

## **Appendix A**

### **Historical context: Family law and social change in Australia 1976–2006**

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As noted in Chapter 1, the *Every Picture Tells a Story* report (House of Representatives Standing Committee on Family and Community Affairs, 2003) that provided the immediate impetus for the 2006 Reforms was, more than anything else, a response to concerns about separated parents' opportunities to spend time with their children. The report considered these concerns but also placed emphasis on the quality of children's post-separation relationships with each parent and the safety needs of both children and former partners.

Issues related to post-separation parenting and parent and child safety are linked to a range of social changes that have been occurring in Australia and elsewhere over several decades. Indeed there has been almost continuous parliamentary and popular debate and discussion about the family law system's responses to social norms and social change since the inception of the Family Court of Australia (FCoA). Social change has been reflected in changes to the legislative base for family law. As Deputy Chief Justice Faulks (2008) put it:

We live under an Act, which is ever-changing, both in its legislative provisions and in its interpretation, and that fact is not likely to change.

One key indicator of the attempts of the family law system (both individual decision-makers and the courts collectively) to accommodate social change has been the large number of amendments to the legislation that have occurred since 1976. At the time of her address to the 12th National Family Law Conference, the Chief Justice (Bryant, 2006) calculated the number of amending Acts to the *Family Law Act 1975* (Cth) to have been 69. The following section considers briefly some of the key reasons why amendments have been so frequent.

### “No fault divorce” and the resolution of disputes

The FCoA began operation on 6 January 1976 at a time of considerable political turmoil and social change. The *Family Law Act 1975* (Cth) created a new federal court<sup>1</sup> with jurisdiction to hear matters arising from marriage breakdown. The Act's most radical innovation was the introduction of a single-hurdle requirement for the dissolution of a marriage. Under the new legislation, an applicant for dissolution needed only to demonstrate that the parties to the marriage had been separated for at least 12 months. John Fogarty, a former FCoA judge, has noted that this single ground (popularly called “no fault” divorce) was so controversial in the early 1970s that the legislation was passed in the House of Representatives by only one vote (Fogarty, 2006). According to Fogarty, the very lengthy parliamentary debates that preceded the legislation were mainly devoted not to what principles and practices would inform post-separation parenting arrangements or the distribution of property (the main decision-making issues confronting any family court), but to arguments concerning the abandonment of the possibility of using fault-oriented grounds to support an application for the termination of a marriage.

Despite the fact that “fault” had been the centre of attention of the parliamentary debates, once the legislation had been passed by both houses, the government of the day somewhat paradoxically expressed considerable confidence with regard to how disputes arising from separation and divorce would be handled. One government release (cited in Fogarty, 2006) saw the new laws 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. (p. 4)

Star (1996) has argued that this prediction proved to be somewhat unrealistic. The reasons for this are numerous. At a broad level, for example, it could be argued that no legislation could have predicted the

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<sup>1</sup> For constitutional reasons, the Australian Government's ability to legislate in the area of family law has been constrained to laws relating to marriage (see Fehlberg, Behrens, & Kaspiew 2008, Chapter 2). A federal law for the regulation of marriage dissolution (one ground was evidenced by 5 years of separation) was enacted in the *Matrimonial Causes Act 1959* (Cth) but jurisdiction was exercised by state courts. Since the late 1980s, the constitutional limits on power have been addressed to a significant extent by states referring powers to the Commonwealth to legislate in relation to children's matters and more recently in relation to financial arrangements. However, neither Western Australia nor South Australia have yet referred these latter powers: see e.g., Senate Standing Committee on Legal and Constitutional Affairs, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, August 2008, ¶ 2.6–2.8).

accelerating rate of social change that was to be a feature of the next 30 years.<sup>2</sup> But two reasons, embedded in the practice of family law from the beginning, are particularly worthy of mention.

The first, a pragmatic issue, relates to resources. In late 1975 was a freeze on public service positions, which in turn meant that the court opened its doors with less than half its designated staff in place. Fogarty suggests that this was a legacy from which the court never fully recovered.

