothers. Information was collected about each child under the age of 18 years who had a parent living elsewhere.

6 These children were in the K cohort, and were in kindergarten when data collection began in 2004 (Renda, 2013).

7 The reforms were enacted through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

8 See the *Family Law Amendment (Family Violence and Other Matters) Act 2011* (Cth).

9 The LSSF was initially part of the Australian Institute of Family Studies (AIFS) evaluation of the 2006 family law reforms. LSSF focused on separated parents with a child under 18 years old who had separated since July 2006 and had registered with the Child Support Agency in 2007. The first wave collected data from 10,000 separated parents in 2008, when they had been separated for an average of 15 months. One year later, 70% of these parents were re-interviewed. Questions in relation to children were focused on one child. In Wave 1, most of these children were of preschool age, with 41% under 3 years old and 18% 3–4 years old.

their father during the daytime only (Table 1).¹⁰ One-third of the children never stayed overnight with their father. By contrast, only 2% of children never stayed overnight with their mother, comprising 1% who never saw their mother and 1% who saw their mother during the daytime only. The most common care-time arrangement was children being in the care of their mother for 66–99% of nights. Forty-five per cent of children stayed overnight with their mother most nights (i.e., 66–99% of nights), while only 3% of children stayed with their father most nights. Overall, 16% of children had a shared care-time arrangement (35–65% of nights).

Table 1: Care-time arrangements of study child, Wave 1 (2008)	
Proportion of nights per year with each parent	%
Father never sees child	11.1
Father sees child in daytime only	22.5
66–99% with mother (1–13% with father)	45.1
Shared care time (35–65% with each parent)	16.1
1–13% with mother (66–99% with father)	3.0
Mother sees child in daytime only	1.3
Mother never sees child	1.0
Total	100.0

Notes: Based on analysis of focus child's care-time arrangements. Where both parents participated in the survey, only one parent's response in relation to care time was used (selected randomly).

The characteristics of parents and children differed depending on whether children had no face-to-face time with the father or whether they spent some time (daytime only or overnights) with the father. Children who never saw their father were younger than the other children. In Wave 1, 59% of children who never saw the father were under 3 years, compared with 39% of children aged 3 years or over. Parents whose child never saw the father were younger than other parents. Around 30% of mothers whose child never saw the father were under 25 years, while under 20% of the other mothers were this age. Mothers whose child never saw their fathers were also less likely to have been married to the father: 35% compared with just over one-half of the other mothers. Furthermore, parents whose child never saw the father lived farther apart from each other compared with those of other children (data not shown). Consistent with other research (e.g., Cheadle, Amato, & King, 2010), these findings suggest that no face-to-face contact between father and child limits the time available for fathers to develop a bond with and commitment to their child.

Further findings indicate that arrangements where children rarely or never see fathers are linked with complex personal dynamics, conflict or family violence. Mothers whose children never saw the father were more likely than other parents to report:

- lots of conflict or fearful relationship with the other parent;
- experiencing physical hurt and/or emotional abuse before or during separation; and
- having issues such as mental health problems or substance abuse before separation.

¹⁰ Overall, the prevalence of children having little or no contact with their fathers differs from the findings of the ABS and LSAC studies. This is likely to reflect, among other factors, the sample of families included, the length of time since separation, the age profile of the study children, the definitions applied in each study, and whether mothers' or fathers' reports were used. A detailed discussion of these methodological issues is beyond the scope of this chapter.

The LSSF Wave 2 data suggest a slight increase in children with arrangements involving little or no contact with their fathers from Wave 1 to Wave 2 (an average of 28 months after separation). Interpretation of the data on this point is complex, since mothers' and fathers' reports differed somewhat. Among fathers who participated in both waves, 8% in Wave 1 reported they never saw the child. Just under 8% in Wave 2 reported having no time at all with the child. On the other hand, of mothers who participated in both waves, 14% in Wave 1 reported that their children had no time with the father, while this percentage increased to 16% in Wave 2.

Analysis also suggests that changing from having time to no time with the father or vice versa is associated with the factors such as children's age, distance between the two homes, and the quality of interparental relationships. Patterns for children aged 3–11 years were more likely to change from having no time to having time with their fathers, compared with younger and older children. Teenagers (aged 12–17 years) were more likely than younger children to drift towards having no time with their fathers. The longer the distance between the two homes, the more likely was there to be a change from having time to having no time and the less likely was change in the opposite direction. Interparental relationships characterised as having lots of conflict or being fearful were associated with a higher likelihood of change from having time to having no time, compared with circumstances where parents described their relationships as friendly, cooperative or distant. In addition, for some children, there was a gradual drift from having little time with their father to having no time.

Using FDR to make parenting arrangements

The use of family dispute resolution services to make parenting arrangements is not uncommon among separated families. Between a quarter and a third of parents in the LSSF Wave 1 indicated they had attempted family dispute resolution or mediation for parenting arrangements, and 7% and 14% respectively of parents who had reached parenting arrangements or were in the process of doing so reported that this was the main pathway for making parenting arrangements (Kaspiew et al., 2009). However, empirical evidence emanating directly from FDR services on parenting arrangements made in this way is rarely available. Data from an evaluation of a pilot program of Coordinated Family Dispute Resolution (CFDR) in cases where there has been a history of family violence goes some way toward filling this gap (Kaspiew et al., 2012; see also Chapter 22 in this volume). The aim of the pilot was to provide family dispute resolution services where both the process and the outcome safeguarded the safety of the child and the parent who was the target of family violence.

The evaluation of the CFDR pilot, conducted by AIFS, incorporated data from 126 cases handled in the pilot, along with a sample of comparison group cases ($n = 247$) that were dealt with within "standard" family dispute resolution processes.¹¹ The discussion describing parenting arrangements is based on the number of children (rather than cases) for whom arrangements were determined in the pilot (51 children in 27 cases)

¹¹ The evaluation was based on a mixed-method design and involved: qualitative interviews with professionals working in the pilot both in the early implementation phase and near the end of the data collection period; mixed-profession focus groups; an online survey of professionals; a request for information regarding adaptations and innovations to CFDR in each location; interviews and an online survey with parents who had received CFDR services; and case file analyses of all CFDR cases over the period of the evaluation ($n = 126$) and a sample of comparison group files who received standard family dispute resolution services ($n = 247$).

and comparison groups (38 children in 100 cases). The cases in each of these samples were those judged by family dispute resolution professionals to be eligible for handling in the pilot because one or both parties disclosed a history of family violence. Risk management was centralised in the pilot process, with each party having a support worker experienced in family violence, access to legal advice and intensive preparation for the family dispute resolution process.

As the core findings from the CFDR evaluation show, a significant proportion of the cases in which parents approached family dispute resolution did not proceed through the process to an agreed outcome. There are several reasons for this, but the refusal of one party to engage with the process, or to maintain engagement, is the most significant (Kaspiew et al., 2012). The majority of both CFDR pilot and comparison group cases involved histories of family violence and concerns about child safety, with more indicators of severity present in the pilot group. Concerns about child safety were more markedly present in relation to fathers in both groups. Mental health issues and substance abuse issues with one or more family members were present in just over half of the CFDR pilot cases and in more than one-third of the comparison group cases.

The patterns evident among the LSSF samples show that more children were in parenting arrangements that allowed for time with their fathers at the conclusion of the dispute resolution process (Table 2). Prior to the process, just over a fifth of both samples (23% of pilot children and 21% comparison children) were in arrangements where the children never spent time with their father, but after the process only very small proportions of children in either group (pilot: 4%; comparison: 1%) never had time

Table 2: Children's parenting time arrangements before and after services received, CFDR pilot and comparison groups

Child's parenting time arrangement	Before services				After services			
	CFDR pilot group		Comparison group		CFDR pilot group		Comparison group	
	%	N	%	N	%	N	%	N
All time with mother, no time with father	23.3	57	20.6	93	3.9	2	0.7	1
Most time with mother (at least 66% of time)	54.3	133	53.4	241	54.9	28	62.3	86
Shared care (35–65% with each parent)	8.6	21	12.2	55	9.8	5	21.7	30
Most time with father (at least 66% of time)	7.8	19	8.0	36	5.9	3	8.0	11
All time with father, no time with mother	2.5	6	5.1	23	–	–	–	–
Not in agreement ^a	N/A	N/A	N/A	N/A	–	–	7.3	10
Missing	3.7	9	0.7	3	25.5	13	–	–
Total	100.0	245	100.0	451	100.0	51	100.0	138

Notes: Percentages may not total exactly 100% due to rounding.^a "Not in agreement" means that parents did not agree to parenting time arrangements as part of the mediation process.

Source: Kaspiew et al. (2012), Tables 3.11 and 4.29

with their father. Shared care arrangements increased by almost ten percentage points among comparison group children (12% to 22%), but there was little change among pilot group children.

The data for both the CFDR pilot and comparison groups were further analysed by whether mental health or substance abuse issues were present, and by whether parents were an alleged perpetrator or had allegedly experienced family violence. Although sample sizes are small, a few tentative observations can be made regarding the comparison group: where there was a drug or alcohol issue with one or more family members, an agreed shared care arrangement was less likely to occur (14% cf. 28% for families without such issues). The majority of alleged perpetrators of family violence were male and in these cases two-thirds of children spent most or all time with their mothers, one-quarter were in shared care and it was rare that children spent most time with their fathers after the process. A similar analysis of the CFDR sample was not possible due to small sample sizes.

Parenting arrangements: Court outcomes

Small proportions of parents resort to the courts for the determination of their parenting arrangements, with about 11% of the LSSF Wave 2 sample nominating court as the main pathway for developing or revising parenting arrangements (Qu & Weston, 2010). Research evidence shows that the majority of matters determined either by consent after court proceedings have been initiated or by judicial determination involve allegations of family violence and/or child abuse (see, for example, Kaspiew et al., 2009; Moloney et al., 2007). Court-based parenting outcomes may have two core aspects: orders relating to parental responsibility (these may not always be made if they are not sought), and orders relating to how much time the child spends with each parent (depending on the orders sought in the applications made by the parents, court determinations may or may not specify precisely how the child's time is allocated). The 2006 amendments made an explicit link in Part VII of the *Family Law Act 1975* (Cth) between parental responsibility and parental time. These amendments introduced a presumption in favour of equal shared parental responsibility, although this is not applicable in cases involving concerns about family violence and child abuse, and is rebuttable on the basis of evidence to convince a court its application would be contrary to the best interests of the child (*FLA* s 61DA). Where orders for equal parental responsibility are made pursuant to the presumption, courts are obliged to consider making orders for the child to spend equal or substantial and significant time with each parent where this is found to be reasonably practicable and in the best interests of the child (*FLA* s 65DAA).¹²

Analysis of data derived from court files established that orders severing parental responsibility or providing for no or severely limited contact with one parent were comparatively uncommon both before and after the 2006 reforms (the discussion here focuses on post-reform findings).¹³ The court files highlighted that shared parental

¹² These provisions were not changed by the 2011 amendments (*Family Law Amendment (Family Violence and Other matters) Act 2011* (Cth)); however these amendments were intended to ensure family violence was disclosed and that protection of children from harm was given greater weight where this issue was in conflict with the child's right to meaningful involvement.

¹³ As part of AIFS evaluation of the 2006 family law reforms, information was gathered from a sample of court files involving children's matters heard in the Family Court of Australia (FCoA), Federal Magistrates Court (FMC) and the Family Court of Western Australia (FCoWA). Data were collected from a sample of 985 cases filed after 1 July 2006 and finalised by November 2008. The aim of the court file analysis was to obtain systematic data on the implementation of key aspects of the

responsibility was the most common parental responsibility order, with 87% of children in the sample of all three file types having this arrangement (Table 3).¹⁴ Even in the numerically small class of cases most likely to involve allegations of family violence or concerns about child safety—those determined by judges—a majority (56%) of outcomes provided for shared parental responsibility.

Table 3: Parental responsibility outcomes, by type of case, post-1 July 2006				
Outcomes for children	Judicial determination (%)	Consent after proceedings (%)	Pure consent (%)	All cases (%)
Shared parental responsibility	56.1	89.7	92.2	86.5
Sole responsibility to mother	28.2	6.8	3.8	8.2
Sole responsibility to father	6.2	1.3	0.4	1.6
Other	9.4	2.1	3.6	3.6
Total	100.0	100.0	100.0	100.0
No. of children	222	594	525	1,341

Notes: The shared parental responsibility category includes a small number of cases where there was shared parental responsibility with exceptions (less than 1%). The “other” category includes sole responsibility to maternal grandparent(s), to paternal grandparent(s) or to other relatives, along with a small proportion of orders for both mother and father. The sample was restricted to cases in which a parental responsibility was applicable and the outcome was recorded on the file. Weighted percentages. Percentages may not total exactly 100% due to rounding.

The file analysis also provided important insights into the patterns of care-time arrangements for court matters finalised after 1 July 2006.¹⁵ The findings establish that in cases where time with each parent was specified, the most common arrangement was for children to live with their mother and spend 14–34% of time with their father (45% of children). Around one-fifth of children (21%) lived with their mother and spent 0–13% of time with their father. A similar proportion (23%) were in shared care arrangements (35–65% of time with each parent). Very few children lived with their father and spent either 0–13% or 13–34% of time with their mother (3% and 8% respectively).¹⁶ Table 4 provides a detailed description of patterns in orders for the allocation of children’s time

Shared Parental Responsibility (SPR) Act 2006. Along with basic demographic data of the parties and children, extensive data were also gathered on the orders made by the court relating to parental responsibility and care-time arrangements, including any special conditions (such as supervision when a parent spends time with a child). In cases where a Form 4 had been filed (an allegation of family violence and child abuse), this information was also captured. Information on the appointment of an Independent Children’s Lawyer (ICL) and whether a family report was on file was also covered in the data collection.

14 There were: (a) “pure consent” files, initiated as consent orders reflecting applications for court endorsement of arrangements agreed to by the parties; (b) “consent after proceedings” files, involving matters that started as contested applications but that were subsequently settled by consent; and (c) “judicial determination” files, comprising matters where the final outcome was determined by a judge.

15 Care-time arrangements were analysed by combining information about the person with whom the child spends time (e.g., mother, father, or other person such as grandparent) and the percentage of contact hours, standardised to a four-week block from the last order or judgment on file.

16 In a significant number of files, no information was available about the amount of time the child was to spend with his or her other parent. Some of these files included arrangements where the child’s time was “as agreed”, while in others no reference was made to the number of hours.

between parents, broken down by file type. Where the time allocation between parents was specified in the orders, fewer judicial determination files (8%) provided for 0–13% of time to be spent with fathers than either consent after proceedings (16%) or pure consent (13%) files.

Table 4: Care-time arrangements for children subject to proceedings with final arrangements, post-1 July 2006

	Judicial deter- mination (%)	Consent after proceedings (%)	Pure consent (%)	All cases (%)
Live with mother (0–13% with father)	7.5	15.6	13.1	13.3
Live with mother (14–34% with father)	10.2	27.1	34.3	27.8
Live with father (0–13% with mother)	3.7	0.6	2.9	2.1
Live with father (14–34% with mother)	3.1	5.1	5.1	4.8
Shared-care (35–65% with each parent)	12.6	16.5	12.6	14.2
Live with mother—time as agreed with father	26.0	27.6	20.8	24.4
Live with father—time as agreed with mother	10.5	3.0	3.4	4.3
Live with mother—no info on time with father	25.1	3.8	6.4	8.0
Live with father—no info on time with mother	1.2	0.7	1.4	1.1
Total	100.0	100.0	100.0	100.0
No. of participants	253	541	622	1,416

Notes: Care-time arrangements are based on arrangements in last order or judgment on file. A small number of children were excluded for whom information on who they were living with was missing or who lived with someone other than their mother or father, and who were living with either their mother or father but who had contact hours with a person other than a parent (such as a grandparent). Weighted percentages. Percentages may not total exactly 100% due to rounding.

Further analysis of data relating to family violence and child abuse allegations showed that care-time arrangements where children spent little time with one parent were particularly associated with complex cases.¹⁷ In cases where there was an allegation of child abuse,¹⁸ 25% of children lived with their mother and spent 0–13% of time with their father, and 7% lived with their father and spent 0–13% of time with their mother. Where there was an allegation of family violence, 24% of children spent 0–13% with their father and 6% spent 0–13% with their mother. In contrast, in cases where there was

17 The file analysis also included information on a set of “factual issues” from key documents, including affidavits, family reports and judgments. “Family violence” was defined as a parent’s assertion of family violence that was sexual, physical, or emotional/psychological/threatened, or a family violence order. “Child abuse” was defined as a claim of a need to protect the child from: physical harm, sexual harm, emotional/psychological harm, neglect or witnessing family violence.

18 Due to the very small proportion of allegations of family violence and child abuse in “pure consent” cases, the analysis that follows is restricted to cases that were either finalised by judicial determination or by consent after proceedings had been initiated.

no allegation of family violence or child abuse, the proportion of children in care-time arrangements providing for little or no time with one parent was lower, with 17% of children spending 0–13% of time with their father and 3% spending 0–13% of time with their mother (data not shown).

Conclusion

An emerging focus of discussion and debate concerns circumstances where, in Professor Patrick Parkinson's words (2011), the family law system tries "too hard to keep alive relationships that are not sufficiently healthy to survive without intensive care" (p. 149). This chapter has made an empirical contribution to this discussion by bringing together insights from different datasets that establish what patterns are evident in relation to situations where little or no contact occurs between children and one parent after separation. Given the different samples and definitions applied in each of the source studies, the conclusions drawn on the basis of this analysis are tentative. However, in bringing these insights together in this way, some influences on the question of whether children maintain contact with their fathers after separation have been illuminated, albeit in an exploratory fashion.

Around a quarter of children from representative populations of children in separated families have little or no contact with their fathers (ABS, 2011; Renda, 2013). In the LSSF population, the factors associated with this pattern suggest a lack of opportunities for paternal investment in the father–child relationship, as well as mental illness and factors linked with family dysfunction, such as family violence, safety concerns and substance misuse. These findings suggest considerable heterogeneity in the circumstances in which little or no contact occurs.

An important point arising from the parenting arrangements evident in the datasets generated through contact with the formal parts of the family law system (CFDR and the Legislation and Courts Project) is that although these client groups manifest the characteristics of family dysfunction, completion of family dispute resolution processes is likely to result in an average increase in the amount of father–child contact that occurs and a reduction in the extent to which patterns involving little or no contact occurs. Considering the specific sub-group of court users whose matters were determined by consent after the initiation of proceedings or judicial determination, it is evident that a minority of outcomes involved curtailing parent–child, and more specifically father–child, relationships through court orders for no or restricted parental responsibility and time. In both the CFDR and the Legislation and Courts Project datasets, the findings indicate that relationships are curtailed or restricted only when the most severe elements of dysfunction are evident.