The second issue, of more fundamental relevance to an evaluation of contemporary family law, concerns the very nature of a “no fault” divorce and its consequences (see for example Behrens, 1993). Fogarty (2001) has drawn attention to the confusion that arose about what, if anything, should be the link between “no fault” divorce and decision-making about children and property. On the one hand, he suggests that there was:

... no doubt that the fault based grounds of the past were artificial and hypocritical and led to much unnecessary pain, anguish and cost, especially tied up as they were with issues of property and children. (p. 96)

On the other hand, Fogarty continues:

... the unanswered question was—removal of fault from what?—in particular in relation to children and property. These were not seriously addressed at the time or in the legislation and it has taken the Family Court the next 25 years to work through these issues. (p. 96)

Although, as Fogarty suggests, much of this confusion was gradually attended to, tensions have remained with respect to how the concept of “no fault” in divorce sits beside unacceptable or criminal behaviour within a marriage when decisions about children and parenting must be made (see for example Kaspiew, 2008). The tensions are especially apparent with respect to current contrasting expectations that under normal circumstances children have the right to a meaningful relationship with both parents, and the right to be protected from physical or psychological harm. Logically and morally, the latter right must clearly trump the former. However various studies (see for example Brown, Frederico, Hewitt, & Sheehan 1998; Kaspiew, 2005; Moloney, Smyth, Weston, Richardson, Qu, & Gray, 2007) point to the difficulty the family law courts have experienced in finding an appropriate balance between determining probable risks to safety and the prospect of a continuing parental relationship.

Clearly, informed debate about the extent to which the legislation and those who administer it are adequately meeting the needs of children and other family members at any given time is both healthy and inevitable. It is perhaps no surprise that the family law system continues to be criticised (e.g., Rathus, 2007; Rhoades, 2008) for failing to arrive at a proper balance between promoting ongoing parent–child relationships and promoting safety. At the same time, it is important within the context of an evaluation of any family law system to consider the extent to which the core issues with which judicial officers, legal and family practitioners and the legislation itself grapple, are of family law’s making. Family law responds to social change but inevitably has an impact on the very changes to which it is responding.

Looking back from the vantage point of the FCoA’s then 30 years of existence, Fogarty’s (2006) assessment was that that the greatest changes in this period occurred not within the legislation or within the court, but in the “values and attitudes of society” (p. 4). Family law, he suggested, can be seen during this period as “a remarkable saga of inflated expectations, harsh realities and apparently endless change, but ultimately a triumph over continual adversity”.

Whether or not Fogarty’s view is accepted, it is important to contextualise the major reforms introduced in the Family Law Court’s 30th year by considering key changes that have impacted on the evolution of family law over this period. Four key changes considered below are: women’s increased participation in the workforce; changing understandings of fatherhood; greater recognition and increased intolerance of family violence and child abuse; and an increasing emphasis on the rights of the child. These issues are interlinked in complex ways, but for the sake of brevity are considered separately below.

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2 The title of Star’s book, *Counsel of Perfection*, suggests that there may have been a presumption by family law reform advocates of the day that the legislation itself was capable of ushering in or at least substantially shaping the social changes already underway.

## Key social changes associated with the evolution of family law

### Women's increased participation in the workforce

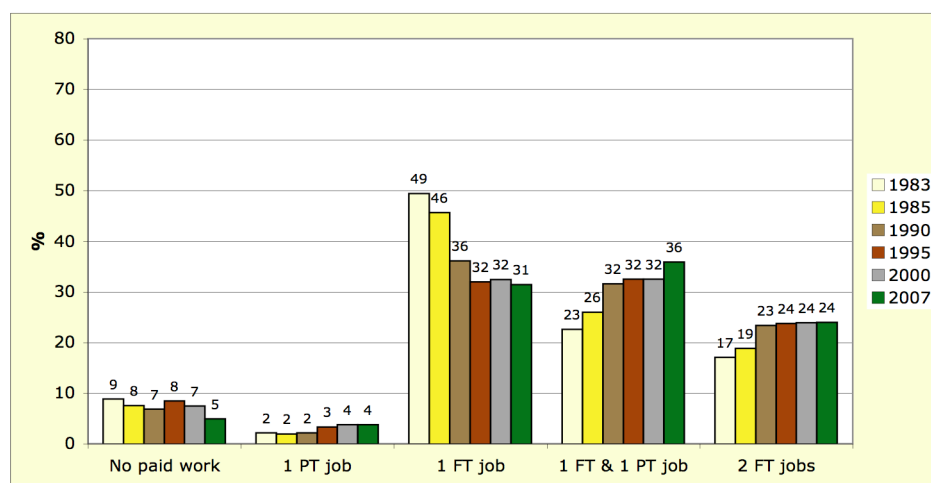
Weston, Stanton, Qu, and Suriano (2001) have summarised changes to women's labour force participation in Australia during the 20th century. They note that until 1966, married women were not permitted to be appointed or to remain as permanent officers in the Commonwealth Public Service after the birth of their first child. This attitude impacted on many women caught up in the post World War II "baby boom", which resulted in the fertility rate being higher in 1961 than it had been at any other time in the century. During this period of high fertility and relatively low workforce participation by women, the divorce rate in Australia remained modest.

Fifteen years later however, the birth rate had fallen below the replacement level of 2.1 babies per woman. It levelled out in the 1970s and 1980s and then fell progressively in the 1990s (Hugo, 2001). Alongside the falling birth rate, Weston et al. (2001) speak of other "push and pull" factors that have contributed to a "revolution" in women's labour force participation (p. 19). These include an increase in housing costs, the prolonged dependency of children due to lengthier education periods, increased education and employment opportunities for women accompanied by less gender discrimination with respect to wages, and the increased availability of part-time and casual work accompanied by greater availability of child care. This in turn was associated with more "family friendly" work places with innovations such as maternity leave being introduced in 1979.

Figure 2.1 below shows trends between 1983 and 2007 in the breadwinning roles of each parent in couple families with dependent children. Here "part-time job" refers to paid work entailing fewer than 35 hours per week.

The figure shows that in 1983, 51% of the couple families had one parent in paid work, whether full-time or part-time and 40% had two parents in paid work, while the opposite applied in 1990: both parents were more likely than only one parent to have paid work (55% cf 38%). This trend has since strengthened, with 60% of couple families having both parents in paid work and only 35% having one parent in paid work in 2007. Families with two full-time breadwinners, however, are less common than those with a single full-time breadwinner or with one full-time and one part-time breadwinner. In fact the latter situation is now the most common one.

**Figure 2.1: Trends in the breadwinning roles of parents in couple families with dependent children, 1983 to 2007**



Notes: A part-time job refers to paid work of fewer than 35 hours per week.

Source: Updated trends provided in Renda (2003). Renda's data were based on ABS Labour Force Status and Family Characteristics (Catalogue no. 6224.0). The 2007 data were based on ABS (2007) Labour Force Status and Other Characteristics of Families (datacube ST FA4).

As Moen and Yu (2000) pointed out, such changes have a ripple effect that can take years to be fully realised. For example, during the period in question, there has been greater emphasis on flexible work hours, working from home, and leave to look after family members. During this same period, increased government-subsidised child care has also been gradually introduced. Such externally-based initiatives

increase the range of options available to parents. In addition however, as rising proportions of mothers have taken on breadwinning responsibilities, attitudes concerning fathers' roles have undergone significant changes.

## Changing understandings of fatherhood

Dermott's (2008) review of the literature suggested that for most of the 20th century, providing a family income—"breadwinning"—was seen as the key component of good fathering. This view happened to dovetail neatly with much of the child development literature, especially the research into attachment processes between children and their mothers, which began with Bowlby (1953) and gathered pace in the remainder of the 20th century. Similar to the child development literature, socio-legal and other academic commentary and research, as well as more popular discourse, largely ignored the potential nurturing role of fathers for much of the century.

Presumptions about the essentially gendered nature of nurturing and emotionally responsive parenting began to be challenged in Australia and in other Western countries in the 1970s.<sup>3</sup> But this same period saw a growing awareness of the role played by men, many of whom were fathers, in controlling their partners and their children through the imposition of violence and abuse (Pizzey, 1973; Walker, 1979; Scutt, 1983). Narratives that emphasise nurturing fathers (with a focus on the needs of the child) and violent fathers (with a focus on safety issues for both partners and children) have developed somewhat independently. The confusion generated by the parallel nature of these narratives is often starkly manifested in debates about what post-separation parenting arrangements are "best" for children.