On the basis of this analysis, it is evident that outcomes involving no or restricted involvement between fathers and children are not a common consequence of engagement with family law system services, and that the maintenance (and/or increase) of father–child contact most frequently results from such engagement, even when family dysfunction is present. A range of implications requiring further consideration arises from this. These include the extent to which service engagement addresses the underlying causes of dysfunction and equips the parents and children involved to manage their relationships into the future. A related question is whether the parenting arrangements made in such circumstances are sustained over the medium to long term and how the family members involved fare in these arrangements.

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Family violence and financial outcomes after parental separation

Belinda Fehlberg and Christine Millward

SINCE THE 1990s, THERE has been increasing recognition in Australia of the relevance of family violence to the resolution of financial arrangements when parents separate. Yet the available evidence suggests there is a continuing and significant gap between “law in books” and “law in action” in this area. Our analysis of interviews conducted with 60 separated parents as part of our wider study on links between post-separation parenting and financial settlements, following major family law and process amendments in 2006, suggests that the effects of family violence on financial arrangements require further attention.

By way of background, since the 1990s Australian family law courts have increasingly recognised the relevance of family violence in proceedings to divide property under the *Family Law Act 1975* (Cth) (FLA) (e.g., *In the Marriage of Kennon* (1997) 22 Fam LR 1; FLC 92–757 and, more recently, *Baranski & Baranski* [2012] FamCAFC 18). After *Kennon*, a course of violent conduct by one partner to another during the relationship that has a significant adverse effect on the target’s contributions can result in the target’s contributions being given additional weight. However, this test is difficult to satisfy and research suggests that adjustments are infrequent and small (Middleton, 2001). Moreover, most family law disputes are not decided by the courts. The most relevant research, conducted in the late 1990s by the Australian Institute of Family Studies for the Office of the Status of Women (Sheehan & Smyth, 2000), concluded that:

women who report spousal violence are more likely than women who report no violence to have received a minority share of property ... The share of property these women receive appears to reflect the practical difficulties they face in trying to negotiate a fair settlement with a violent former spouse—a situation where safety may be given precedence over the right to a fair share of the matrimonial property. (p. 16)

Their data also suggested better outcomes for those experiencing violence (usually women) who had access to legal advice.

In the child support context, separated parents who experience or fear family violence may be excluded from the usual requirement (known as the Maintenance Action Test) that they apply for child support to avoid a reduction in their Family Tax Benefit Part A payments (the main government payment to parents to assist with the costs of raising children). Confusingly, the exemptions policy is found in the *Family Assistance Guide* (Australian Government, 2013, section 3.1.5.70) but further information about the family violence exemption is found elsewhere, in *Child Support: The Guide* (Department of Human Services [DHS], 2012, section 6.10.1).¹ Determinations are made by Centrelink social workers. A 2012 report by the Australian Law Reform Commission (2012) recommended that the relevant legislation, *A New Tax System (Family Assistance) Act 1999* (Cth), and the *Family Assistance Guide* should be amended to make it clearer that family violence and fear of family violence are grounds for exemption. So far these recommendations have not been acted upon. In any case, qualitative research suggests that gaining an exemption does not necessarily resolve the complex range of issues raised by family violence (Patrick, Cook, & McKenzie, 2008; Patrick, Cook, & Taket, 2007). Most recently, research conducted by the Australian Institute of Family Studies (AIFS) found that parents who had experienced family violence before/during or since separation were more likely to use Child Support Collect, reported higher non-compliance and were more likely to perceive the amount of child support to be personally unfair than those not describing violence (De Maio, Kaspiew, Smart, Dunstan, & Moore, 2013).

Further, while the research suggests that family law services are valuable in addressing the problems faced by women exposed to family violence (Sheehan & Smyth, 2000), the availability of free or low cost professional advice on financial—especially property—matters after separation is very limited in Australia. There is negligible legal aid available for property matters, most Community Legal Centres do not provide property advice, Family Relationship Centres (FRCs) deal mainly with parenting issues, and financial counselling is not widely available (Fehlberg, Smyth, & Fraser, 2010).

It is also well known that women face significant additional issues, including fear of disclosing violence and reduced ability to navigate the family law system because of the violence. These issues have been increasingly addressed in relation to parenting disputes; for example, there is increased attention to screening and assessment for family violence in family dispute resolution (FDR) (which is parenting-focused), and the former (Gillard) Commonwealth Government supported increased lawyer involvement in FDR, including lawyer-assisted FDR (Moloney et al., 2011). However, the Commonwealth Government's coordinated FDR pilot (Kaspiew, De Maio, Deblaquiere, & Horsfall, 2012), which was directly addressed at providing FDR in the context of family violence, was not subsequently funded. There has generally been much less emphasis on supporting those exposed to family violence to resolve their property and child support arrangements.

Most recently, 2012 FLA amendments widened the legislative definition of “family violence”, but specific amendments were directed at parenting rather than financial disputes, and discussion of the implications of the changed definition on financial disputes has been noticeably absent.

¹ In 2011, the Child Support Agency (CSA) was integrated into the Australian Government Department of Human Services and is now known as DHS Child Support. The former CSA Collect service is now known as Child Support Collect. The terminology used in this chapter reflects that used at the time and as referred to by the participants.

Our study participants and method

Between 2009 and 2011 we conducted in-depth, face-to-face interviews annually with the 60 separated parents participating in our study. We asked participants about their parenting and financial arrangements (property, child support, spousal maintenance) and about the level of financial difficulty they experienced. We aimed to explore whether financial arrangements changed if parenting patterns changed, and specifically whether financial disadvantage resulted for primary carers and their children if shared time reverted to primary care. In the context of this wider study, family violence was of key relevance.

Our participants comprised 40 mothers and 20 fathers. Only one parent per family was interviewed for reasons of sensitivity and confidentiality (so we did not collect couple data). Participants were all resident in Victoria and were recruited mainly via newspaper and online advertisements, and study brochures left at mediation/FDR services and mailed out with final court orders. The study was described to participants as focusing on decisions about parenting and finances (property and money) after separation or divorce, but not on family violence.

This was a volunteer sample resulting in rich, qualitative data. We over-sampled for parents with shared time arrangements, while still including those whose children lived with one parent and spent time with the other. As a result, we had three main groups: parents whose children lived with one parent for more than 70 per cent of time, substantial shared time arrangements (where children lived at least 30 per cent and up to 44 of time with each parent) and equal shared time arrangements (where children lived at least 45 per cent of time with each parent).

Most of our participants had completed secondary school and had post-secondary school qualifications. About two-thirds had been married and about one-third had been in de facto relationships (all had separated before the 2009 amendments bringing de facto couples under the FLA). Participating fathers' total household income was considerably higher, on average, than that of participating mothers (\$70,650 and \$56,430 respectively). Net property pools ranged very widely, from \$2,000 to \$2 million, but averaged around \$460,000 and a median value of \$322,000.

Wider study findings are reported elsewhere (Fehlberg & Millward, 2013; Fehlberg, Millward, Campo, & Carson, 2013). Pseudonyms are used in the case examples below in order to protect participants' anonymity.

Family violence within our sample

As previously noted, our study did not focus specifically on cases involving family violence but questions regarding this issue were asked each year. In the course of interviewing, half of our 60 participants disclosed "family violence" in their relationship with their ex-partner, as now defined in FLA s 4AB ("violent, threatening or other behaviour by a person that coerces or controls a member of the person's family ... or causes the family member to be fearful"). Many reported ongoing hostile relationships.

In addition, a small number of participants (including two fathers who said that their wives had taken out intervention orders against them) described family violence but did not identify it as such. For example, "Beth" said there had been no family violence, but later described her ex-husband's ongoing verbal abuse related to child support:

I rang [Child Support] last week when my ex had sent me threatening text messages to cancel the back pay and to, you know, change things and

whatnot, and threatened me that if I didn't he would do this, that and the other. So I rang them very upset and the lady was very good, advising me what to do and how to deal with it.

Consistent with previous research (De Maio et al., 2013; Kaspiw et al., 2009), our participants most commonly reported their ex-partner's emotional and financial abuse directed towards them. Around a third (all of whom were mothers) reported their physical and/or sexual abuse by their ex-partner. A small number reported perpetrating violence toward their ex-partner (usually describing this as mutual), or provided information suggesting they had done so (see, for example, "Jeremy", below). A small number also reported their ex-partner's abuse of children of the relationship (usually emotional abuse, and in one instance physical abuse and neglect, resulting in intervention by the Children's Court), but child abuse is not our specific focus here.

More mothers than fathers said they had been the target of their ex-partner's family violence. Unlike mothers, descriptions given by fathers ($n = 6$) who said they had experienced family violence did not convey coercion, control or fear, as the current legislative definition requires, and mainly involved financial abuse. Mothers but not fathers in our study said they had called the police, obtained intervention orders, left the family home, sought refuge accommodation, changed their phone number to stop verbal abuse and/or declined or gave up property entitlements or child support due to family violence (see the next section).

In our study, the reports of participants who described experiencing family violence within the FLA definition (all mothers) indicated that physical and sexual violence ceased after separation, but emotional and financial abuse often continued. Violence commonly ceased because contact with the ex-partner also ceased. Some other parents described family violence within the FLA definition followed by a subsequently cooperative relationship, but they commonly spoke in qualified terms. For example, in 2009, "Fran" had an equal-time shared-care arrangement, following Family Court consent orders. She was unhappy with that arrangement because her ex-partner had mental health problems. She described him as having been physically violent in the past and said the legal system had done nothing to protect her and the children:

Well I was actually going to go to court for full custody, but they said unless I could physically prove his mental health issues ... Unless I could physically prove that he was violent towards them or whatever, because it was predominantly projected at me, there's not a whole lot I can do ... I thought, well, if I push and go to court, I either really push him over the edge mentally or financially ... In regards to parenting there wasn't a whole lot I could do because I had never reported things over the years and I think even if I had reported it, it probably wouldn't have made much difference anyway because the courts want that shared care.

By 2011, Fran was reporting very little conflict with her ex-partner. However, she had called the state statutory child protection service recently because of her concerns about his neglect of the children, and she described recent verbal abuse: "He rings up and just goes off his nut at me". Yet by this time Fran no longer appeared fearful of, or coerced or controlled by, her ex-partner. She appeared resigned to the equal time arrangement, believing that it was futile to try to change it, especially as "the boys like going there; they do like to see their Dad".

As Fran's case illustrates, and consistent with previous research, participants' descriptions suggested that family violence did not limit the perpetrator's parenting role. Also, disclosure of family violence was discouraged in a context where there was pressure to support the abusive partner's involvement and agree to shared time (Chisholm, 2009; Kaspiw, 2005; Kaspiw et al., 2009; Moloney et al., 2011; see examples in the next section). The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), in force from 7 June 2012, reflected the Australian Government's recognition that a better balance needed to be achieved between protecting children from family violence and abuse and supporting parent–child relationships (see, for example, the new FLA s 60CC(2A)). Research on the effects of the most recent amendments is just beginning to emerge (Rathus, 2013), and it is unclear whether the pressure to agree to shared time described by several parents in our study was greater immediately following the 2006 amendments than it is now.

Family violence and financial arrangements

None of our participants described receiving an increased share of property in recognition of their contributions having been made more onerous due to the family violence they experienced (*Kennon*), but nor did they describe judicially adjudicated arrangements where this may be more likely to occur. Our participants had arrived at property settlements privately or with the assistance of a family lawyer, sometimes formalised in consent orders. Participants accessed mediators or FRCs regarding financial issues far less often than they did for parenting issues, reflecting the greater focus of such services on parenting (Fehlberg et al., 2010).

Our study included several cases in which participants described their experiencing family violence within the current FLA definition that had had a negative effect on property division, child support outcomes or both.

Our study also included participants who described experiencing family violence within the FLA definition that appeared to have no *direct* negative influence on financial outcomes. These cases commonly involved victims with reasonably strong personal and professional resources, including legal representation leading to property arrangements formalised in consent orders, and an ability to navigate their relationship with their ex-partner. Even so, the controlling behaviour of ex-partners often influenced parenting outcomes, which in turn played a role in shaping financial outcomes, so in this respect violence could have an *indirect* negative effect on financial outcomes.

Property division

It was clear that family violence had influenced property settlements reached by several parents ($n = 7$) in our sample. Of these, five were mothers who described shared time arrangements at some point during our study and two were mothers with primary care. All described experiencing emotional abuse, with three cases also involving physical, sexual and financial abuse. The cases in this group provided strong support for Sheehan and Smyth's (2000) finding that "a party's experience of violence puts them at a disadvantage when dividing the matrimonial property" (p. 111), but also regarding child support.

An example of this is "Jeanette" whose ex-partner had been physically and emotionally abusive during their relationship due to his "drinking problem" and depression. When she left their family home with her three children (including one child of that relationship), she relied on financial help from her family, and her ex-partner retained most of their property, worth \$160,000: "It would have been a fight uphill all the way and, look, at

the end of the day my main concern was the children". Jeanette kept just the car she left in, worth \$20,000 and comprising 13% of the total property pool. Jeanette also said child support was being collected for her by the then Child Support Agency (CSA Collect). Amounts varied over the course of our study due to the father quitting his job and not declaring cash income (which Jeanette saw as aimed at reducing his child support liability). In 2011, Jeanette was receiving \$30 a month. Following several years of legal dispute and a period where the child spent 2 out of 14 nights with her father (leading to her severe anxiety), Jeanette obtained full-time care of their child, formalised in further consent orders. Her ex-partner then began stalking her house and making abusive phone calls.

Another example is "Lynn", a recent migrant to Australia. Lynn was the main carer in a substantial shared-care arrangement for her young son with her ex-husband, pursuant to Family Court consent orders that she had agreed to under pressure, including pressure from her solicitor. During the marriage, Lynn experienced verbal, emotional and financial abuse and highly controlling behaviour by her ex-husband. The financial abuse involved her being pressured by him to take out personal loans in her own name to finance his business and new car. Lynn said that her cultural background led her to believe that wives should be submissive to their husbands. All assets were in her husband's sole name and she had received nothing from the \$1.3 million pool, but was still paying off the personal loans, totalling \$22,000:

He got everything. He has everything, everything ... I wasn't in a position to ask for more legal advice because they all cost money ... To settle [parenting] cost me \$5,000. If I want to go through that [property settlement] it will cost me, and they told me there's no guarantee I will get the money from him, so it's better just to give up.

After Lynn agreed to consent orders for substantial shared time she was assessed by the then CSA as being liable to pay child support to her ex-husband, who was self-employed. Lynn did not comply with this assessment because she disputed his income estimate, claiming that he made a lot more money than disclosed. She lodged an objection to the assessment but he persuaded her to withdraw her application, saying he would enter a private agreement to pay child support. He agreed to pay her \$125 per week but paid nothing. In 2011, Lynn made a further private agreement with her ex-husband that he would pay \$50 a week directly to her but he had paid only twice in eight months. Due to his self-employed status and failure to declare his true income, Lynn feared she would once again be assessed to pay child support if she went back to the CSA so chose not to do so. She had by that time re-partnered with a high income earner and so financially she was able to make that choice.

Child support

Problems obtaining child support were often described by mothers in our study, including those who reported family violence. Problems were described by those with Private Collect and CSA Collect arrangements. While the patterns we found were consistent with recent AIFS research (De Maio et al., 2013), our case studies provide the opportunity to explore these patterns in greater depth.

The case examples in the previous section illustrate that family violence could affect property and child support, but there were also mothers in our study who described family violence affecting child support but not property. Reasons for this included an

absence of property to divide (see Angela's case, below) and the greater role of legal representation in property settlements. For example, "Sharon" had not identified family violence, but it appeared that she had suffered financial and emotional abuse. She described her ex-husband as being "totally controlling about money" and said he had not wanted her to make any decisions during their relationship and this had continued after separation, including Sharon feeling pressured into consent orders for equal shared time. Her financial settlement (65% of the \$800,000 asset pool and spousal maintenance of \$1,500 per month for one year and \$750 per month for a further year), was negotiated by her lawyer and formalised in consent orders, and reflected her homemaker role during a long marriage to a company executive. More problematic was the parents' "self-administered" child support arrangements: despite his much greater income, her ex-husband refused to pay any set periodic child support and required the mother and their three teenage daughters come to him "cap in hand" for every bill or purchase. They mostly got the things they needed, but it was quite an onerous and demeaning exercise.

In our study, mothers often described problems with obtaining child support when the on-going parental relationship was hostile. Family violence (along with other related problems, such as mental health issues, drug and alcohol dependency, and employment instability) often featured in these cases (e.g., Beth, Jeanette and Lynn, above, and "Jeremy" below). A further example is "Angela", who had been in a *de facto* relationship and was the primary carer of two primary-school-aged children with special needs. Her ex-partner (who was alcohol- and drug-dependent) had been violent towards her, involving physical and emotional abuse, which led her to call the police on two occasions. Soon after they separated, he took the children (aged only 1 and 3 years at the time) and refused to return them despite not having the correct medications and the younger child still being breastfed. Family and lawyers intervened to return them. A parenting plan was reached at a legal aid roundtable dispute management, which stipulated that he would have their 5-year-old daughter three nights a week and their 3-year-old son two days a week, but he had often had the children for less time than this. From 2008, there were consent orders providing that the children stayed with him one night a week, due to the children's medical needs and their father's drug and alcohol dependency, which hindered his capacity to care for them. While there was negligible property to divide (a pool of \$13,000), ongoing problems existed regarding child support. Angela described herself as having no choice but to apply to the CSA (due to the operation of the Maintenance Action Test; Angela appeared to have no awareness of the exemptions mentioned earlier and there was a history of irregular payments):

I just had to fax the birth certificates of the children, and tell [CSA] what income I was on and they contacted him, and he told them what income he was on, and then he went absolutely ballistic at me. He just thought that I was trying to get money out of him. It was actually one of the worst things that you have to do when you're dealing with a person who's got some real mental issues. And you have to talk to the Child Support, when you don't have any money, just want to be sent some money so that you can buy food, and they make you contact Child Support who then stir all up this stuff and make the other [parent] psycho.

Even so, for the first two years after separation Angela received no child support at all. Her ex-partner was often unemployed, and when employed he did not declare his income. However, in 2010 (three years post-separation), he lodged a tax return, which

resulted in a new CSA assessment of \$140 per month (\$33 per week). By 2011, he had lost his job, Angela received no child support (not even the minimum payment), and he successfully claimed for the Australian Government Carer's Allowance to be split between them. Angela described their relationship as involving less conflict over time but it appeared that there were ongoing difficulties arising from his care of the children and that she carefully assessed his mood before raising issues with him. She also accepted full responsibility for the children, including the high costs of their medications. In this way, his behaviour was still controlling. In order to survive financially, Angela had moved in with her father and received a lot of support (child care, clothes and food) from her extended family, in addition to family assistance payments from the government (including some Rent Assistance).

Over time, several mothers who described family violence (such as Lynn and Angela) had "given up" on expecting to receive financial support from their ex-partner and were therefore paying for almost everything for their children.

Some fathers also reported paying no child support after acrimonious separations. "Jeremy" said his ex-wife was granted a relocation order and had moved interstate with their children. He reported that an intervention order had been made against him because his ex-wife alleged there had been violence. Jeremy was supposed to pay for the children to fly down and visit him (in lieu of child support), but this rarely happened and he had not paid any child support since separation.

Conclusion

In our study, family violence often influenced parenting arrangements and thus indirectly influenced financial settlements. Family violence often affected mothers' child support receipt, including in CSA Collect/Child Support Collect cases. Mothers who described family violence that affected property settlements also commonly described problems obtaining child support from their ex-partner. Family violence that diminished or ceased after separation could still have a continuing influence, discouraging pursuit of legal remedies by those exposed.

There has been much emphasis on family violence when reviewing the 2006 shared parenting amendments, but less on its implications for financial outcomes. In our study, family violence was often relevant to disputes and to disadvantageous processes and outcomes for both finances and parenting (property and child support) matters, and could add to financial difficulties for primary carers and children. Our study, and the paucity of previous research in Australia and internationally, suggests that more work needs to be done with larger, representative samples as a first step in encouraging law reforms and policies that reflect a more holistic understanding of the relevance of family violence to post-separation disputes.

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[25]

Lionel Murphy and the dignified divorce Of dreams and data

Lawrie Moloney

The dream

In my interview with Lionel Murphy in 1977, he used the word “dignity” twenty six times. (Messenger, 2012, p. 2)¹

As Attorney-General for much of the lifetime of the Whitlam Government, Lionel Murphy displayed an almost visceral determination to reform Australia’s divorce laws. In correspondence to the Divorce Law Reform Association in 1973, for example, Murphy wrote of his determination to move beyond “a carry over of the old ecclesiastical garbage”, suggesting that under the *Matrimonial Causes Act 1959*, Australia’s divorce laws at the time, had become “a sick joke which few people any longer find funny” (as cited in Swain, 2012, p. 14).

The *Matrimonial Causes Act* contained 14 grounds for the dissolution of marriage, most requiring the establishment of fault on the part of one of the parties. Throughout the lifetime of the legislation, fewer than a fifth of couples sought dissolution on the one major “no fault” ground available—separation for five years or more, with the large majority of applications for the dissolution of marriage being made on the grounds of cruelty, adultery or desertion (Finlay, Bailey-Harris, & Otlowski, 1997).

For Lionel Murphy, the key to the transformation of divorce law and divorce-related proceedings lay in “ridding the law entirely of the concept of fault and matrimonial offence” (Murphy, 1973, p. 282). Consistent with this aim, the *Family Law Act*, which replaced the *Matrimonial Causes Act* in 1975, is perhaps best known for its creation of a single ground for the dissolution of marriage—irretrievable breakdown demonstrated by separation for 12 months or more.

Far less energy, however, was devoted to questions of how decisions about property and children were to be made once fault-focused grounds for dissolution no longer

1 Dally Messenger was Foundation Secretary of the Association of Civil Marriage Celebrants of Australia.

applied. Rather, a review of the parliamentary speeches and debates prior to passing the legislation (see Finlay, 2005) revealed a commonly held belief that the removal of fault from applications for dissolution of marriage would, in itself, lead to a reduction in, or even elimination of, separation-related conflict—especially conflict over children. The underlying presumption associated with this line of reasoning was that a great deal of the bitterness associated with separation and divorce was *caused* by the fault-focused nature of most applications for dissolution under the *Matrimonial Causes Act*.

As matters transpired, the limitations of “no fault” divorce as a tool to reduce post-separation conflict soon became apparent. At the extreme end of the spectrum, the early Family Court was subjected to violence of a sort that had rarely if ever been perpetrated against an Australian court. Much of the subsequent commentary (e.g., Goodman, 1986) suggested that the primary cause of such violence lay in challenges that the legislation was presenting to those men who had hitherto assumed a position of uncontested dominance within their family relationships. At the same time, adversarially driven litigation and negotiations were also increasingly being seen as processes that inflamed rather than reduced conflict. Adversarial interventions were regarded by the first Chief Justice, for example, as “destructive of morale and [likely to] create bitterness for all” (Evatt, 1979, p. 10).

Positive and negative critiques of the “adversarial system” have continued since the early days of the Family Court (see Harrison, 2007, for an excellent review). On the critical side, a report that in many ways set the tone for the 2006 family law reforms (Family Law Pathways Advisory Council, 2001) concluded that “too much adversarial behaviour” was apparent in the family law system (p. E4). A subsequent key report (House of Representatives Standing Committee on Family and Community Affairs, 2003), argued that:

parenting is a life long responsibility. Yet the adversarial ethic pits people against each other to determine a winner and a loser. It pushes them apart when they need to be brought together around their children’s needs. (p. 75)

Though not always easy, bringing separated parents together around their children’s needs must be regarded as a “key performance indicator” for any modern family law system. This is no doubt why, like many others favouring reforms to the *Matrimonial Causes Act*, Lionel Murphy supported important innovations designed to complement no fault divorce. These included having independent legal representatives, as well as access to conciliation conferences and supervisory processes arranged by “welfare officers”, who were to be employed within the proposed Family Court. Thus, though primarily focused on the removal of fault as grounds for divorce, Murphy’s (1974a) vision was also that of a court that would offer assistance to the parties themselves:

to iron out difficulties affecting the welfare of the child ... so much of the bitterness engendered in contested custody cases will be removed. (p. 642)

Interestingly, the Attorney’s ultimate dream had been to remove legal regulation from divorce altogether. Murphy (1974b) noted, for example that:

the Bill is not presented as my ideal solution to the very difficult problems that arise in the area of human relationships, but is presented as proposals

which may be generally accepted now. I would prefer solutions even more compatible with the dignity of the individual. It does not seem right to me that divorce itself should be an occasion for judicial intrusion. (p. 760)

Recognising his ideal as having no chance of succeeding, Murphy's aim nonetheless remained ambitious. It is perhaps best captured by an Attorney-General's Department press release, which late in 1975 spoke of the new *Family Law Act* as:

sweeping away the laws and procedures of the past and providing a new era of calmness and rationality, presided over by specialist judges assisted by experts and which would introduce speedy, less expensive and less formal procedures. (as cited in Fogarty, 2006, p. 4)

To what extent was such an "era of calmness and rationality" recognised by family law reformers such as Lionel Murphy as a largely aspirational goal? At that time, virtually no data existed on the efficacy of interventions by social science experts. Nor did reliable empirical data exist on the characteristics of separating couples. We did not know, for example, what percentage of individuals seeking dissolution on the one ground of irretrievable breakdown was likely to be able to manage their separation with dignity and with minimal professional intervention. Or what percentage would need further counselling and assistance. Most importantly, we had almost no reliable data on the percentage of couples for whom the separation itself suggested a history of seriously dysfunctional and possibly dangerous behaviours in need of more intensive and protective forms of intervention.

Swain (2012) sought views from those involved in the early days of the Family Court on why this final category of separating families was virtually ignored at that time. Most interviewees spoke of the fact that the level of violence and other dysfunctional behaviours among separating couples was either not appreciated or thought to be of little relevance. The first of these observations can be explained to some extent by an absence of empirical data on the subject. But the reasons behind thinking that such behaviours were of little relevance are more complex. They may have something to do with a prevailing zeitgeist noted by Swain that placed considerable emphasis on individuality and personal freedom and less emphasis on personal responsibility within relationships.

Swain (2012) also cited former Senior Judge, John Fogarty, who, in a reflection on the early years of family law in Australia, concluded that:

the very strong determination ... to cut away from the harsh moralistic style [of the era] and to try to model yourself on people who were more dignified ... probably went a bit [too far] ... You just couldn't have in any case, in children's cases, property cases, fault being raised at all. It was a complete misunderstanding, but an almost universally held misunderstanding. (p. 103)

The parliamentary speeches and debates in support of a new "no fault" *Family Law Act* clearly foreshadowed the approach described by Fogarty. In short, an absence of reliable social science data at the time dovetailed neatly with a prevailing view in these speeches that allegations of cruelty and violence were likely to be mainly an artefact of the fault-driven and deeply flawed *Matrimonial Causes Act*. As Behrens (1993) was later to suggest, cruelty and violence at that time were too readily associated with the "uncivilised" aspects of the old legislation that reformers were anxious to leave behind.

Ironically, the empirical data that parliamentarians *did* call upon to support the 1975 reforms, sprang from somewhat idiosyncratic interpretations of divorce statistics associated with the *Matrimonial Causes Act*. For example, in a parliamentary speech in support of reform, McMahon (1975) cited evidence suggesting that 95% of applications for divorce were “uncontested”. He went on to assert that of the 5% of contested cases, less than half were opposed on the grounds of adultery or cruelty (p. 943).

Drawing on inferences made in an English Report (Archbishop of Canterbury’s Commission, 1966), J. McClelland (1974) had previously suggested that an uncontested divorce was, in effect, a divorce by consent. McMahon’s conclusion, therefore, was that the vast majority of couples seeking dissolution of their marriages were, if not reconciled to the reality of the situation, at least acquiescent and focused more on the future than the past. Serious ongoing unacceptable behaviour was assumed to be a relatively rare phenomenon.

Kerin (1975) went further, arguing that applications on the grounds of cruelty and adultery were often “cooked up” in order to achieve a “quicker result” (p. 951). His view that most applications were an artefact of the legal system itself was reinforced by his observation that grounds for dissolution differed significantly from state to state.

Finally, Jenkins (1975) succinctly summarised the argument at the heart of many of the objections to the exiting legislation, arguing that:

vindictiveness, indignity and hatred too frequently are the *results* of divorce proceedings (p. 1369; emphasis added)

and that:

the proof of fault in divorce proceedings has made a farce of the law and has greatly damaged the institution of marriage. (p. 1370)

Analysis of the speeches and debates around the Family Law Bills leaves little doubt that for most parliamentarians in favour of reform, “fault” under the *Matrimonial Causes Act* had become a thoroughly debased currency. In the absence of reliable empirical evidence to the contrary, it was assumed that allegations of seriously unacceptable behaviour were mainly linked to the capriciousness of the legislation itself.

It was only after the commencement of the Family Court of Australia that credible data on the more problematic dynamics of family life in Australia began to accumulate. In particular, the pioneering work of the Royal Commission on Human Relationships (Evatt, Arnott, & Deveson, 1977) and of one of its commissioners (Deveson, 1978), as well as the work of Scutt (1979, 1980, 1983) and her colleagues, began to reveal the existence of dark undercurrents within Australian families, especially with respect to the treatment of women and children.

Of course, data do not in themselves lead to changes in behaviour. For example, with respect to US findings on child abuse published in the early 1960s, Helfer and Kempe (1976) pointed with consternation to the considerable gap between presenting clear but challenging research findings and prompting action on those findings. Likewise, Arrow (2013) found that for a long time Australians were reluctant to hear and accept the reality of many of the more disquieting messages from the Royal Commission on Human Relationships.

Though there were exceptions in the form of a number of judicial statements and scholarly articles on the subject, the extent of significantly dysfunctional behaviours in family law cases received little recognition in the Family Court and among practitioners (both lawyers and non-lawyers) until the early to mid-1990s (see Moloney, Weston, and

Hayes, 2013). Further studies during the second half of the 1990s and the first part of the next decade increasingly pointed to evidence that such behaviours were common among separated families, especially those families actively engaging with the courts (see Moloney et al., 2007).

The true extent of these problems in Australia, however, and how they affected the ways in which decisions were made about children, remained largely a matter of “informed conjecture” until the publication of data by the Australian Institute of Family Studies as part of its evaluation of the 2006 family law reforms. These data—from two waves of the Longitudinal Study of Separated Families (LSSF; Wave 1 in 2008 and Wave 2 in 2009)—form part of more comprehensive reports by Kaspiw et al. (2009) and Qu & Weston (2010).

Relevant parts of the data from these reports are briefly summarised in the next section. In light of this analysis, the final section and concluding statement then reconsider Lionel Murphy’s vision of divorce with dignity.

The data: Post-separation relationships and decision-making over children

Relationships

LSSF Wave 1 2008 drew on a sample of 10,000 separated parents.² The data reveal that a year or so after separating, almost two-thirds of both mothers and fathers reported friendly or cooperative relationships with their former partners. About a fifth described their relationships as distant, while a little over one in eight suggested there was still “lots of conflict”. A fearful relationship was reported by 3% of fathers and 7% of mothers—this being the only category in which there were significant gender differences.

These figures had not altered a great deal when parents were again interviewed approximately a year later (LSSF Wave 2 2009).³ Although the percentage of parents reporting a distant relationship had increased a little, this was offset by small decreases in the percentage reporting lots of conflict and fearful relationships, and a small decrease in the percentage of parents describing their relationship as friendly. The decrease in fearful relationships was entirely accounted for by reports from mothers, though mothers still made up about nearly three-quarters of this category of responses.

At Wave 1, a little over half the fathers and almost two-thirds of mothers said that some form of emotional or physical violence had occurred in their relationship before or during the separation. Emotional abuse alone was reported with considerably greater frequency, though just over a quarter of mothers and a third of fathers said the violence was physical. Family violence figures were similar in the original Wave 1 sample and the continuing sample, suggesting that those who were no longer part of the sample had similar characteristics to those who had been willing to be interviewed again at Wave 2. When the continuing sample of parents was compared at Wave 1 and Wave 2, a modest reduction in reports of violence was found, this being almost entirely accounted for by

² The majority of parents in this survey had separated in 2007 (82%), 13% had separated in the second half of 2006, and 5% had separated in 2008. The interviews were conducted over the period August and October 2008.

³ A detailed description of the sampling and methodology—allowing for comparison between the two samples via an “continuing sample” (Wave 1 parents who agreed to be interviewed again at Wave 2)—can be found in Qu and Weston (2010, Chapter 2).

lower rates of physical violence (from 22% to 4%). The most common expression of emotional violence at both waves was “humiliating insults”.

Links between family violence, addiction issues and serious mental health problems have been well established (Bromfield, Lamont, Parker, & Horsfall, 2010). Half the Wave 1 mothers and around one-third of the fathers indicated that mental health issues and/or the use of alcohol or drugs, gambling or other addictions (classified together as “addiction issues”) were apparent before separating. Consistent with the findings of Bromfield and her colleagues, a large majority of the parents who said that mental health and addiction issues had been present before separation reported the experience of some form of family violence, with physical violence being higher between these parents than in any other group. Violence was also commonly linked to mental health problems and/or addiction issues among parents interviewed at Wave 2. Indeed regardless of gender, parents who indicated that there had been mental health problems and/or addiction issues in the relationship before separation were more likely than other parents to report that they had experienced some form of abuse inflicted by the other parent.

Decisions and decision-making pathways

Notwithstanding extensive reports of violence, 71% of fathers and 73% of mothers reported at the Wave 1 interview that they had sorted out parenting arrangements for the focus child;⁴ 19% of fathers and 16% of mothers indicated that they were in the process of sorting out arrangements; and 10% of both fathers and mothers reported that nothing had been sorted out.

Of those who had sorted out arrangements, about two-thirds saw “discussions between themselves” as the key pathway, while a further one in six said that their parenting arrangements “just happened”. In other words, professional interventions were perceived as a main pathway towards resolving post-separation parenting arrangements by only about one in six parents who had reached agreement, with courts being cited as the least used pathway, followed by lawyers and then “counselling, mediation or family dispute resolution” (FDR) as the pathway employed most frequently.

Of those parents who said they were still in the process of sorting out parenting arrangements at the time of the survey, a majority continued to report “discussions” or “it just happened” as their main pathways. Most of the remainder (about two in five parents) attributed their main pathway, in roughly equal proportions, to courts, lawyers and FDR.

A detailed analysis of these data provided by Kaspiew et al. (2009) included comparisons with pathways taken by a “retrospective” sample of parents (the Looking Back Survey), who had separated prior to the 2006 reforms. This comparison provided qualified support at that time for the suggestion that following the reforms there had been a drift away from the use of courts and lawyers. These data were reinforced to some extent by the results of a court file analysis, also conducted as part of the AIFS evaluation, which found that there had been a decline of 22% in the total number of applications for final orders in children’s matters during the period of the evaluation.⁵

4 The focus child was the first child aged under 18 years who was listed in the database that provided the sample for this study.

5 More recent evidence (Parkinson, 2013) suggests a 32% decline in court hearings in these cases in the five-year period between 2005–06 and 2011–12.

By Wave 2, there had been a modest increase in the proportion of parents who reported that their arrangements had now been sorted out, and a modest decrease in the proportion reporting that they were in the process of sorting things out. The proportions in the “nothing sorted out” category, however, remained almost unchanged. The “sorted out” group was easily the most stable, with 87% of those who had sorted out matters at Wave 1 providing the same report at Wave 2. On the other hand, “sorted out” was by no means a static concept, with almost half of this group noting that they had made (usually modest) changes between waves.

Although “discussions” or “it just happened” continued to be the most frequent main pathway for sorting out parenting arrangements, by Wave 2 there was increased nomination of services and courts as the main pathways. That is, as time went on, services and courts are more likely to be called upon. In addition, when parents at both waves were asked about their satisfaction with a number of dimensions of their main dispute resolution pathway, “discussions” were viewed the most positively, followed by FDR, lawyers and then courts.

These findings link in turn to data strongly suggesting that use of professional services and courts to assist in resolving disputes over children is related to the experience of family violence. Only 23% of Wave 1 parents who nominated FDR as their main pathway towards reaching a settlement reported that there had been no violence in the relationship. The equivalent figure for those who nominated lawyers as their main pathway was 16%, while among those who nominated courts, only 9% had not experienced violence. The proportion of the violence that was physical also increased as the interventions became more formal (FDR: 25%; lawyers: 37%; and courts: 48%).

These figures contrasted with results from those who mainly used discussions among themselves (easily the largest sub-group), or said that the resolution “just happened” (the next largest sub-group). Roughly half of these sub-groups reported no violence, while physical violence was reported in about one in six of these cases.