The question of family violence is dealt with in the following section. In this section, the discourses supporting or challenging the concept of fathers as nurturers are touched upon because they are relevant to legislative assumptions with respect to post-separation parenting. These discourses can be divided into attitudinal surveys, legal/rights-based discussions and psycho-social research.

Attitudinal surveys generally support La Rossa's (1997) observation that since the 1970s the change in fathering identity from provider to provider/nurturer has been a gradual one. In an Australian survey de Vaus (1997) found that a small majority of men (56%) and a large minority of women (45%) continued to agree with the proposition that "a husband's job is to earn the money and a wife's is to look after the family" (p. 7).

From a legal/rights-based perspective, Weitzman (1985) argues that early gender-neutral presumptions about parenting capacity were informed not by arguments that focused on the children's rights or children's psycho-social development, but by arguments supporting the rights of fathers themselves. According to Weitzman, the 1973 change in Californian family law away from a presumption of maternal preference to a presumption (in theory at least) that men were equally capable of parenting their children, had its origins in the 1972 case of *Stanley v. Illinois*. In this case, which Weitzman claims went on to fuel demands from men's groups for more parenting orders to be made by family courts in their favour, it was held that the presumption that an unwed father was not a fit parent was "unconstitutional as a denial of both due process and equal protection" (cited in Weitzman, p. 468).

Somewhat ironically, at that time there was no formal psycho-social evidence that men were capable of being competent parents in the domains of nurturing and emotional support. In summarising the evidence from his first compilation of research on the subject in 1976, Lamb, (1997) observed:

Social scientists in general and developmental psychologists in particular, doubted that fathers had a significant role to play in shaping the experiences and development of their children, especially their daughters. (p. 1)

In his third volume of research findings, Lamb (1997) reached the following conclusion:

We do know ... that mothers and fathers are capable of behaving sensitively and responsively in interaction with their infants. With the exception of lactation, there is no evidence that women are biologically disposed to better parent than men are. Social conventions, not biological imperatives, underlie the traditional division of parental responsibilities. (p. 120)

<sup>3</sup> Some (e.g., Griswold, 1993; La Rossa, 1997) have suggested that the origins of a "new fatherhood" in Western countries can be found in the period of the Great Depression, a period in which the role of some men was less formally associated with financial responsibilities. La Rossa accepts, however, that the major transformations began to manifest themselves in the 1970s.

Assuming that fathers and mothers are equally capable of nurturing children does not necessarily mean that fathers are routinely engaged in their children's lives at this level of intimacy. There are now numerous studies of male and female engagement with domestic tasks and child care. Almost all conclude that women continue to do more of both than their male counterparts and that this cannot be adequately accounted for by differences in patterns of paid work. As de Vaus (2009) has observed:

Men and women have experimented with many ways both to parent and hold down a paid job. Many of these approaches involve mothers and fathers sharing the domestic load more evenly. The theory sounds great. As mothers generate an increasing share of the responsibility for earning the family income so fathers are to play a larger role in domestic work and family care. But ample research has demonstrated that mothers who hold down even full-time jobs continue to be responsible for the larger part of these family responsibilities. (pp. 118–119)

This reported unevenness also spills over into that part of fathers' family responsibilities that involves the hands-on care of children. Estimates vary considerably. According to Craig (2006) for example, Australian time diary data suggest that "becoming a mother markedly increases and cements the differences between the sexes" (p. 139). At the same time, Dermott's (2008) review of a range of studies in the United States, the United Kingdom, Europe and Australia concludes with the following assessment:

... two facts emerge strongly from the data across a number of countries: namely that there has been a trend for increasing amounts of paternal-child time over recent decades (in absolute terms and relative to mothers), and that fathers spend less time with children than do mothers. "New fatherhood" does seem to involve spending relatively more time in childcare (Yeung et al., 2001) but as Smith (2004) concludes using data from 14 European states, fathers, at most, perform around 30 per cent of substantial child care. (p. 43)