Family dispute resolution: Use and outcomes

A significant aspect of the 2006 reforms was the introduction of mandatory FDR (with exceptions) when parents were in dispute over arrangements for their children. The LSSF data addressed key research questions regarding the use of FDR, immediate and medium-term outcomes, and the profile of the clientele.

A little under a third of fathers and a little over a quarter of mothers of the total Wave 1 sample reported at interview that they and their former partner had “attempted FDR or mediation”. Among Wave 2 parents, use of FDR was a little less common—reported by about a quarter of fathers and a little over one in six mothers who had revised, recently developed or were still revising or developing their initial agreement.

Of the Wave 2 parents who had made use of FDR during the previous 12 months, 39% of fathers and 35% of mothers had also reported at the Wave 1 interviews that they had made use of FDR. For more than a third of these parents, therefore, it is clear that FDR is a process entered into on more than just one occasion and possibly for more than one set of issues.

Of the parents who attempted FDR at Wave 1, roughly two-fifths reached agreement about parenting arrangements at the time that FDR took place. About three-quarters of those who had reached agreement at this point went on to report at the Wave 1 interview that parenting arrangements continued to be sorted out. About a fifth reported

that they were currently in the process of sorting things out, while only 6% reported that nothing was sorted out.

Those who did not reach agreement as part of the FDR process were divided into two groups—parents who were given a section 60I certificate by an FDR practitioner (which under the legislation would enable them to take their dispute to a court); and parents who were not given a certificate. Only a fifth of FDR participants were given a certificate, and almost a third were not given a certificate even though they had not reached agreement.

A little over two-thirds of those who had not reached agreement at FDR but had *not* received a certificate, reported at the Wave 1 interview that arrangements regarding the children were now sorted out; a little under a quarter of these parents reported that they were still in the process of sorting things out, while the remaining 12% said that nothing had been sorted out. By way of contrast, while a little over a third of those who had received a certificate reported at the Wave 1 interview that arrangements for the children had been sorted out, almost half said that they were in the process of sorting arrangements out. The remaining 17% said that nothing had been sorted out.

Immediate outcomes for the Wave 2 sample were very similar with respect to agreement rates and non-agreement rates found in Wave 1. The difference, however, was that 31% of the non-agreement parents in this sample had been issued with a certificate (compared with 22% in Wave 1); while 23% had not been issued with a certificate (compared with 30% in Wave 1). Thus, a somewhat higher proportion of the FDR non-agreement cases between Waves 1 and 2 had been assessed to be cases that may need a court hearing or litigation-focused intervention.

About two-thirds of those who had reached agreement at FDR between Waves 1 and 2 reported at the Wave 2 interview that parenting arrangements were still sorted out (this compares with three-quarters of parents at Wave 1), and about a quarter were still in the process of sorting things out (compared to a fifth at Wave 1). Finally, close to one in ten said that nothing had been sorted out, compared to a little over one in twenty at Wave 1.

Of those who did not reach agreement but who did *not* receive a certificate at Wave 2, a considerably smaller proportion reported having sorted matters out than was the case at Wave 1. Conversely, a considerably greater proportion reported being in the process of sorting things out, and a somewhat higher proportion reported that nothing had been sorted out.

Finally, though a higher percentage of certificates had been issued at Wave 2, the profile of the certificate group in Waves 1 and 2 was quite similar, with only about a third having sorted out parenting issues, and a large minority still in the process of sorting things out.

In summary, despite *initial* FDR agreement rates being similar at both waves, the issue of certificates at Wave 2 was somewhat higher and the medium-term sustainability of agreement rates was somewhat lower. This suggests that FDR conducted during the second year of separation is likely to be dealing with greater complexity and/or higher levels of family dysfunction. It may also reflect a well-known observation among mediators that it is more difficult to resolve conflicts that have existed for longer periods of time and may have become chronic or entrenched.

FDR and the experience and effects of family violence

Under the 2006 legislation, a key exception to the requirement to attempt FDR, is the experience of violence. An important principle informing this exception is that for

mediation to be ethically defensible, both parents must feel sufficiently empowered to represent their own interests and the interests of their children. Of all Wave 1 parents, however, those who reported the experience of violence were much more likely to have attempted FDR (41% who experienced physical violence and 35% who experienced emotional abuse alone) than those for whom violence had not occurred (15%).

The data also suggest that the experience of family violence has a negative effect on some, though by no means all, outcomes. It was found, for example, that the highest rate of agreement reached as a direct result of the FDR process, occurred in cases in which there had been no reports of violence (48%), while the lowest rate occurred in cases in which there had been physical abuse (36%). Consistent with this finding, the highest proportion of s 60I certificates issued was in cases in which physical abuse had been reported (26%), while the lowest proportion (10%) occurred in cases in which there had been no reports of physical violence or emotional abuse.

Both fathers and mothers who had experienced emotional abuse or physical hurt were also more likely than other parents to report use of FDR between survey waves. Around a third of the fathers and a quarter of the mothers who said that they had experienced physical or emotional abuse reported that they had made use of FDR between survey waves. This was only reported by around 10% of parents who had not experienced either form of abuse. A large majority of these parents referred to this behaviour as emotional abuse only (usually humiliating insults), but 4–5% of fathers and mothers noted that the other parent had hurt them physically during this period.

In summary, the Wave 1 data on FDR suggest that although a little over half those parents who “attempted FDR or mediation” did not develop an agreement at the time that FDR took place, a majority of those who had participated in FDR had reached agreement by the time they were interviewed. Many of those who reached agreement sometime after the completion of FDR suggested that the main pathway towards these agreements consisted of discussions between themselves. These findings continued to hold for parents who had developed or revised their arrangements at Wave 2, lending support to the idea that FDR can be an important step in a complex set of formally facilitated as well as non-facilitated negotiations over parenting.

Finally, the data show that agreements about post-separation parenting are clearly linked to quality of relationships. Those with a history of abusive relationships are considerably less likely than those with no such history to reach agreements about their children and considerably more likely to make use of family relationship services such as FDR. Abusive relationships are also extremely common among those parents who nominate lawyers and courts as their main dispute resolution pathways.

At the time of writing, Wave 3 data tapping the experiences of parents who had been separated for approximately five years, had been analysed but not published. Broadly speaking, these data suggest that the management of most ongoing and entrenched post-separation parenting disputes must find ways of acknowledging and dealing with past and possibly ongoing abuse. Many such cases are likely to require a multifaceted approach, in which legal and family relationship interventions are supportive of each others’ endeavours.

The dignified divorce?

The titles of Swain’s (2012) account of the early years of the Family Court of Australia (*Born in Hope*) and of Star’s (1996) analysis of the first twenty years of the court (*Counsel of Perfection*) suggest that the bold experiment of Lionel Murphy and his colleagues

would inevitably fall somewhat short of its original aspirations. At the same time, data from the Longitudinal Study of Separated Families demonstrate that these aspirations were not entirely unrealistic. Importantly, they indicate that the majority of parents reported a capacity to manage their separation and ongoing relationship with each other and with their children, some notwithstanding a history of violence and abuse and/or a history of addiction and mental health difficulties. However, almost one in seven parents reported “lots of conflict” more than one year and two years after the separation had occurred, while almost one in twenty (the majority of whom were mothers) described their relationships with their former partners at these times as “fearful”.

Arriving at sustainable parenting arrangements in the face of such obstacles presents significant challenges. Notwithstanding the exceptions clauses with respect to mandatory FDR, it is perhaps not surprising that many parents who had experienced significant relationship difficulties opted for (or were advised to consider) FDR and/or some form of therapeutic intervention. When these proved to be insufficient or inappropriate, the data show that lawyers were increasingly sought to assist in negotiations or to support a client in seeking a judicial determination.

The data also suggest however, that even when the circumstances were complex and even when relationships may have been abusive, FDR, especially when supported by other therapeutic or advisory services, may at times have represented a pragmatic response by parents themselves or by their advisors. This may be because, though facilitated and therapeutic approaches need to be carefully monitored when power relationships are significantly imbalanced, it remains the case, as Star (1996) concluded, that “there are some areas of human experience that cannot be dealt with adequately by law” (p. 213). Star came to this conclusion at a time when separation-related family relationship services were thin on the ground and when modest progress (at best) had been made with respect to reconciling the competing philosophical underpinnings of the law and social sciences. Since that time, much has occurred to rectify the first of these deficits, most significantly the creation of 65 Family Relationship Centres as the centerpiece of the 2006 family law reforms (see Moloney, 2013; Moloney, Qu, Weston, & Hand, 2013; Parkinson, 2013; Pidgeon 2103).

The *Operational Framework for Family Relationship Centres* (Attorney-General’s Department, 2007) specified that lawyers were not to accompany their clients to Family Relationship Centres. But in a post-reform environment, lawyers and community-based family relationship practitioners have found themselves working together with increased frequency. Encouragingly, in June 2009, the then Attorney-General announced the Better Partnerships Program, which aimed to assist separated or separating families “by providing access to early and targeted legal information and advice when attending Family Relationship Centres” (R. McClelland, 2009).

The AIFS evaluation of the program (Moloney, Kaspiew, De Maio, & Deblaquiere, 2013) reached the following conclusion:

The implementation of the Better Partnerships Program reflects a point in the evolution of the Australian family law system where constructions of the respective roles and functions of social science and legal professionals have continued to shift away from a paradigm based on competition to an understanding that collaboration and inter-disciplinarity are essential if the system is to meet the needs of families with complex dynamics. (pp. 265–266)

It has become increasingly clear that many individuals (including the children) from separated families in which the dynamics are complicated and/or abusive need access to a range of facilitated and relationship-focused services. The more vulnerable within such families (including the children) also need advocates who have time both to hear and represent their clients' concerns. For families such as this, the challenges for the family law system are both skills-based and systemic.

Though resources will always remain an issue, Australia has developed, for the first time, a network of registered family relationship practitioners skilled in addressing complex separation-related issues. And for the first time, a formal (albeit early) evaluation of an Australia-wide cooperative endeavour between key relationship practitioners and their legal counterparts has been completed and has yielded promising results. The results suggest that success in the more difficult cases tackled by these practitioners is linked to both individual practitioner skills *and* a willingness to continue to find ways of bridging the philosophical differences that come from traditions of individual advocacy on one hand and a whole-of-family focus on the other.

It needs to be acknowledged that the promotion of cooperative endeavours between legal and family relationship practitioners has also been central to the work of the Family Law Pathways Networks, which came into being as a result of recommendations made by the Family Law Pathways Advisory Group (2001). Until relatively recently, these "quiet achievers" in the family law system have lived with the tensions associated with the sort of attitudes towards legal processes noted above. More recently their mission to "foster collaboration and cooperation amongst service providers working within the family law system" (Attorney-General's Department, 2011, p. 11), has been made easier as a result of recognising the potential benefits of formally supporting legal and family relationship practitioner cooperation.

Conclusion

It seems that Lionel Murphy's dream of dignified divorce and his acknowledgment that, at its core, divorce in a modern Western democracy is a human relationships problem, has continued to find expression in the ongoing development of family law. In retrospect, it seems logical that if family relationship services are considered an appropriate forum for assisting many of the parents who find themselves in dispute about their children, then the bulk of those services would be better placed outside formal court structures. What has been missing in the model, however, just as it was missing in the original legal adversarial/Family Court counsellor model in 1975, has been focused attention on how the different starting points of legal and family relationship processes can work together in the service of families who are separating.

Such cooperative endeavours are by no means a panacea. But in a less adversarial climate (also an important aim of the 2006 reforms), family law processes and family relationship interventions are much better placed to find areas of common ground. And at the more investigative end of the spectrum, when issues of protection and possible rehabilitation must be to the fore, there is also considerable scope for lawyers and practitioners with both therapeutic and forensic skills in the social sciences to work cooperatively in ways that recognise that a mere "one-off" and externally imposed decision, especially one that emerges after a single climactic trial, is rarely an appropriate response for such families.

Unlike the days in which a new *Family Law Act* was being promoted, we now have data that tell us that simple and dignified procedures are indeed likely to be helpful to

those many separating couples who develop good post-separation relationships and who make little or no use of services to assist them in arriving at parenting arrangements. But the data also strongly suggest that from a practitioner's point of view, "easy" family law cases are few and far between. It has become increasingly clear that many of the families who struggle to reach resolution after separation do so because they continue to carry a burden of dysfunctional relationships into the negotiations. These families require more than the mere ironing out of difficulties that Lionel Murphy had in mind. At the same time, there is little doubt that the cooperative approaches to legal and social services, increasingly apparent since the 2006 family law reforms, have brought Murphy's dream of a dignified divorce for all a little closer.

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PART D

**Social science and
developments in Australian
criminal and family law**

[26]

Prosecuting child sexual abuse **The role of social science evidence**

Antonia Quadara

DESPITE SIGNIFICANT REFORMS TO the criminal prosecution of sexual offences against children, a gap persists between the number (prevalence) of people who have experienced sexual abuse as a child and the far lower number of incidents that are adjudicated. Through a process of attrition, only a small number of cases are prosecuted.¹ In this paper, I reflect on a second, related, gap between what the social science evidence tells us about the dynamics of child sexual abuse, and what the criminal law is able to countenance as “legal evidence”.

The social science research on the reasons for this gap points to the misconceptions and mythologies about both victims and offenders that have shaped legal actors’ decision-making.

With the increased willingness of victims to step forward and report (see Cossins, 2010, for a summary), and as investigative training increasingly draws on research about sexual abuse, and offenders’ tactics and motivations, and locates sexual offending explicitly as a “crime of and in relationships” (P. Tidmarsh, personal communication, December 2010), this gap has become more pronounced. There is something peculiar to the criminal law that makes the empirical understanding of sexual abuse difficult to translate into the legal arena: the complex edifice of legislation, case law and jurisprudence about precisely what information about the sexual abuse can be admitted to the court and heard by the trier of fact (usually the jury).

¹ In Australian legal systems, much effort has been directed towards closing the “attrition gap” and improving victim/survivors’ experiences. This includes increased specialisation among investigating officers in relation to both the dynamics of sexual offending and in the techniques used to gather this evidence in their investigations, specialisation among prosecutors (in some cases), greater collaboration and interagency responses to investigating sex offence matters, and using processes and protocols to minimise the distress associated with giving evidence. This is in addition to legislative reforms to judicial warnings on corroboration and delayed complaint.

This chapter briefly discusses the persistent “prevalence vs attrition” gap before highlighting three key issues that affect the extent to which a comprehensive narrative of sexual abuse can be presented to the jury: the laws of evidence,² judicial warnings and directions to the jury, and the extent to which “extra-legal” evidence can be, and is, adduced by the court. I am limiting this discussion to issues that are relevant to the criminal jurisdiction, specifically the higher courts.³ These issues are contextualised in light of the current empirical evidence base in relation to delayed disclosures, the context and dynamics of sexual abuse, and perpetrators’ grooming and offending tactics. The discussion is particularly focused on child sexual abuse perpetrated by family members (immediate and extended),⁴ and subsequently, where there is a high likelihood that the case is a delayed complaint or relates to historical child sexual abuse.⁵

The prevalence–attrition gap

Significant numbers of people in Australia are survivors of child sexual abuse. Looking at nationally representative data from the Australian Bureau of Statistics (ABS; 2006) Personal Safety Survey, 956,600 women (12%) and 337,400 men (4%) experienced sexual abuse before the age of 15. These figures are in the range suggested by other Australian prevalence studies with community samples. Child sexual abuse is thus not uncommon, with somewhere between 1 in 10 to 1 in 7 males, and 1 in 8 to 1 in 3 females having experienced some form of child sexual abuse (Child Family Community Australia, 2013).

Yet the numbers of incidents of child sexual abuse that enter the criminal justice system and that result in a conviction are very small by comparison. Of child sex offence matters progressing through the New South Wales justice system between 1995 and 2004, fewer than 16% of the cases reported to the police resulted in proven charges (Cossins, 2010). This was more pronounced in cases involving adult complainants (Daly & Bouhours 2010).⁶ Beyond victim/survivors not reporting the offence to police at all (approximately 8 out of 10 victims do not), it is in the early stages of the justice process—

2 By “laws of evidence”, I am referring to the Acts, legislative provisions, case law and jurisprudence by which “legal evidence”—as opposed to medical, scientific or empirical evidence—is constituted, and the manner in which it can be used in proving a charge.

3 The criminal law remains a highly symbolic and powerful system of meaning. Its task is to assign *criminal liability* for incidents such as homicide or rape, which subsequently results in the loss of liberty (and historically, death). As such, in addition to the rules of due process (including the burden and onus of proof), judicial interpretation of seemingly pedestrian concepts such as relevance, harm, fault, causation and intention sets the bar very high. One consequence of this is that criminal law has developed as a relatively closed, self-referential knowledge system (Cover, 1986; Luhmann, 1987). Concepts of harm or intention from other knowledge systems, including empirical social science, are thus not easily integrated.

4 I am predominantly referring to abuse perpetrated by an *adult* family member or mature minor (i.e., 15+ years of age). Siblings constitute a significant proportion of intra-familial perpetrators; however, the circumstances of their abusive behaviours are not entirely commensurate with adult offenders (Stathopoulos, 2012). Young people displaying sexually abusive behaviours are sometimes themselves victims of child abuse, including sexual abuse. For these reasons, criminal justice and therapeutic responses increasingly distinguish between adult and adolescent perpetrators.

5 Note that there is no standard definition of what constitutes “historical” or “delayed”.

6 It is difficult to obtain an accurate picture of what specific proportion of *historical* child sexual abuse cases are filtered out of the justice system, as such cases tend not to be disaggregated, either from data on child sex offence cases (which include child complainants) or adult sexual offence data involving all adult complainants (including adult survivors of child sexual abuse). The information could be included in both.

from the incident report to police clearance,⁷ and between clearance and before the commencement of criminal proceedings—that matters are most likely to not proceed. In terms of child sex offences, the predominant reasons for this are because either no suspect is identified or the victim withdraws the complaint (Cossins, 2010).

Closing the gap through “front-end” reform?

As noted, trying to close the prevalence–attrition gap has seen an extensive program of reforms across Australian jurisdictions for both child sexual abuse and sexual assault (including adult survivors of child sexual abuse). In a review of recent sexual assault law reform, Daly (2011) identified some 48 unique approaches that endeavour to improve both victim/survivors’ experiences of the justice system and improve systems’ outcomes (e.g., decreasing victim withdrawal, and increasing guilty pleas and verdicts). In addition to fairly standard approaches to law reform (i.e., reforming the substantive aspects of the offence and the admissibility of different types of evidence) are a host of other changes to the justice response to sexual offences.

Particularly noticeable are efforts to increase the level of specialisation of police investigators and to enable and improve collaboration among first responders (i.e., sexual assault services, child protection, police and forensic examiners). This specialisation may be the consequence of the changed nature of cases being reported to police. Not only are more victim/survivors reporting to police, but the nature of the sexual abuse being reported has altered; reported cases increasingly involve family members, historical incidents, ongoing sexual abuse, and adult survivors reporting abuse upon discovering the perpetrator abusing another child (e.g., their own child or sibling) (Cossins, 2010; Daly & Bouhours, 2010). Such sexual victimisation challenges the stereotypes of child sexual abuse. To be clear, it is not that the nature of child sexual abuse itself has changed. Thirty years of research has already demonstrated that, contrary to received wisdom, child sexual abuse is not a rarity, a fantasy of the child, the result of a precocious sexuality, the result of mothers’ sexual absence, or due to the predatory behaviour of an unknown sexual deviant (Cossins, Goodman-Delahunty, & O’Brien, 2009; Eastwood, Kift, & Grace, 2006; Goodman-Delahunty, Cossins, & O’Brien, 2011; Taylor & Joudo, 2005). Child sexual abuse—like adult sexual assault—has been demonstrated to be fundamentally located within familial and familiar relationships, and that it is precisely these relationships that provide the opportunities for offending, and for silencing and denying (Clark & Quadara, 2010; Craven, Brown, & Gilchrist, 2007).

An effective and appropriate investigative response requires a significant degree of knowledge about child sexual abuse and offender behaviours, and a high level of skill in conducting investigations and interviewing victims, witnesses and suspects. Thus specialist police responses have been established, such as the Sex Offences and Child Abuse Investigation Teams (Victoria), the Joint Investigation Response Teams (NSW), and the Sexual Assault & Child Abuse Team (ACT). These are complemented by collaborative and multidisciplinary service provision (e.g., multidisciplinary centres in Victoria comprising sexual assault services, police, child protection workers). The overall effect is an increasingly specialised investigative capacity, enriched and supported by experts in both the victim services and offender treatment sector. Findings from the limited evaluation data suggest that victims of sexual offences are having more positive

⁷ Police clearance refers to the point at which police have ceased the investigation, which may or may not result in charges being laid.

experiences when reporting to police (Success Works, 2011). Anecdotal evidence from the sector indicates improved attitudes and increased knowledge among police, and a greater capacity by the police to see themselves as partners alongside other agencies in supporting victim/survivors to engage the justice system and to prevent further offending.

However, best efforts at this “front end” of the justice system do not necessarily translate into improved outcomes in relation to prosecution and conviction (the “back end”). The arena of adjudication (i.e., the courtroom) is markedly different from the investigative one. The police role is to investigate a complaint by gathering all the available evidence and put together a brief of evidence to support a charge that has reasonable prospects of conviction. Moreover, unlike the court arena, in which there is no victim per se but a witness for the prosecution (or complainant), police are victim-focused. This is not to say they advocate for victims, but their role is in response to a victim’s complaint.

The courtroom, on the other hand, is an arena in which the evidence gathered is tested (at law) by a judge and by the tribunal of fact (usually a jury, in indictable offences). The evidence is tested for: its relevance to the elements of the offence and the particular facts in issue; its admissibility, that is, what of the gathered evidence can legitimately be heard by the jury; its credibility; and its reliability (is it accurate and complete). With these requirements met, the trier of fact also needs to be satisfied that all offence elements for each charge have been proven beyond reasonable doubt (Bronitt & McSherry, 2001). The role of the judge in this is to guide the jury’s assessment and use of the evidence in their decision-making (and to guide them in such a way that it does not occasion an appeal).

This is the overall framework in which indictable offences are tried. Arguably, sexual offences are presented with additional evidentiary obstacles in the form of exclusionary rules on evidence and judicial warnings on witness testimony. While these are not limited to sexual offences, they occasion significant difficulties when one considers the circumstances in which child sexual abuse occurs. These issues are taken up in the next sections.

The dynamics of child sexual abuse

The majority of child sexual abuse occurs within familiar and familial relationships.⁸ As such, it tends to be characterised by:

- prolonged or repeated victimisation;
- secrecy; and
- delayed disclosure (see Finkelhor, 1986; Herman, 1992; Smallbone & Wortley, 2001).

Perpetrators expend significant effort in identifying and building a connection with a potential victim, and use a range of “grooming”⁹ strategies to do so, such as:

8 Nationally representative statistics for 2006 show that approximately 90% of girls and 80% of boys who had been sexually abused knew the perpetrator, with girls being more likely to have been sexually abused by family members. Fathers, step-fathers and other male relatives (including siblings) made up more than half (52%) of perpetrators against females, and one-fifth (21%) against boys (ABS, 2006; see also Mouzos & Makkai, 2004).

9 Reviewing the research on grooming, Craven, Brown, and Gilchrist (2006) provided the following definition: “A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child’s compliance and maintaining the child’s secrecy to avoid disclosure” (p. 297).

- *identifying the most vulnerable child* (e.g. the child who is picked on by her siblings, is struggling at school, or is lonely) (Craven et al., 2007);
- *identifying vulnerable or receptive families* (e.g., a single mother with primary care for her children) (Leberg, 1997; Van Dam, 2006);
- *isolating the child from other children or guardian* (e.g., sending other siblings to bed early, encouraging the child's mother to take up activities outside the home);
- *conferring a "special status" on the child* (e.g., making them feel more adult or worldly) (Herman, 1992);
- *gradually desensitising them to sexual touch* (Smallbone & Wortley, 2001); and
- *becoming "indispensable" to significant adults in the child's life* (e.g., offering to look after the child or children, or do tasks parents, teachers have little time for and which puts them in a position of trust) (Craven et al., 2007).

These strategies demonstrate long-term planning (whether conscious or not), such that perpetrators gain "insider status" and its benefits (e.g., trust, authority and respect) long before they start offending (Van Dam, 2006). These benefits are amplified in contexts of intra-familial sexual abuse.

Perpetrators may also use bribes, threats, coercion, denial and blackmail to continue the offending and to ensure victims' compliance and silence. This can take the form of creating secrets the child must keep, thus rendering them complicit or co-conspirators in their abuse (Paine & Hansen, 2002); demonstrating potential for violence by harming others; threatening the family will break down or non-offending parents will be upset if the child discloses; or making the child feel responsible for not stopping the abuse (Craven et al., 2006, 2007).

The dynamics of child sexual abuse produce complex barriers to disclosing, such as fear of not being believed; being blamed; shame; fear of, or feeling responsible for, the consequences (Quadara, 2008). "A neat, coherent and timely disclosure should be regarded as the exception rather than the rule" (Staller & Nelson-Gardell, 2005, p. 1417). A US survey (Kogan, 2004) with 1,958 adolescent women found that although 24% disclosed their abuse within 24 hours, the majority either delayed or did not disclose at all. One in five waited more than a year, while one in four had never disclosed until the survey, findings that are reflected in the broader literature (see Cossins, 2010, for a summary of these studies). Perpetrators themselves commonly deny or normalise their behaviour (Nugent & Kroner, 1996; Van Dam, 2006); however, it is very difficult for this understanding to be translated into the criminal justice setting.

Prosecution and conviction issues

This section discusses three issues: the difficulties with providing courts with the full context in which the sexual abuse occurred; judicial warnings and directions to their jury; and the treatment of "extra-legal" evidence by the court. Discussion is with reference to jurisdictions in which uniform evidence legislation is in operation.¹⁰

¹⁰ These jurisdictions are the Commonwealth, the Australian Capital Territory, New South Wales, Tasmania and Victoria. Uniform evidence law has been a long project, and legislation has been introduced in a staggered fashion across the different jurisdictions. The overall legislation applies to both civil and criminal law and codifies some aspects of the common law (i.e., it puts into statute principles the common law has developed over time). However, it also diverges from the common law (Hulme, 2009).

Evidence of context

During investigations, police gather different types of evidence from a range of sources (the victim, other witnesses, documents, phone records, etc.). In cases of historical child sexual abuse, this process is significantly challenged because much of the strongest corroborative and forensic evidence (e.g., a disclosure made to an adult or evidence of sexual penetration) is no longer available. Often, the only evidence is the account of the survivor herself, which may well be of multiple offences over several years. Investigators will need to follow leads and clues in that account in order to provide the specificity required for an actual charge. However, not all this evidence will be admitted into the courtroom if the case goes to trial. Indeed a number of threshold requirements¹¹ are in place that whittle away at the narrative initially provided, namely: whether the evidence is relevant to the facts in issue;¹² whether the evidence is hearsay or opinion evidence; whether it invites the jury to make propensity reasoning, or “similar fact” reasoning; and whether the probative value of the evidence is outweighed by the prejudicial effect it has for the defendant. These thresholds apply to all offences; however, as Judge Roy Ellis (2007) observed, child sexual abuse cases differ in that the allegation typically involves a “course of conduct” over a period of time; in other words, there may be multiple charges relating to an extended period of time. This has evidentiary implications in that complaints lack specificity. Further, concepts such as time or the sequence of events may not yet be fully developed. However, some specificity and parameters may be possible; for example, the first or last incident of sexual abuse, incidents that occurred on particular or special days, such as birthdays, and incidents that may have occurred at different locations or in different circumstances than normal. Ellis went on to note that:

in these cases, if a jury is to gain appropriate insight into the real context of the allegations it may be necessary for events not the subject of a charge to be referred to. The real context in this sense means a number of things, including but not confined to the history between the complainant and the accused and the circumstances in which the complainant was living at the time of the allegations. (para. 13)

In other words, knowledge about a range of behaviours (some of which may constitute offences of their own, e.g., killing the family pet, and are referred to as “uncharged acts”), interactions and events that are not related to the charges can be put to the jury. The purpose of this is twofold: to enable the recollection of the actual charges and to locate the sexual abuse within in its “proper context” such that the charged acts don’t appear as though they came “out of the blue” (Hamer, 2008). This is context evidence, which may also include relationship evidence (although there is a lack of precision in the use of these terms and whether they are interchangeable or different categories).

However, courts do not like evidence that invites “propensity reasoning”; that is, it is not permissible for the jury to improperly conclude that because the defendant behaved in the way presented by the prosecution (e.g., the uncharged act of killing the family dog

¹¹ These thresholds are helpfully set out in the Victorian manual to the Evidence Act, the *Uniform Evidence Manual* (see Judicial College of Victoria, 2013).

¹² The threshold test is whether there is a logical connection between the evidence and a fact in issue (*Papakosmas v The Queen* (1999) 196 CLR 297, [81]). In addition, the evidence is relevant not just because of this connection, but also because the evidence presented rationally affects how the overall evidence of the case is assessed (*Washer v Western Australia* (2007) 234 CLR 492 (HCA), [5], n 4).

or of other sexual[ised] interaction with the victim), it is more likely he did the charged act (i.e., the charge of child sexual abuse). Hulme (2009) noted this was a particularly prominent issue in sexual offence matters, and that context evidence introduced specifically for the purpose of helping the jury to understand the circumstances in which the charges occurred was “likely to be highly prejudicial to an accused person, and the jury must be carefully directed as the extent to which it may legitimately use the evidence when determining the facts in issue” (p. 16).

Thus, the introduction of context evidence is not automatic, being subject to a number of considerations: whether propensity is an incidental effect rather than central purpose of the context evidence, whether the evidence actually applies to any issues that have been raised in the trial, the necessity of balancing between its probative value and its prejudicial nature and, ultimately, judicial discretion as to its admissibility.

Judicial warnings and directions to the jury

A jury is the tribunal of fact. It is not the jury’s role to become entangled in the intricacies, fine gradations and customs of the criminal law. However, in the assessment of facts and the use to which they are put in deciding the guilt or otherwise of the accused, jury members must be guided about how to make sense of evidence presented by the prosecution and defence.

The following three directions (or warnings) relate specifically to corroboration and delayed complaint:

- The Murray direction (*R v Murray 1987*): Where there is only one witness, the evidence of that witness “must be scrutinised with great care” before the jury should arrive at a verdict of guilty.
- The Longman warning (*Longman v the Queen 1989*): Where the complaint has been delayed, it would be “unsafe or dangerous” to convict on the uncorroborated evidence of the complainant alone unless the jury has scrutinised the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, and were satisfied as to its truth and accuracy.
- The Crofts direction (*Crofts v the Queen 1996*): If a jury is informed that a delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons for why a victim of sexual assault may hesitate in making a complaint, the jury should also be informed that the absence of complaint or its delay may be taken into account in evaluating the evidence of the complainant and in determining whether to believe him or her (Cossins, 2010).

The Longman warning in particular has been subject to significant discussion and criticism, both from judicial officers (e.g., Wood CJ, see Nicholson, 2008) and the wider legal fraternity (e.g., Hamer, 2010). The warning is essentially about the “forensic disadvantage” caused to the accused by virtue of delayed complaint; had the complaint been made in a timely fashion, the accused would have had better opportunity to gather evidence and mount a defence. Criticisms of the Longman warning and its application in Australia include:

- There is no definition or guidance on “delayed complaint”, with earlier cases having defined “delay” as being in the realm of hours or days, but more recent cases considering six months to be a relevant delay.
- Loss of evidence and the forensic disadvantage caused to the defendant has been presumed in Australian case law rather than being something the defendant needs to specifically identify or demonstrate.

- It is not always necessary to demonstrate the specific disadvantage caused, nor is there much discussion about the probative significance of that evidence (i.e., the lost evidence may in fact be peripheral to the case).
- Phrases such as “dangerous to convict” are an invitation for the jury to acquit.
- It conflates the specific issue of forensic disadvantage with the credibility of the complainant.

Legislative reform in some jurisdictions has attempted to limit the scope of such warnings by requiring the defendant to request the warning, the judge to indicate the nature of the disadvantage, and the phrase “dangerous to convict” not to be used. Nevertheless, the Longman warning remains for the most part mandatory (particularly where clear legislative prohibitions are absent) in an effort by trial judges to err on the side of caution and not risk an appeal by failing to give the direction. A study of successful appeals against conviction by the Judicial Commission of NSW (Donnelly, Johns, Poletti, & Buckland, 2011) found that 60% of those appeals related to a deficiency in the Longman warning, resulting in an error of law. In a majority of these appeals an inadequate Longman warning was the *only* error at law.

The Crofts direction is also problematic. Like Longman, it is a direction given in relation to a delayed complaint. Previously, a Kilby direction (*Kilby v the Queen* 1973) could be given in which the trial judge directed the jury that a delay or absence of complaint could be used as a factor in determining the credibility of the complainant. Given that such a direction reinforced stereotypes and misconceptions about victims of sexual abuse and disclosure (i.e., a “genuine victim” would raise a “hue and cry” at the earliest opportunity), legislative reform was introduced in Victoria to the effect that in relevant cases the trial judge needed to direct the jury that an absence or delay in complaint did not necessarily mean that the allegation was false (s 61(1)(b) of the *Crimes Act 1958* (Vic.)). In the appeal case *Crofts v the Queen*,¹³ the High Court held that s 61(1)(b) did not preclude the giving of a Kilby direction. Thus, it is possible for a jury in the one trial to be directed both that an absence or delay in complaint does not necessarily mean the allegation was false *and* that the very same absence or delay can be used in the jury’s determination of the complainant’s credibility.

In addition, directions may be given in cases where they are not relevant to the evidence (see discussion by Australian Law Reform Commission, 2010; Hamer, 2010; Tasmanian Institute of Law Reform, 2006). There is also the matter of what the research tells us about delayed complaint in child sexual abuse; that delayed complaint is the rule not the exception.

True enough, reform has been introduced with the aim of bringing this empirical knowledge into the courtroom. However, the Longman and Crofts directions point to a deeper issue: the ongoing tension between the power of legislative reform against the power of common law, in which it is judicial interpretation that often gives effect and substance to the operation of legislation, sometimes contrary to the spirit of the reform itself.

Expert evidence and specialised knowledge

Some effort has been made to provide courts with an empirically informed understanding of child sexual abuse with the introduction of s 79. This provides that expert evidence

¹³ In *Crofts v the Queen* (1996), the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault.

can be presented to the court, but is limited to its applicability to the specific matters at hand, not the general pattern of child sexual abuse. Further, its focus is on understanding the behaviour of the child, not the perpetrator. Finally, it is not clear how often it is being used. Anecdotal discussions with prosecutors and the NSW judicial commission suggest that it has not been used advantageously. The research literature tends to support this view in that scholarship on the use of social science evidence in criminal proceedings peaked in the late 1980s and into the 1990s; there is very little contemporary analysis. Previous research (Blumenthal, 2002) suggested that there is a divide between legal and empirical evaluations of social science evidence, namely that:

- Judges have questioned the material value that research findings and expert evidence provide, seeing the conclusions to be “commonsensical”.
- Too much expert evidence on such commonsensical findings invaded the “province of the jury”.
- Juries nevertheless could not be left to their own devices in evaluating such evidence.
- Social science researchers have not been particularly effective in undertaking legally relevant research and judges see the research paradigms as atheoretical.
- Social science research findings have not been presented in such a way that the court easily uses them.

Overall, the available commentary paints social science evidence and the law as “rival systems” (Tanford, 1990)—social science is innovative, while law resists innovation; social science is based on data and observation, law on precedent and hierarchy; social science seeks objective answers and law an adversarial victory; social science findings are probabilistic, but law’s conclusions must appear certain. Tanford concluded that social scientists needed to accept that research that runs counter to law’s epistemic and value system was unlikely to have influence. At the same time, the law aims to adjudicate on matters that occur in the empirical world—the very world that much social science research attempts to document and understand. Given the hidden nature of child sexual abuse, it would appear that such expert knowledge would be essential in assisting the jury in their deliberations.

Implications for future reform

What, then, are the ways forward? The issues discussed certainly raise the question of whether the criminal law is in fact the best arena for dealing with sexual offences, particularly offences that are historical in nature and involve intimates or family members. Indeed, there is ongoing discussion and, in some situations, implementation of alternative justice responses to child sexual abuse (for example, restorative justice conferences) (Cossins, 2010; Gavrielides & Coker, 2005; Jülich, 2006). However, it is not clear to me that we have yet exhausted opportunities within the justice system. Justice Neave of the Victorian Court of Appeal observed that the law—particularly evidence law—was “limping behind” the research base on child sexual abuse (Neave, 2012). She pointed out that there are many gateways inhibiting the presentation of the full context (or the “whole story”) of an experience of sexual abuse into the courtroom (relevance, admissibility, exclusionary rules, and the balance of probative versus prejudicial evidence), which is a matter of concern, and an area where more work could be done within the current system.