Important though the time analysis studies are, it is perhaps more critical to consider the extent to which good-quality fathering actually *matters* to a child. The issues are again complex but the short answer is that good-quality fathering does appear to matter. For example Lamb (2007) has summarised the results of his most recent research into the impact of fathering as follows:

The clear implication is that active paternal involvement, not simply the number or length of meetings between fathers and children, predicts child adjustment ... the better (richer, deeper, and more secure) the parent-child relationships, the better the children's adjustment, whether or not the parents live together. (pp. 16–17)

Lamb's analysis appears to reflect Baumrind's (1968) earlier notion of the relationship between "authoritative" parenting and good outcomes for children, a concept that was later to find strong empirical support in the work of others such as Amato and Gilbreth (1999). "Authoritative parenting" encompasses warmth and involvement, the encouragement of psychological autonomy, and monitoring and boundary-setting.<sup>4</sup> Gottman (1998) even suggested that child development outcomes are better predicted by these sorts of attitudes and behaviours from fathers than by mothers' attitudes and behaviours because fathers' behaviours have been more variable during this period.

Finally and somewhat paradoxically, alongside increased evidence of fathers' involvement in their children's lives is the continuing evidence suggesting a significant minority of fathers who remain largely absent. As Dermott (2008) pointed out, most of these are fathers whose children lived on a permanent basis in households in which there has been a relationship breakdown. In Australia the high level of continuing absence is suggested by surveys of resident parents conducted by the ABS in 1997, 2003 and 2006–07 (reported in ABS, 2008). Insofar as resident parents' reports are an accurate reflection of what is happening, it would appear that there has been little change in the proportion of children under 18 years who see their non-resident parent less than once a year or never (30% in 1997, 26% in 2003 and 30% in 2006–07).<sup>5</sup>

4 Amato and Gilbreth (1999) found that frequency of contact per se had little impact on children's wellbeing (e.g., academic success or symptoms of behavioural or emotional problems). Rather, children appeared to benefit when they and their fathers felt close to each other and where the fathers adopted a responsible ("authoritative") parenting style. See Smyth (2008) for an excellent discussion on the relationship between quality of outcome and the question of how much time a father spends with his children.

5 As noted, these estimates are based on data for children whose resident parent provided information on contact arrangements. The ABS (2008) report indicates that 28% of all children saw their resident parent less than once a year or never in 2006–07. However, this figure was based on all children, including the 7% for whom no information about contact arrangements was available.

Depending on the perspective of the commentator or researcher, these men have been variously described along a spectrum from “defeated dads” to “deadbeat dads” (Braver & O’Connell, 1998). The “deadbeat” label is intended to convey the idea of low engagement usually combined with an unwillingness to assist with financial support. Such an attitude is likely to impact negatively on a child. But of equal or greater concern are fathers whose relationship with their children and/or their partners has been characterised by violence and abuse.

## Increased recognition and intolerance of family violence and child abuse

The 2005 Crime and Safety Survey (ABS, 2005) estimated that 4.8% of the population had been assaulted in the previous 12 months. In all assault cases, 84% of the offenders and 54% of the victims were men. The offender was known to the victim in 47% of cases involving male victims, but in 73% of cases in which the victim was female. Significantly, of the women assaulted, 19% were assaulted by a current or former partner.

This figure of 19% is especially relevant to family law. It is this category of violence that was largely hidden from public view at the time the FCoA opened its doors. Drawing on research conducted in the United Kingdom, Pizzey (1973) provided some of the earliest empirical evidence of largely male-initiated systematic controlling violence towards female partners. In Australia, the first national conference on family violence took place in 1974. Five years later, Scutt (1979) presented an overview of completed and projected research in the area and 4 years after that Scutt (1983) drew the research together more formally. However, these findings did not make their way into formalised policy responses in areas such as family law for a considerable amount of time.