In late 2011, the Australian Institute of Criminology, the Australian Institute of Family Studies and Victoria Police hosted the two-day national Truth, Testimony and Relevance

symposium to discuss these issues with police, legal officers, the judiciary, academics and researchers. There was agreement that while it was dangerous to have juries reasoning outside the evidence presented, and beyond the caveats provided through jury directions, it was also the case that juries would fill in the gaps in the story by drawing on their own, not always accurate, understandings about child sexual abuse. This is particularly the case in relation to victims' behaviours and reactions in relation to the defendant that appear counter-intuitive (e.g., calling the defendant or making a time to see the defendant).

The collective expertise across these sectors highlighted that there are a number of ways in which the gap between the empirical picture of child sexual abuse and the evidential picture can be closed. However, while there was shared agreement about the importance of comprehensive "whole-story" investigation practice, there were questions about how far this approach would be able to shift practice at later stages of the criminal justice process. That is, there are barriers at the trial stage that preclude this evidence from being heard by a jury. The symposium debate on this pointed to organisational and systemic factors such as:

- Building a whole-story case enables the prosecution to create a narrative in the courtroom. However, there is rarely feedback to police investigators as to the way in which this information can be used, especially at trial.
- Further, much of this information is not identified or capitalised on to its full potential, especially as far as police and government prosecutors are concerned.
- The point was made on a number of occasions by participating members of the judiciary that there is capacity for prosecutors to use evidence law to a greater extent than is being currently exercised. It may be that entrenched or formulaic practices of both prosecution and defence in sex offences cases have limited the capacity of this legislation to be explored.

In response to these issues, a number of areas for improvement and innovation were identified. One key avenue relates to the legislative and jurisprudential aspects of criminal law. A second avenue relates to practice within the justice system. Suggestions here included:

- pre-trial "capacity building" for juries, as is occurring in New Zealand, so that jurors are better able to assess the evidence;
- better integration and feedback mechanisms from the prosecution to the police as to how the brief can be prepared so that it can be used more effectively in cases, regardless of plea; and
- strategic litigation to define and evaluate the principles and parameters within the *Uniform Evidence Act*.

While some effort has been made to provide courts with an empirically informed understanding of child sexual abuse through expert evidence provisions, there remains a sense that social science evidence and the law are "rival systems" of knowledge. Yet, the hidden nature of both adult sexual assault and child sexual abuse indicate that specialist knowledge and access to empirically based information would assist both legal professionals and the fact finder in their deliberations.

Conclusion

The harms associated with child sexual abuse are now well recognised. Moreover the particular contexts in which child sexual abuse occurs, perpetrators' grooming strategies

and their many tactics of normalisation, silencing and denial are becoming increasingly well understood by the agencies charged with investigating these offences.

However, the efficacy of “front-end” reforms and improvements take place in the long shadow cast by judicial decision-making. That is to say, assessments of “reasonable prospects of conviction” made by the Director of Public Prosecutions and, further downstream, by police, are informed by what happens upstream in the realm of judicial interpretation and creation of case law. While the evidence gathered in investigation may situate the sexual abuse in its full context, providing a comprehensive understanding of how the abuse occurred, only select types of evidence are admissible in court. The consequence is that the front end of the system may wonder at the purpose of gathering such evidence if it is not presented to the jury.¹⁴

A question to consider is to the extent to which increased specialisation and collaboration among “first responders” and investigators about the dynamics and strategies of perpetration and the behaviours of victim/survivors in response to this has occasioned a deepening chasm between an empirically informed understanding of sexual abuse and what will be heard in the court by the fact finder. The idea of a chasm between the reality of what sexual victimisation looks like empirically and what the law imagines is not new. Significant feminist research has theorised the ways in which sexual assault against women has been reimagined and reconfigured in the law according to masculinist, patriarchal and Anglo-centric systems of logic (Heath & Naffine, 1994; Kaspiw, 1995; Naffine, 1991; Young, 1998). Many of these have been diluted through law reform. What remains, however, are the rigors of the laws of evidence in which narratives are carved up such that the whole circumstance of sexual abuse by a caregiver, guardian or relative is fragmented. Crucial information—at least from the point of view of an empirically informed picture of sexual abuse—is absented through exclusion rules, tests and balancing acts. In other words, the very things that make prolonged sexual abuse possible and hidden, and the victim silenced and cooperative, are in opposition to many of the principles of the laws of evidence.

Closing this gap will become increasingly pertinent. Not only is criminal law an important plank in effective prevention (in that it reflects prevention messages and actions at the community level), but, as the Royal Commission into Institutional Responses to Child Sexual Abuse progresses, there will be increasing expectations that the criminal justice system can respond to particular charges. While developing, implementing and evaluating alternative justice practices is important, there are many avenues within the criminal justice system that can also be explored.

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¹⁴ This was a significant element of discussion on day two of the symposium.

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[27]

The scientists are coming What are the courts to do with social science research?

Michael Kearney

When it comes to decisions about lives in the context of individual families, the power to make sound decisions and exercise wise judgements continues to lie in the uniquely human capacity to weigh and evaluate multiple sources of evidence. Having done that, one can only strive to reach a balanced synthesis of the facts of the matter. (Hayes, 2014, page 292 in this book)

Decisions about the parenting of children involves just such a balanced process. They rely on and are made within the context of the knowledge offered by the social sciences, both on an individual and broader basis. The manner in which social science knowledge may be used as a part of parenting determinations is a vexed and at times controversial topic.

This chapter outlines how social science knowledge is taken into account in parenting proceedings pursuant to the *Family Law Act 1975* (Cth) and considers some of the issues that have troubled courts in recent times.

The underlying themes of this analysis are to:

- acknowledge the central role that the knowledge offered by the social sciences has in determining parenting proceedings, but also recognise that such knowledge is almost always the subject of controversy, both in content and application, to any given proceedings;
- demonstrate that the present approach to the use of such knowledge is inconsistent and, on one view, requires a degree of intellectual gymnastics if it is to be used without attracting appellate intervention; and
- contend that the use of social science knowledge should not be confined to the prism afforded by established evidentiary principle but, rather, that there needs to be a reconsideration of the manner in which judicial officers are permitted to have regard to such material.

The role of social science research

The centrality of social science knowledge in the determination of parenting issues emerges from the provisions of Part VII of the *Family Law Act* itself.¹ Consideration of the statutory mandate that:

the best interests of the child are the paramount consideration

is sufficient to call to mind any number of matters that are not identifiable as propositions derived from legal principle nor the facts presented by any given case; for example, the importance (or otherwise) of bonding and attachment, and the significance of chronological and developmental age.

Such consideration also gives rise to an appreciation of the changing content of the best interests principle and the differing emphasis afforded elements of the principle over time, including in light of developing social science knowledge. The changing content of the best interests principle can be illustrated by reference to examples such as the approach of Supreme Courts to dealings with children in the *parens patriae* jurisdiction in the 1900s and to the so-called “mother principle” laid to rest by the Full Court of the Family Court of Australia in *Raby* (1976) FLC 90–104. Indeed, Kennedy (1991) went as far as to describe the best interests principle as being no more than “a somewhat crude conclusion of social policy” (pp. 90–91).

Whether to be properly understood as a legal principle or social aspiration, the application of the best interests principle in parenting proceedings is one in which social science knowledge has an integral role. Broadly, there are four overlapping means by which social science knowledge is presently being used by the courts:

- in the application of the provisions contained in Part VII of the Act, reflecting in some part the social science knowledge which the legislature has chosen to incorporate;
- through the evidence of experts who prepare reports addressing particular issues, usually family consultants, psychologists or psychiatrists;
- by relying on published research and articles; and,
- by recourse to social science research and knowledge as background or perhaps contextual material, often described as being relied upon for the purpose of understanding the material otherwise before a court.

It is the latter three considerations that inform the first in any particular case, and it is the latter two which will both underpin and inform an understanding of any expert evidence in the proceedings.

The evidence of a particular expert appointed in proceedings is available to be explored and tested in the course of a hearing in the traditional manner and by reference to such material as informed and influenced the expert. That process will not be explored further here, although it is in itself an important topic.

The present focus is the use by the court of social science knowledge that has not been prepared for or directed to an assessment of that which is in the interests of the particular child who is the subject of the proceedings.

The relevant legislative provisions

It is a fundamental aspect of parenting proceedings that issues are to be determined by the application of relevant principle to the evidence before the court. The evidence

1 Part VII of the *Family Law Act* deals with the making of orders in relation to children.

before the court, including any to be drawn from social science knowledge, is governed by the *Family Law Act* and the *Evidence Act 1995 (Cth)*.

In general terms, social science knowledge will be sought to be put before a court in either the form of opinion evidence or, on occasion, pursuant to s 144 of the *Evidence Act*. Section 144 determines those matters of which a court may take “judicial notice” without a requirement for formal proof—for present purposes, matters of “common knowledge”—and will rarely permit social science research to be adduced (see, for example, *McGregor* [2012] FamCAFC 69).

Division 12A of the *Family Law Act* excludes the operation of parts of the *Evidence Act* in “child-related proceedings”, incorporating the intention that parenting proceedings be determined on a less adversarial basis. As permissive as Division 12A is intended to be, however, it is important to recognise that it does not alter the fundamental proposition that proceedings pursuant to Part VII are to be determined on the basis of evidence put before the court. Thus, the *Evidence Act* continues to provide the “rules” or “filter” to be applied in determining the evidence that can properly be put before a court for the purpose of a parenting determination, ameliorated only to the extent provided by Division 12A.

To be admissible in parenting proceedings, social science research must be both:

- an opinion of a specialised nature, based upon training, study or experience (s 79(1)); and
- relevant, in that, if accepted, it “could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding” (s 55);

It is suggested that s 69ZT(1) of Division 12A does not change the above position (see *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, [37]).

The problem to be identified here is that the present evidentiary framework does not readily permit reliance on social science research in parenting determinations, yet judicial officers are routinely having regard to that material, both formally and informally and directly and indirectly, in formulating decisions as to what is in a child’s best interests. This can result in uncertain and conflicting decisions.

How the courts are using social science knowledge

One of the earliest decisions in relation to the use of social science knowledge was that of the Full Court of the Family Court of Australia in *Patsalou* (1995) FLC 92–580. The court considered an appeal where the trial judge’s reasons for judgment had referred to a body of research relating to domestic violence, without that research being in evidence and without an opportunity being afforded to either party to make submissions or otherwise be heard in respect of it. The Full Court dismissed an appeal directed to the trial judge’s use of the material on the basis that, while appearing in the reasons, there had been no reliance on the material in making any finding in the case.

Following particularly the publication of research in 2007 and 2008 (see, for example, McIntosh & Chisholm, 2007; Tucker, 2008), there was a marked resurgence in explicit reference to and reliance upon such material in judgments, particularly those in relation to interim parenting disputes. As a result, or at least at the same time, the manner in which social science knowledge was to be properly used was the subject of further attention by the courts.

Perhaps a high point was reached in 2007 in the judgment of Carmody J in *Murphy* [2007] FamCA 795, particularly at paras 338–342. In that case, His Honour considered

the manner in which “social facts”, being “facts concerning human behaviour sourced from non-legal disciplines and not specific facts to a particular case” (para. 338), could be considered by a court. Following an exhaustive review of literature and judgments on the topic, His Honour concluded that “judges are relatively free to consult accredited writings and make their own extrinsic enquiries from non-legal materials in forming and applying their own views on social issues. There is probably no other convenient or expedient way of doing it in this jurisdiction” (para. 341). Since that time, a series of decisions have sought to clarify and confine the approach to the use of social science research.

In *Wheldon & Dinh* [2010] FamCA 740, Murphy J engaged directly with a number of the propositions in the *Murphy* decision, urging caution in relation to the use of such research and concluding that published research sought to support findings in a particular case ought in the usual course be the subject of an appropriately qualified expert. Importantly, His Honour distinguished the use of such material “to support a judicial view” as being permissible. As will be developed, it is queried whether one is capable of being divorced from the other.

The Full Court has also expressed views in a series of cases as to how social science material is to be used in compliance with the tenets of procedural fairness, and in a series of decisions it has been suggested (albeit not without caution) that peer-reviewed research could be used by a decision-maker to make findings of fact if parties to the proceedings are afforded notice of an intention to do so and an opportunity to address such material (see *McCall & Clark* (2009) FLC 93–405; *Barclay and Orton* [2009] FamCAFC 159; *Allen and Green* [2010] FamCAFC 14). Although against this suggestion has been a series of decisions, including that in *Maluka* [2011] FamCAFC 72, in which the Full Court was faced with a case in which it was clear that the trial judge had expressly drawn the parties’ attention to three particular articles and had provided the parties with the opportunity to make submissions in relation to that material. While the Full Court recognised that the trial judge had given notice of his intention to use the material, no notice had been given of how the material might be and was ultimately used, such that the appeal was allowed.

An evident tension has emerged in the courts as to the extent to which social science research is permitted to be taken into account and the purpose for which it may be applied, and it is suggested that the present approach of the courts is inconsistent with the realities of decision-making. Is it possible for social science research to be taken into account in making a parenting decision without relying upon it to determine issues in those proceedings? Is it possible to confine the use of social science research in proceedings to background material or the derivation of “social facts”, even if such facts are distinguishable in definition and consequence from any other fact to be determined in proceedings?

These difficulties are conveniently illustrated by two separate cases (*Salvati & Donato* [2010] FamCAFC 263, and *SCVG & KLD* [2011] FamCAFC 100) in which the same Federal Magistrate, without prior notice to the parties, referred to similar social science articles in each judgment, both judgments containing the following paragraph:

This research is background material to my judgment. It is not evidence. It is not material in respect of which I take judicial notice, and I make no findings of fact as a result of this material. It is background material, and it assists in understanding the expert evidence provided by the Family Consultant. One

also lives in hope that parents might learn from it. (*Salvati & Donato* [103]; *SCVG & KLD* [47])

In the first decision, of *Salvati & Donato* [2010] FamCAFC 263, the Full Court considered that notwithstanding the above paragraph, the magistrate had in fact impermissibly relied upon such material by considering that an order being made was contrary to the research and recommendations contained in the identified articles. In the second decision, *SCVG & KLD* [2011] FamCAFC 100, the Full Court found that there had in fact been no reliance upon the material in determining the proceedings and dismissed the appeal, although the court expressed the view that it would have been preferable for material not raised with the parties to not have been referred to. Notwithstanding this, the court recognised, perhaps unsurprisingly, that the “reasons for judgment would cause some disquiet in the mind of the litigant as to just how they might, consciously or unconsciously, have influenced the judicial mind” (para. 56).

How ought social science knowledge be taken into account?

The present state of the law is such that if social science research is to be relied upon either by a party or a court in determining the proceedings then it ought to:

- form part of the evidence before the court;
- be the subject of exploration in the oral evidence, including to the extent necessary with any expert witness; and
- be the subject of attention in submissions, including as to the purpose to which it is to be put and any findings of fact upon which it might bear.

In the course of such process, the reliability and relevance of such material can be tested. Otherwise, a court ought not make reference to, nor rely upon, such material.

This conclusion does not, however, properly nor fully recognise the pervasive role that social science research is suggested to inevitably have in most, if not all, parenting determinations. Further, and if it be accepted that the application of the principles in Part VII to the evidence in any particular case will necessarily involve a court drawing upon such material, then the failure to identify and refer to that material gives rise to other difficulties. The more obvious of these include the source and reliability of such material and concepts of procedural fairness. These issues are all the more stark and important in interim parenting determinations where there is no ability to test contentious evidence, usually no or limited expert evidence as to the children’s interests, and a greater reliance upon propositions derived from social science research as to the “best outcome” for the children.

The challenge for the legislature, courts and social scientists is to determine how social science research is to be used in the application of Part VII to the circumstances of any particular child.

The first matter to be recognised is the artificiality of seeking to draw distinctions between those matters permissibly relied upon by a court in a particular parenting determination, as opposed to those to which reference may be made for context or background or for the determination of some (but not all) facts.

This is not to seek to abandon the requirement for an evidence-based determination, but to seek to recognise that there are a multiplicity of inputs into such a decision, and to seek to confine reasons to only those matters formally in evidence before a court is to risk obscuring the real reasons for a decision in many instances.

As the Hon. Justice Michael Kirby wrote extra-judicially (1999):

The grant of power ... to decision-makers who hold judicial office, ought to be conditional upon the exercise of that power in a way which the people governed by it, understand and generally accept. To keep in the dark those affected by the exercise of power and to disguise from them the true processes engaged in is the way of autocracy which fears sharing the truth with the people. My thesis is that judicial candour, although perhaps initially unsettling to those who hanker for fairytales, is more appropriate to our times. (p. 8)

The present approach to the use of social science research only serves to encourage reasons for a decision not to refer to this material at all, or to engage in the intellectual gymnastics necessary to ensure that such material as is referred to in a decision can be “quarantined” from the actual reasons for any particular decision.

The transparent disclosure of that which is to inform a judicial decision will permit not only appropriate identification of such material, but will enable engagement with questions regarding the reliability and relevance of such material by both the court and practitioners in a manner that the incorporation of such material by way of background or context (if at all) does not permit.

Perhaps the most valuable product of a clear exposition of the social science research relied upon in parenting determinations would be the facilitation of a process by which the validity and reliability of such research could be tested in a manner which conforms with existing legal aspirations for reliable and relevant evidence. The issue of whether the research is applicable or relevant to the case could also be tested.

The second matter, which arises as a consequence of the first, is the need to permit (explicit) reliance by courts upon social science research in a manner that the present state of the law does not allow. The granting of such permission would be to do no more than validate that which is already occurring. The benefit, however, of addressing the issue would be to facilitate a fuller exposition of the reasoning process, thereby permitting a critical analysis of the social science research incorporated therein.

Social science research will not often comfortably fall within the categories of “common knowledge” nor be evidence able to be efficiently and appropriately adduced in parenting proceedings in accordance with the principles of the *Evidence Act*. Such material does, nevertheless, form part of judicial determinations in varying measure and cannot and is not ignored. Thus, the question arising is the manner in which social science research ought to be able to be properly taken into account in parenting proceedings, not whether it should be.

One of the fundamental issues to be addressed in determining how a court is to be permitted to have regard to social science research is the manner in which the relevance and reliability of that knowledge is to be determined.

The actual bases of social science research and the methodologies by which conclusions are drawn are not often the subject of consideration in the course of parenting proceedings. Similarly, the relevance of the conclusions derived from social science research to the facts of any particular parenting case, having regard to the bases of such research, is rarely the subject of consideration. To the extent that such matters have been considered, they have been primarily the domain of expert witnesses appointed in proceedings, and the courts and practitioners have relied upon their expertise in distilling such matters.