There is now broad consensus about the locus of responsibility for violent acts. In Australia, Jenkins (1990) was one of the first to openly challenge men to move beyond responses like, “She made me do it”. There is also now less ambiguity about the criminal nature of violence and assault when they occur in the home. At the same time, what constitutes violence remains the subject of some considerable disagreement. Therefore as Hegarty and Roberts (1998) have noted, the prevalence of partner abuse in Australia has variously been estimated to be as low as 2% and as high as 28%, depending largely on the definitions used. Using a broad inclusive definition, Sheehan and Smyth (2000) found that 65% of divorced women and 55% of divorced men in an Australian sample reported having experienced some form of violence in their relationship.

In summarising the results of the 2007 Wingspread Conference on violence in the context of family law, Ver Steegh and Dalton (2008) has made the point that agreeing on definitions and understanding contexts matter if the research and practice are to advance. At the same time, studies have consistently found that however defined, the number of *allegations* of violence by members of separating families (mainly women) who make application to the family law courts in Australia is high; the nature of many of those allegations is often serious (e.g., Brown et al., 1998; Kaspiew, 2005; Moloney et al., 2007); and on the best evidence available (Jaffe, Crooks, & Bala 2006; Johnston, Lee, Olesen, & Walters, 2005), such allegations are on balance considerably more likely to be substantially true than otherwise.

Just as intimate partner violence was poorly recognised at the time that the Family Law Act was proclaimed in Australia there was also little formal recognition of the nature and extent of child abuse, even the more obvious signs of physical abuse.<sup>6</sup> Following a New York medical symposium on the subject of childhood injuries, Kempe, Silverman, Steele, Droegemueller, and Silver (1962) provided evidence to suggest that a significant number of parents and caretakers were injuring their children, some to the point of death. The subject was picked up sporadically in other places (e.g., Birrell & Birrell, 1968) in Australia. But these data on child abuse were frequently greeted with such scepticism that Helfer and Kempe (1976) suggested that children’s suffering at the hands of adults was being exacerbated by society’s continued widespread denial. Notwithstanding the scepticism, child abuse did begin to achieve a level of recognition in Australia in the early to mid-1970s (e.g., Colcough, 1972; Department of Community Welfare, Western Australia, 1975; Price & Krupinski, 1976). However, the subject appears to have achieved only limited uptake until, at the earliest, the end of the decade (e.g., Adler, 1979; Connors, 1979).

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<sup>6</sup> Neglect of children has been better recognised. Traditionally, however, these cases have more often come to the attention of state-based welfare authorities and have therefore had less of a profile in family law disputes.

Twenty years on, James (2000) noted that the true extent of child maltreatment has remained very difficult to gauge. An Australian Institute of Health and Welfare (2006) report suggested that between 1999–00 and 2004–05, the number of notifications to the child protection system had doubled. The 1999 estimate of substantiated child abuse for children under the age of 16 had been 5.6 per thousand children. However, as Liddell, Donegan, Goddard, and Tucci (2006) noted, these figures contain a number of discrepancies and possible contradictions, including a wide variation in notification rates between states. It is likely in their view that such figures continue to underestimate the true state of affairs.

The discrepancies in overall reporting rates are large, especially with regard to questions of sexual abuse. James (2000), for example, suggested that some research estimates that up to one in four girls and one in 12 boys have experienced sexual abuse. Estimates by de Mause (1998) based on historical research were even higher. With respect to physical abuse and neglect, Bartollas (1993) has suggested that the incidence in the United States may be as high as 1 in 20 families, with neglect being twice as common as abuse.

In summary, it could be said that during the lifetime of the Family Law Act, society has developed a more sophisticated understanding of the extent and nature of family violence generally, and of intimate partner violence and child abuse—two areas of particular concern to family law. This understanding began from a very low knowledge base, which was in turn supported by significant cultural denial. There is still much to learn about this difficult and complex area of human behaviour and consequently many challenges remain for family law legislation and family courts.

## Increasing emphasis on the rights of the child

As noted, the 1960s and 1970s saw many jurisdictions formally move away from fault-based and gender-based decision-making criteria in post-separation child disputes (Jacob, 1988). In most of these jurisdictions, including Australia, various iterations of the “welfare” or “best interests of the child” became the “sole” or “paramount” decision-making criterion (Dickey, 1997). Consistent with this criterion, early judgments of the FCoA articulated a principle that parenting after separation should be considered not as the right of a parent but as the right of the child. More broadly though, and shortly before the new Australian court opened its doors, Rodham (1973) concluded that children’s rights remained a “slogan in search of a definition” (p. 487).