If courts are to continue to have regard to social science research in determining parenting disputes, then it is necessary to engage in a critical analysis of the basis for the propositions emerging and to permit the parties to engage in the testing of the reliability and relevance of the research relied upon. This is not to encourage or require such an analysis to be undertaken in every case. The family law system in Australia has been so constrained in its resources that this would simply not be possible.

Courts and practitioners, no doubt informed and assisted by social scientists, need to participate in the development and understanding of a reliable and relevant body of social science knowledge that may properly be brought to bear upon parenting determinations, without the requirement for the adducing of formal evidence of such matters in particular proceedings. This is not to anticipate that such knowledge could or ought to be capable of producing binary and static propositions for ready assimilation into parenting determinations, but rather to seek to divert from a ready reliance upon recent or publicised theory solely because of such attributes. By way of further education of judicial officers and practitioners to understand and critically approach social science research, coupled with the exploration of the reliability and relevance of key research in suitable cases (whether at trial or appellate level), courts would be able to build up a body of both research and knowledge that have been both considered and found to be of value and importance in the determination of parenting disputes.

In 2000, the Australian Law Reform Commission addressed some of these issues in the report *Managing Justice: A Review of the Federal Civil Justice System*, and it is time to revisit the recommendations that:

- the court processes in relation to reliance upon social science ought be made more transparent; and
- the *Family Law Act* ought to be amended to make specific provision for reliance on relevant, accredited and published research in parenting proceedings.

As Altobelli FM commented in *Roth* [2008] FMCAfam 781, the exclusion of available social science knowledge is “inconsistent with contemporary approaches to child-focused decision making” (para. 39). This being correct, there is a need to develop a coherent and principled approach to the use of social science knowledge in parenting determinations.

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[28]

Social science and family law **From fallacies and fads to the facts of the matter**

Alan Hayes

IT WOULD BE TEMPTING in a chapter on this topic to focus on some of the current controversies bubbling and boiling in family law circles surrounding the uses and abuses of social science “evidence”. Rather, I have assumed a dispassionate and detached perspective that is usually associated with the scholar, scientist or others who daily exercise the Wisdom of Solomon! I will examine some of the fallacies and fads regarding social science “evidence” that can get in the way of determining the facts of the matter. As such, it bears on the broader question of how social science “evidence” is to be used in family law matters. I will address:

- the historically contextualised and ever-changing nature of knowledge;
- some myths of uniformity and common misinterpretations of developmental science; and
- the primacy of discernment and judgement when assessing the facts of the matter, including the weight to be placed on social science evidence.

The belief that a contemporary perspective represents the highest point of knowledge in any field carries a certain conceit. On the one hand, it can be argued that most topics in contemporary social science, including in my own field of developmental psychology, have a long ancestry, though they are often presented as if only recently “discovered”. On the other hand, some ideas that would have been regarded as “facts” in their day now appear ridiculous to us. And some ideas remain enshrined in social knowledge, even though they have long passed their scientific use-by date!

Science, like all knowledge, is historically contextualised

Yesterday’s facts can become today’s fallacies

Among many that might have been chosen, two examples from the distant past are mentioned briefly.

Dr John Langdon Down, whose name has been lent to the syndrome, concluded that “mongolism”, as it was labelled when first described in 1866, was likely caused by tuberculosis (O’Connor, 2008). This incorrect conclusion was based on his observation of one mother who had the condition, and that the incidence of tuberculosis in children with the syndrome, suggested a possible congenital link (Ward, 1999). Others, however, were quick to associate the condition with the widely held belief that, like other examples of “feeble-mindedness”, mongolism was most likely caused by the deleterious effects of education on women. Down did not accept this idea and was actually a champion for the provision of educational opportunities to women (Wiedermann, 1992). We now know, of course, that the condition actually involves errors in cell division that result in a range of chromosomal abnormalities, including the most common: Trisomy 21. While the precise cause still eludes us, we do know that a strong correlate is maternal cellular age, with some associated paternal cellular age contribution also having recently been described. The link to education may be coincidental, given that better educated women may tend to have children later in life. Additionally, social class differences in health and access to health services such as amniocentesis and medically indicated terminations may actually result in a *lower* rate of the condition in the children of better educated women. How inconvenient.

A related example now seems similarly ludicrous. Prior to the American Civil War, it was concluded that brain size is related to race, gender and intelligence. This was heavily influenced by the work of Dr Samuel George Morton who, in 1820, began collecting an amazing array of Egyptian, Indigenous Australian Aboriginal, African, Asian and Caucasian skulls from around the globe. He amassed so many that friends and colleagues jovially referred to his home as the “American Golgotha” (Gould, 1981). Morton’s conclusions were based on an impressive range of measures of cranial volume (craniometry) that were conveniently optimised with the aim of providing irrefutable scientific evidence of the superiority of white, male brains. On Morton’s death, in 1851, the *New York Tribune* stated that “probably no scientific man in America enjoyed a higher reputation among scholars throughout the world” (as cited in Gould, 1981, p. 51). Unfortunately for Morton’s place in history, Gould (1981) re-analysed the data and found that Morton’s findings resulted from a “patchwork of fudging and finagling in the clear interest of controlling a priori convictions” (p. 54). Scientific fame can be short-lived and built on fragile foundations.

Three contemporary examples of the changing state of knowledge

Those two examples can be dismissed as fatuous anachronisms. But some of today’s “scientific evidence” can be similarly open to question, if not ridicule. Fad and fashion can inflate the significance of particular research and lead us to ignore the issue of the validity of single studies. As such, assertion is too easily mistaken for evidence.

Three contemporary examples, again among many, show that the changing nature of knowledge is not only a problem of the distant past. A first example relates to our knowledge of the brain and its development. Until relatively recently, it was thought that we had a fixed number of neurones at birth and that these could not be replaced. The ravages of time and, dare I say, lifestyle factors were thought to ensure that neurologically it could only be downhill (the pace of decline was found to occur at a faster rate for men than women!).

We now know this is not correct. Nor is the concept that our nervous system is hardwired from birth. “There is a diversity of wiring in the brain. Furthermore, this wiring

constantly changes in response to biological and environmental influences" (Institute of Medicine and National Research Council, 2012, p. 3). Advances in neuro-imaging and biochemistry have revealed the brain in a very new, complex and dynamic light. The degree of plasticity of brain functioning is far greater than previously thought, as studies of the transfer of functions in those who have suffered brain injuries now show (Doidge, 2007). Neural tissue has "a remarkable capacity for reorganization" and replacement (Garcia-Segura, 2009, p. 9). While suspected for some time (see, for example, Bergland, 1985), evidence is increasingly available that demonstrates the complex hormonal systems that underpin this plasticity and mediate and moderate the effects of experience (Garcia-Segura, 2009). The brain is the largest gland in the body, with the most complex assemblage of nerve cells and interconnected circuits. And yet, simplifications and erroneous ideas about brain development exert enduring influences on present thinking.

A second example relates to Gardner's (2004) concept of parental alienation syndrome (PAS), in which a child repeatedly denigrates and belittles one parent, without justification. Emery, Otto, and O'Donohue (2005), among others, questioned the scientific status of this concept and concluded "that it is blatantly misleading to call parental alienation a scientifically based 'syndrome'" (p. 10), especially given Gardner's admission that he regarded his single study as the only one that had been statistically based. While others may disagree, given the state of the "evidence", I would err on the side of caution in the use of such a construct and would not use the term "syndrome" when discussing alienation. Clearly, a definitive conclusion on the topic awaits much further research (Warshak, 2001).

The final example I would cite, albeit briefly, takes me closer to the cauldron. It relates to the concept of bonding. Most prominently associated with the work of Klaus and Kennell (1976, 1982, 1983), Eyer (1992) observed that "research on bonding was inspired by the popular belief that women, one and all, are inherently suited for motherhood" (p. 1), and that the time immediately following birth was a particularly sensitive period in relationship formation that was biologically based. Notwithstanding its weak empirical foundations, the focus on bonding did have benefits in changing obstetric and neonatal care. For example, infant feeding regimes were permitted to suit the needs of the mother and child, rather than the needs of the hospital and its routines. Bonding continues, however, to be confused with the concept of attachment, and the two are frequently used as synonyms. As Minde (1986) concluded, however, while the concept of attachment is supported by a voluminous research literature, there is scant evidence to support the concept of bonding as framed by Klaus and Kennell. "Bonding is, in fact, as much an extension of ideology as it is a scientific discovery" (Eyer, p. 2).

Myths of uniformity

Developmental age and stage

Scientific argument becomes the stuff of popular social knowledge that is all too readily detached from the detail and the critical debates within the scientific community. In this process, scientific evidence can be distorted in its meaning and significance. As such, it then takes on the status of an article of faith rather than empirical fact. Fallacies have a way of persisting and fads are remarkably fashionable.

While I support the focus on the early years of childhood, for example, it has become in some ways faddish. In reading the recent early childhood literature one might conclude that this is the only time in life when key brain developments occur. Those

researchers who have focused on developmental epochs other than the early years (Blakemore & Choudhury, 2006; Dahl, 2004) have struggled to have their voices heard. While adolescence is of growing interest (Spear, 2004), some developmental eras, such as middle childhood, continue to be overlooked. And adulthood is still too often seen as merely an end point, rather than a time of continuing developmental change in its own right (Smith, 2006).

Adolescence, for example, is a time of interesting paradoxes. On the one hand, there is a quantum leap in the physical strength, intellectual processing speed and capacity, and overall resilience of adolescents. On the other, it is marked by heightened risk, with morbidity and mortality rates doubling over these years (Dahl, 2004). Changes occur to multiple neurological and endocrinological systems and their interactions (Kelley, Schochet, & Landry, 2004), with brain developmental changes preceding and driving the hormonal changes associated with puberty (Dahl, 2004). Changes to myelination and neuronal pruning, especially in the prefrontal cortex, characterise the entry to adolescence (Spear, 2000, 2004). The net effects of these changes are profound and, in part, explain the propensity of adolescents to seek novelty and engage in risky behaviour (Blakemore & Choudhury, 2006; Kelley et al., 2004; Spear, 2000, 2004). Importantly, the neurological changes that occur in adolescence signal changes that continue through life (Blakemore & Choudhury, 2006).

Rather than slavish adherence to age- and stage-based approaches, as conveniently simplifying as these may be, the action in developmental psychology for some decades has been on the life course. Just as there is considerable variation and overlap on most variables between groups, so too there is considerable difference when one measures developmental age in contrast to chronological age. Further, the older one gets, the less important distance from birth becomes than proximity to death!

Developmental outcomes at any age or stage are also influenced by the interpretation of events, and these in turn change over life (Sameroff, 2004). Parents, children, teachers and, dare I say, social scientists and those across the family law system, have differing views of the meaning and import of children's behaviour. What is reported can be as much a function of the seer as the seen. De Los Reyes and Kazdin (2005) highlighted discrepancies in informants' ratings of child psychopathology. They went on to say that developmental history "may represent not the past acting on the present but the present reconstructing the past ... People act on and create their own lives, including their memories and their futures, through the formation in the present of future goals, desires, and needs" (p. 75).

It is important to avoid being trapped by the external standpoint into highlighting assumptions based on the norms of development and what one might expect at a particular age or stage. A focus on individual differences highlights the need to see the world, as far as possible, as each child sees it (Henaghan, 2012). As Parkinson and Cashmore (2008) emphasised, children want to express themselves and have their views heard on the things that are salient in their lives. Henaghan quoted Baroness Hale: that when children are heard, "the court will see the child as a real person, rather than the object of other people's disputes or concerns" (as cited in Henaghan, 2012, p. 40).

Change, continuity and the problem of prediction

A second myth of uniformity relates to the extent of change, continuity and predictability of development. There is considerable scope for change in development. The longer the time between measurement points, the greater the scope for variability. Stability

of relationship and personality variables, over time, tends to be low. As Lewis (2001) concluded, “based on the collective evidence to date—in a multitude of domains, including cognitive, social, emotional, and psychopathological—the best that can be said is that there sometimes is very limited support for the belief that earlier events are connected to later ones” (p. 74). For example, it is a mistake to see attachment as a fixed trait or stable individual characteristic across time. There is, in fact, a lack of continuity from infancy to adolescence and beyond. In the longitudinal study conducted by Lewis and his colleagues, attachment at 18 years was related to family status, whether divorced or intact, but not to attachment in infancy.

In quoting Rutter’s conclusion that, “attachment is not the whole of relationships”, Ludolph and Dale (2012) highlighted the role that other elements of the developing child’s context play in complex interactions with the characteristics of each child and the quality of the processes that connect child to context. As such, they argued that attachment should be but one “additive *best-interest* factor” rather than “a determinative one” (p. 40). Cashmore and Parkinson (2011) made a similar argument. And yet the notion of the power of earlier events and states to determine what happens later in life is an enduring belief. As Sameroff (2004) observed, “developmental achievements are rarely sole consequences of immediate causes and more rarely sole consequences of earlier events” (p. 9).

Given the diversity of pathways through life, the interplay between change and continuity underscores developmental complexity. This begs the questions, “What drives change?” and “What maintains continuity?” As Brooks-Gunn (2003) argued, the issue is steeped in magical thinking and there is still much to be learned about the processes that operate to sustain developmental continuities. She provided a compelling critique of what might be called the “early childhood error”—the belief that all is evident and active, albeit in some instances in latent form, in early life and therefore remediable then, if only we had the knowledge. What is not clear is what is sustained, as opposed to lost, from early experience. I am reminded of Rutter, Maugham, Mortimer, and Ouston’s (1979) book, *Fifteen Thousand Hours*, and the limited residue of all that time spent in school. Not everything experienced is retained!

As Clarke and Clarke (1976) observed, “what one does for a child at any age, provided it is maintained, plays a part in shaping his development within the limits imposed by genetic and constitutional factors” (p. 273). I would echo Farran’s (2000) conclusion that “somehow, [we have] to move beyond thinking of the problems of young children as being something someone else fixes at an earlier age or in a different place so that other systems do not have to change. A developmental focus that covers the first 12 to 15 years of life would be a good start” (p. 542).

What might this mean in a family law context? As Sroufe put it, “we cannot definitively say, based on attachment assessment, this child should be with this parent more than with that parent. The major thing that I think a judge would do well to know is that attachment relationships are a lifetime thing” (as cited in Sroufe & McIntosh, 2011, p. 463). Much can and does change over a lifetime!

The dynamic nature of development makes the timing of our actions and interventions to address problems a difficult issue. Problems emerge over time. Difficult temperament, conduct problems and aggressiveness tend to appear early in life, while social withdrawal, difficulties in peer relationships and academic problems tend to manifest themselves in the school years. The outcomes of early vulnerabilities are a function of the number of risks and problems and the presence of factors that catalyse their emergence or

ameliorate their effects. In development, difference is the norm, change is the constant and the diversity of development pathways is typical. This makes decision-making based on attempts to predict the future particularly challenging.

Critical consideration of the evidence underpins discernment and judgement

The importance of the long view

Prospective longitudinal studies are essential if we are to tease out the factors that drive developmental outcomes. Such studies follow a sample that is broadly representative of the population, prospectively, rather than identifying a group of interest, such as a clinical sample, and looking retrospectively for the factors that might explain their membership of the group. Prospective longitudinal studies can provide valuable insights into issues of change and continuity of pathways (Masten, 2004). The prospective Life Chances Study has shown the divergence of life paths in ways that are very difficult to foresee (Taylor, 2011).

Werner (2005) highlighted the value of prospective longitudinal research in identifying the factors that lead to successful adaptation and resilience. Prospective studies “have consistently shown that even among children exposed to multiple stressors, only a minority develop serious emotional disturbance or persistent behaviour problems” (p. 4). By way of contrast, a retrospective research strategy “created the impression that a poor developmental outcome is inevitable if a child is exposed to perinatal trauma, poverty, parental psychopathology or chronic family discord, since it examined only the lives of the ‘casualties’ not the lives of successful ‘survivors’” (p. 3).

The work of Sampson and Laub (2005; Laub & Sampson, 2003) underscores the scope for developmental change and the factors that alter negative pathways and maintain positive ones. In considering young men with a history of juvenile offending, they cited the evidence for the world of work, with its regularities and routines, and close personal relationships as two salient sets of influences that alter negative pathways and sustain more adaptive life trajectories. The presence or absence of connections to work and relationships, explain the patterns of desistance or persistence they observed in the life courses of the juvenile offenders. Of those who offend as juveniles, only a very small percentage goes on to a career in crime.

In reflecting on the Kauai Longitudinal Study—arguably *the* groundbreaking study of resilience—Werner (2005) extended the list of influences:

Among the most potent forces for positive changes for high-risk youth who had a record of delinquency and/or mental health problems in adolescence, and for teenage mothers, were continuing education at community colleges; educational and vocational skills acquired during voluntary service in the Armed Forces; marriage to a stable partner; conversion to a religion that required active participation in a “community of faith”; recovery from a life threatening illness or accident that required a lengthy hospitalisation; and occasionally psychotherapy. (p. 7)

The Australian Temperament Project (ATP) also provides valuable insights, via the lens of early temperament and its relationships to a range of outcomes (Hayes, Smart, Toumbourou, & Sanson, 2004; Smart & Vassallo, 2005). The study commenced in 1983, when the 2,443 participants were aged between 4 and 8 months. They are now young adults.

Of particular relevance to the present discussion is the evidence that the ATP provides of the variation in the time when pathways became noticeable. The pathway to multiple substance use at the age of 15 to 16 years, for example, was discernible in infancy. Those who went on to be involved in substance abuse in adolescence were, on parental report, less rhythmic as infants; less persistent and less cooperative as toddlers; less shy from 3 to 4 years on; more aggressive from 5 to 6 years on; and from primary school on showed greater inflexibility, poorer peer relations, more depressiveness but lower anxiety and fearfulness. A wide range of indicators, any one of which is unlikely to be predictive!

In contrast, the pathway to persistent antisocial behaviour in adolescence only became noticeable in the primary school years. Those who showed problems of antisocial behaviour had noticeably higher levels of acting out, aggression, hyperactivity, attention problems and volatility that became apparent in the primary school years. In turn, they had lower levels of cooperation, self-control and relationship with parents. At least in terms of temperament, however, there were no significant associations with parental reports of their characteristics in infancy.

The ATP provides an example of a pathway that was evident early in life for boys but not until middle childhood for girls. Boys who went on to show anxiety in adolescence were noticeably more anxious and more likely to be considered to be shy by the age of 3. For girls, their higher anxiety, parent relationship factors and externalising problems only became noticeable at 11 to 12 years of age.