Hodgson (1992) has summarised the tortuous progress towards the “internationalisation” of children’s rights, which culminated in the United Nations Convention on the Rights of the Child being adopted by the United Nations General Assembly in 1989. As Hodgson notes, in seeking input from so many countries, the final document was inevitably a compromise. But it is a remarkable document for all that. At its core, the convention represents a significant shift in thinking—from the construction of the child as a “potential adult”—as somehow less than fully human and therefore less able to lay claim to the full panoply of human rights—to the perception of a child as a fully fledged citizen (Funder, 1996) to whom the full range of human rights must therefore attach themselves.

Since the acceptance of the United Nations Convention on the Rights of the Child, it has become better appreciated that without a fundamental acknowledgment of this status, determination of a child’s “best interests” is likely to be attenuated by “adultist” overtones (Qvortrup, 1991), whereby children’s needs can easily become a proxy for continuing adult-to-adult relationship issues. Though practical difficulties have persisted, acknowledgment of children’s rights as a starting point has the capacity to humanise social and legal responses to disputes over parenting.

Such a stance also conforms with, though is not dependent upon, psycho-biological research into child development that has continued to push the boundaries of “children as agents” further and further back in time. For example, it is now clear that from birth infants actively reach out to engage with their parents and carers and that, from the very start, parents and carers are intimately involved in reciprocal interactions with children. Like adults, children are not passive recipients of environmental stimuli, but actively shape their worlds (Ridge, 2002).

Appreciation of the child as an “agentic”, thoughtful, attached, curious, yet vulnerable individual has profound implications for the way in which decisions are made about children. In the context of family law, this is summed up forcefully in the *Every Picture Tells a Story* report (House of Representatives

Standing Committee on Family and Community Affairs, 2003), which is considered in greater depth in Chapter 1. In the Foreword to that report Hull observed:

One of the highlights of committee work for parliamentarians is the people we meet. During this inquiry our greatest delight was hearing from nine children and five young adults at our final meeting of the inquiry. These children and young adults were a microcosm of what this inquiry was all about ... They told us their stories and as a result the real meaning of this inquiry was clearly understood. (p. xi)

Later, Hull observed that:

[The child] Jack's pictures (reproduced on the front cover of the report) encapsulate the most important voice of all—the voice of the children. (p. xi)

## The family law system's response to 30 years of social change

From the outset, the Family Court was promoted as a “helping court”, a concept that while commendable in its intention, was as Star (1996) has suggested:

... far removed from the conventional view of courts, which was to punish wrongdoers and to sort out the balance of rights in civil actions. (p. 99)

As Star (1996) has also noted, questions concerning who was to be helped and in what manner, and how such help might be compatible with the adversarial expectations of a duly constituted court, continued to exercise the minds of judges, practitioners and commentators over many years. Indeed, it could be said that tensions between a helping court and an (albeit increasingly modified) adversarial court continued to be a dominant concern for the first 30 years of the Family Court's existence.

Responding to Fogarty's (2006) observation that society's values and attitudes, rather than the legislation itself, have been the key drivers of change during the lifetime of the Family Court, four key areas of social change that have impacted directly on family law during this period have been noted above. But before considering the legislation's interaction with these changes, it is important to reflect briefly on the link between outcomes and the litigation processes that have led to these outcomes—in particular the court's numerous attempts to accommodate itself to early expectations that judicial decisions must be derived from adversarially driven proceedings.

Harrison's (2007) analysis of the Family Court's long road to “less adversarial trials” makes note of the court's first formal attempt to break with the adversarial tradition. In an early case, Mr Justice Watson (cited in Harrison, 2007) described the Family Court's processes as “not strictly adversarial but more in the nature of an inquisition followed by arbitration” (p. 11).