So pathways may be differentiated by key sub-group characteristics such as, in this case, gender, as the work of Edwards (2006) also showed in relation to the greater effects of disadvantage on the early development of boys. Finally, prediction of outcomes is likely to be difficult (Hayes, 1990), given the wider representation in the population of the indicators of any problem. Again, this reinforces the need for longitudinal studies designed to trace the various pathways people follow through life (France & Utting, 2005). It again demonstrates the perils of prediction in individual instances. Often, what is presented as predictive evidence is actually better characterised as “retro-diction”. That is, the correlations are calculated retrospectively rather than from analyses of a truly prospective prediction study, where one would analyse the extent to which the predicted outcome actually came to pass; neither an easy nor an impossible exercise.

Genetic and environmental influences

So what else drives continuity? Is it the stability of the environment or are there genetic underpinnings that interact with experience? In considering the continuity of personality characteristics, Caspi and Roberts (2001) concluded that there is modest continuity:

Although the environment is often put forward as a reason for continuity in personality, there is little evidence to support the hypothesis. The genetic underpinnings of continuity are just now beginning to be reported in longitudinal behaviour genetics studies and the early evidence is provocative. (pp. 61–62)

As such, the sources of individual differences are complex. If one considers aggressive behaviour, a topic of considerable contemporary interest—especially for the Australian Government—there is accumulating evidence of the influence of genes and environments. The genetic influences underpin differences in neurotransmitters (such as serotonin) that underpin impulsivity and the propensity to aggressive reactivity (Pihl & Benkelfat,

2005; Rhee & Waldman, 2011) and hormones, including testosterone or the stress-related hormone cortisol (van Goozen, 2005). While the biological contributors to aggression are progressively becoming better understood, there is still much more to be learned about the complex interplay of genetic and environmental factors (Rhee & Waldman, 2011).

The environmental influences on aggression are similarly complex and multiple. Parental behaviour, especially harsh and inconsistent parenting, and a range of other factors—from maternal alcohol, tobacco and other drug misuse prior to birth to perinatal complications and peer influences in childhood and adolescence—have been linked to an elevated propensity for aggression (Tremblay & Nagin, 2005). A link between witnessing interparental violence and subsequent violent behaviour in intimate relationships in early adulthood has been observed (Cui, Durtschi, Donellan, Lorenz, & Conger, 2010; Uslucan & Fuhrer, 2009), though the relationship is at best modest (Black, Sussman, & Unger, 2010). Analysis of prospective longitudinal birth cohort data from the Christchurch Health and Development Study also showed weak linkages between witnessing interparental violence and subsequent relationship violence perpetrated by young adults, once socio-demographic context factors had been controlled (Fergusson, Boden, & Horwood, 2006). Exposure to violent behaviour, in and of itself, does not necessarily portend a life of violence. Exposure to abuse or neglect early in life, however, can lead to neurological and endocrinological changes that influence reactivity and responsiveness; though, again, these are not necessarily immutable effects. Environmental risk is not destiny.

Nor is DNA destiny. Rather, there is an interplay between environmental factors and genetic pre-dispositions that is much more complex than nature versus nurture. Some of these interactions are epigenetic (literally, “above the genome”). The groundbreaking new field of epigenetics highlights the importance of environmental influences on the expression of genes. Such influences can span generations, as indicated by research that shows how famine in one generation followed by abundance of food in the next can influence the risk of obesity and heart disease across generations (Pembrey et al., 2006). To that extent, you are what your grandparents and parents ate. The marks of experience of previous generations are written on the genome and act to influence the expression of genes. But for each individual, *current* experience and lifestyle throws the genetic switch. To that extent, you are what *you* eat.

Differential susceptibility

Susceptibility to intricately interacting genetic and environmental influences is a complex process. Like epigenetics, differential susceptibility is a rapidly developing field of research, with wide implications across several disciplines. Susceptibility to environmental influences varies considerably among children. Those with difficult temperaments, for example, have been shown to exhibit more behaviour problems when experiencing low-quality child care and fewer problems when high-quality care is available (Pluess & Belsky, 2009, 2010). As such, they are more likely to be influenced for good or ill depending on the quality of their developmental context. Children with difficult temperaments have also been shown to be more susceptible to negative maternal discipline and to show fewer externalising behavioural problems if exposed to positive maternal discipline (van Zeijl et al., 2007). Bakermans-Kranenburg and van IJzendoorn (2007) also provided support for the differential susceptibility hypothesis in a study of attachment security, with those children who show insecurity, distress and avoidance (characteristic of disorganised attachment) being more susceptible to unfavourable care

environments but responding positively to favourable ones. Their study demonstrates the link between the genetic substrate and differential susceptibility to environmental experiences. Again, prediction is problematic if one only has partial information about the behaviour but not the genes!

A relationship has also been established between a specific gene that underpins differential susceptibility to childhood maltreatment and the propensity to move from being a victim to a victimiser (Caspi et al., 2002). Those with high levels of expression of the monoamine oxidase A (MAO-A) gene were shown to be less likely to victimise others than those with low levels, despite both groups having experienced maltreatment. In part, this illustrates the value of differential susceptibility in explaining why risk is not destiny.

A focus on differential susceptibility also moves the discussion beyond the simplistic binary consideration of whether, for example, particular care-time arrangements have developmental effects, irrespective of other factors. Like many other public health problems, combinations of factors complexly cause developmental outcomes related to health and wellbeing as well as to behaviours such as aggression and violence.

Beyond myths of uniformity

The very term “development” is not a unitary construct. As Lerner, Lewin-Brizan, and Warren (2011) observed, it “continues to engage scholars in philosophical and theoretical debate” (p. 19). Dualisms abound! There are norms versus individual differences and their translation to normative versus ipsative research approaches. There is a continuing interplay of biology and experience and the tension between continuity and change, person and environment, and the competing systems of the individual and the embedding social systems, as well as single sources of influence and the multiple determinants of outcomes, and finally, the ongoing tension between the vulnerability and resilience of each one of us. And yet, development is too often treated as a unitary given.

Social science is also far from a unitary entity. This is yet another of the myths of uniformity that can mislead. As Rathus (2012) stated, or should I say understated, “there is not usually just one social science view about an issue, so reference to any article (or even a set of articles) by a judge will necessarily be selective” (p. 83).

Uncritical acceptance of social science evidence is a clear and present danger for the family law system. King and Piper (1995) cited Tuebner’s observation that:

far from making law more responsive to the demands of other discourses, bringing it closer to the taken-for-granted world which is widely accepted as ‘social reality’ these attempts to incorporate ‘social knowledge’ within law have tended to produce ‘hybrid artifacts of ambiguous epistemic status’. This means that constructs which started out, for example, in the social sciences cannot be transferred unchanged into legal discourse. (p. 33)

Further, the limits of social science must be acknowledged when presented as briefs in family law matters (Kelly & Ramsey, 2009). These limits ought to be framed in terms of the selection criteria for the studies reviewed and synthesised, the theoretical frame and methods, the manner in which effect sizes are assessed, as well as the extent of acceptance by the scientific community. As such, the norms of science should be applied not only to the research, itself, but to the way it is used!

Common errors in the use of social science include:

- applying evidence from group data to individual instances;

- holding on to outdated, static models of development that ignore the complex dynamics at play over the life course;
- grasping, selectively, a single study or a small number of studies while overlooking the caveats and concerns that apply to them;
- misunderstanding the differences between the concepts of statistical significance, effect sizes and the variance explained by the measures in a study;
- inflating the weight to be put on a single attribute, variable or outcome when multiple and changing influences impinge on individuals, at the biological, behavioural and social levels of explanation;
- overstating the capacity to predict likely developmental outcomes and pathways, given the many influences that impinge on lives, by design and accident; and
- ignoring the complex factors that lead to individual differences, including differential genetic susceptibility.

The way forward is not to eschew the social sciences but to understand the current state of knowledge, across their fields. It is to embrace a more sophisticated and nuanced appreciation of the balance of their strengths and limitations. While they are accumulating valuable insights into developmental processes, the social sciences are certainly not yet in a state to permit formulation of hard and fast rules with predictive powers. And, given the nature of human development, this may never be a realistic possibility. As argued, prediction is problematic. Fortune telling is a fraught enterprise that, more often than not, merely reflects the power of self-fulfilling prophecy. At best, one is left with the balance of probabilities.

When it comes to decisions about lives in the context of individual families, the power to make sound decisions and exercise wise judgements continues to lie in the uniquely human capacity to weigh and evaluate multiple sources of evidence. Having done that, one can only strive to reach a balanced synthesis of the facts of the matter, ever mindful of the historically, culturally and conceptually contextualised nature of knowledge in the social sciences and the family law system.

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Concluding reflections

[29]

Complex family issues

Collective awareness, common narratives and coordinated approaches to promoting resilience

Alan Hayes and Daryl Higgins

LOSS OF RELATIONSHIPS IS an unfortunate fact of family life. Families inevitably confront the loss of loved ones. In earlier ages, with shorter life spans and many more risks, death was the typical way in which relationships ended. With greater longevity, however, “till death do us part” presents new challenges. Relationships now face a more protracted test of time than in earlier generations. The stages of life are elongating, with arguably more transition points along the way, and these can bring their own difficulties, complexities and dilemmas of choice.

In an ideal world, relationship difficulties, separation and divorce would not occur. The world, however, has never achieved that utopian state. Relationship breakdown—between couples, parents and children, as well as among other family members—raises thorny issues both for social policy and legal systems. The challenges are particularly difficult when children are involved. Best interest is the guiding principle, but policy and practice need to be able to deal with changes that occur as children develop and the complexities of family life unfold.

Conflict and dysfunction threaten the sustainability of any family, and some are much more likely to encounter such problems than others. Strong relationships carry considerable capacity for resilience—to bend but not break when buffeted by life’s inevitable storms. “Resilience” is frequently used to describe families’ ability to bounce back from misfortune. Resilience is not only a characteristic of the people involved—the strengths and resources they can marshal—but also reflects the situations and circumstances that they confront and the capacities within families, communities and the wider society to foster and sustain them. If circumstances place sufficient stress on couples, especially those with insufficient personal resources and supports from family, friends and neighbours, relationships can break, with far-reaching ramifications for all concerned.

The social policy challenge is to be mindful of the circumstances and threats to individuals and the stability of their families, to promote opportunities for early

intervention to avert potential trouble and to respond appropriately to support families experiencing difficulties. It is both a matter of strengthening families and maintaining the fences that help to prevent life's pitfalls.

The essays in this volume have addressed some of the issues facing families and their communities and those who seek to support, strengthen and assist them to overcome difficulties. In the Australian context, the complexity, in part, reflects the realities of a nation of federated states and territories. Policy is far from a unitary entity, and each jurisdiction has its own legislative responsibilities and frameworks. Aligning these is a far from simple proposition. That said, the contributions in this volume show the progress that is being made to better align and coordinate approaches to formulate and implement Australian policies and laws focused on children and families.

The essays also reflect the tension between the private worlds of families and the public spaces in which policy and the law operate. The view that much of what happens in families is inherently private has too often impeded appropriate responses to the challenges that families confront. Raising awareness of the issues confronting families contributes to the emergence of shared beliefs, aligned views and common narratives that can drive policy and shift practice. The essays in this volume also highlight the difficulties of coordinating approaches that span the social services and legal systems in order to achieve effective policy implementation.

Collective awareness

While the origins of advocacy for children and families are lost in antiquity, raising public awareness of the circumstances of children and their families has been a continuing force for change. In the early part of the 20th century, a key focus was on maternal and child health, particularly addressing infant mortality, which remained unacceptably high until the 1930s. From the 1950s on, commitment to improving the health of children continued. Across this time, however, emphasis on wellbeing steadily increased, reflecting the growth of knowledge about the importance of the emotional and social dimensions of child development. The increase in the survival of children beyond infancy progressively afforded a focus on aspects of their development beyond physical health, and highlighted the relationship between the quality of their life experiences and later outcomes.

Awareness can both drive changes in the circumstances of children and their families and be a response to changes driven by other forces, such as the demographic and social shifts considered by the authors in Part A of this book. So collective awareness is itself dynamic and is revisited and revised in the light of new insights, knowledge and concerns.

A critical mass of public concern is often the catalyst for policy, legislative and service changes. The commitment to reform can also arise within policy and legal circles, and awareness-raising then becomes a means of building the groundswell of public concern that reinforces political will. Most typically, however, it is the confluence of community concern *and* political will that drives policy change and legislative reform.

In recent years, efforts to raise public awareness have focused on those who experience trauma and the harms that flow from it. Of particular salience have been issues concerning child abuse (including sexual assault) and the removal of children from their families, as discussed by the essays in Part B, as well as family violence and the effects of separation and divorce on children and their parents. With regard to the last of these, there has been a particular focus on parenting arrangements following

relationship breakdown, as explored in the essays in Part C. While the architects of “no fault” divorce sought more dignified approaches to settling matters when relationships became clearly irretrievable, post-separation arrangements remain a complex and changing terrain that presents particular challenges for both policy and the law. As such, several of the essays in this collection focus on the complications for family law of dealing with relationship breakdown, especially where family violence is suspected.

Despite wide media coverage of incidents of terrible family violence, problems that affect children and challenge their families have been, and in some quarters still are, regarded as better kept behind closed doors. Increasingly, however, there is recognition of the wider ramifications and costs to society, especially given the realisation that the harm to individuals spreads, endures and crosses generations.

Yesterday’s policy has a habit of becoming today’s problem. In this early part of the 21st century, ignorance has turned out to be far from bliss as we gain greater understanding of the long-term effects on children, families and communities of policies and practices that had seemed good ideas at the time. Collective awareness has led to a sequence of public admissions of the shortcomings of previous generations. They began with apologies to the Stolen Generations of Aboriginal children removed from their parents and to the Forgotten Australians and Former Child Migrants who were separated from their parents and placed in institutional settings. Most recently, the apology to those affected by forced adoption was an important act of reconciliation and respect for the many who carry the scars of past practices. The discussions of forced adoption in this volume highlight the consequences of not considering the effects of actions that were justified with arguments relating to what was thought to be “in children’s best interest” and for “the greater good” of the society at large.

Common narratives

Greater awareness can be a precursor of shared beliefs, aligned views and common narratives that can then galvanise calls to action and new policy approaches. Such narratives frame an issue of concern. For example, the narrative that has followed recognition of the seriousness of child abuse, sexual assault and neglect has led to the development of the National Framework for Protecting Australia’s Children 2009–2020, a joint initiative of all Australian governments and the community sector, and endorsed by the Council of Australian Governments (COAG, 2009). Similarly, awareness of the extent and seriousness of violence, especially as it affects women and children, has resulted in the National Plan to Reduce Violence against Women and their Children 2010–2022, again endorsed by COAG (2010). Both reflect a broader public concern about the unacceptability of violence and aggression.

Although an important first step, common narratives are not sufficient to achieve sustained change. Views of a problem can also reflect a shared set of beliefs that are subsequently proven to be wrong. Practices such as the forced removal of children or the belief that family violence is a private matter were part of a common narrative at the time that persisted despite accumulating evidence of their serious shortcomings and enduring harms. Notwithstanding, however, a common view can facilitate coordinated approaches to addressing social problems. Such narratives can advance understanding and bridge disciplinary divides, in part by permitting the alignment of concepts, terminology and practice.

But common narratives may also mask very different understandings of the problem by those who work within the range of relevant disciplines. The same concepts and

words may be quite differently understood by practitioners in social-science-based disciplines and the law, for example, and the depth of understanding of key concepts, methods and approaches may vary considerably. In addition, while reform of the law is driven through the formal process of establishing precedents and the implications of appeals against particular judicial outcomes, the social sciences are shaped by replication (or more particularly the failure to replicate), and the resulting accretion of knowledge and occasional shifts in paradigm. The essays in Part D touch on the complexities of reconciling paradigms across areas that may seem similar, but that carry considerable differences in modes of thought and practice.

Coordinated approaches

Most social problems cross the bounds of several specialist areas of policy and practice, and no single discipline possesses the knowledge required to manage the multiple facets of families with complex issues. Multidisciplinary teams are the norm in most areas of medicine, especially those focused on difficult cases. This has been so for quite some time.

Increasingly, this is also the situation in the areas of policy and practice discussed in the present volume. That said, however, spanning the gulf between the social sciences and the law is not always easily achieved. The topics selected here also reflect the considerable complexity of the factors that lead to problems arising and impede easy solutions. While some families grapple with a single problem, others struggle with a package of inter-related problems. What seems like a single issue soon reveals a complicated mix of challenges and needs.

The first set of essays well illustrates the changing face of families, the diversity of their formation and the forces that shape individual identities. Policy seeks to keep pace with developments that are occurring not only in families, but in their neighbourhoods, their communities, and the wider society. The law confronts the challenge of rapid change; family forms and their dynamics also confront the law, as does technological change.

Many of the essays have focused on the ways in which public policy and private law can address the aftermath of relationship difficulties and dissolution. Such policies and laws strive to return fracturing family relationships to safe, secure and stable functioning. Family law initiatives have brought together the information and expertise required to collaboratively manage post-separation parenting matters. The Magellan case management model in the Family Court of Australia specifically focuses on achieving better coordination of parenting matters involving allegations of sexual assault or serious physical abuse of children (Higgins, 2007). Other initiatives involve coordination between lawyers and psychology/counselling professionals in resolving family law disputes where there are concerns about family violence, and the allocation of Independent Children's Lawyers to complex children's matters in family law proceedings, as discussed in chapters 16 and 20.

Recognition of the need for better coordination of social services has resulted in innovations such as the Australian Government's Communities for Children initiative (Edwards, Gray et al., 2011; Edwards, Wise et al., 2009), and coordinated approaches such as Victoria's Services Connect (Department of Human Services Victoria, 2013). The former is a place-based early intervention program focused on strengthening families and achieving better coordination of services and supports within each target community. The latter is a strategy that explicitly aims to overcome complicated organisational

structures, policies and programs focused on the many different needs of families living in circumstances of disadvantage and vulnerability. While these are but two of a rapidly growing list of initiatives, they illustrate practical approaches to coordinating the services that seek to strengthen and integrate community capacity to support families with complex, multiple needs.

When it comes to addressing these needs, both policy and the law are framed in the context of the following realities: change is a constant, difference is the norm and complexity is a simple fact of life! This collection of essays both outlines some of the key problems and sketches some of the positive prospects for progress in addressing contemporary social problems that bear on children and their families. Collective awareness of the issues involved and common narratives are the starting points for better coordinated approaches to promoting the resilience of individuals and the wellbeing of their families.

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