In disagreeing with this formulation, the majority judgment of the High Court in *Re Watson; ex parte Armstrong* affirmed the importance of traditional legal procedures. Perhaps reflecting the passion with which the majority held this view, the judgment pointed to the dangers of the Family Court taking the direction of “palm tree justice”.<sup>7</sup>

The complex and somewhat anomalous nature of Family Court hearings in child related matters is succinctly summarised by Harrison (2007) where she notes that:

[C]hildren are the subject of applications for parenting orders, and in such circumstances the Court must [under s60CA] regard their best interests as the paramount consideration, but [under s100B(2)] they are neither parties nor (except unusually) witnesses to the proceedings. (p. 9)

In balancing this anomaly against the requirement to conduct cases according to traditional procedures Fogarty (2001) and Evatt (1979) have taken some comfort in the fact that the Family Court also possessed its own in-house counselling service. Unlike their legal counterparts, family court counsellors could speak directly with both parents, with or without the presence of their lawyers. Perhaps more importantly, they could speak with the children. They could listen carefully to the children's concerns and anxieties and to the concerns and anxieties that underpinned their parents' applications and affidavits. In so doing, they could establish credibility in the eyes of family members and where appropriate, assist in helping them to find common ground.

<sup>7</sup> Presumably meant to be a derogatory (if somewhat insensitive) term Bala (1986, p. 16) suggests that the expression may have been coined by Bucknill L.J. in *Newgosh v. Newgosh*, a decision not fully reported but noted at (1950) 100 LJ News 525.

From the outset, however, family law clients in dispute over their children were, somewhat confusingly, offered two very different dispute resolution philosophies. As the first Chief Justice put it:

The contrast between the conciliation process and the court proceedings is striking. The court is asked to find a once and for all solution, with all ends neatly tied up. Where the parties are assisted by the counsellor to find their own solution, fluid arrangements can be made to meet the changing needs of people. The counselling process supports people and aims to build up their confidence and ability to cope. The courtroom process can be destructive of morals and can create bitterness for all. (Evatt, 1979, p. 10)

The adversarial trial has been described by Harrison (2007) as a “one off, public, climactic contest” (p. 4). In attempting to impose a once and for all solution on what Dewar (1998) has described as the normal chaos of family law, the adversarial trial fails to address the fluidity that has been found to be to be a common feature of most post-separation parenting arrangements (Smyth & Moloney, 2008). The ambit claims and criticisms made by each parent in adversarial proceedings have prompted observers such as Weinstein (1997) to conclude that such trials are in fact incompatible with the principle of the best interests of the child. But perhaps of greatest significance have been the arguments put forward by eminent commentators such as Kirby (1984), a former High Court judge, and more recently by Davies (2002, 2006), a judge of the FCoA, that challenge the long-held belief that when compared with other systems of inquiry, adversarial processes automatically represent the best method of arriving at the truth.<sup>8</sup>

It is perhaps not surprising therefore, that one significant thread that runs through family law in Australia has been that of multiple amendments (noted above) and procedural reform. These amendments also sit beside multiple reports into the operations of the Act from a range of eminent bodies as well as from individuals and research institutions over the same period.

Cataloguing the amending Acts and the numerous reports into aspects of family law in Australia is beyond the scope of this appendix. A glance at any such list, however, reveals the high proportion of amendments and reports devoted primarily to questions of procedure and process. One example of such a list is the 16 directly or indirectly child-related reports to the Attorney-General accessible through the Family Law Council’s publications portal (retrieved July 2009). Of this list of reports, 10 are mainly concerned with procedural reform. Only a minority are primarily concerned with what might be seen as more substantial child-related issues such as parental child abduction, parental relocation and female genital mutilation.

One of the core insights from the *Out of the Maze* report (Family Law Pathways Advisory Group, 2001) was that good outcomes for children cannot be separated from good processes. The report recognised that the Family Law Act had set up an innovative Family Court but had not created a family law system. It recognised that in a constantly changing social environment, a course of action that would do justice to the concerns of the (usually) two parties to a parenting dispute, and simultaneously represent the interests of the children normally required thoughtful and informed cooperation between a range of services. The report spoke of three core dispute resolution pathways: self-help, supported, and litigation. It emphasised the need for cooperation between a range of services that would strive to be “non-adversarial” in character. It assumed, however, that although it would be tempered by the extensive range of supported services, litigation would remain essentially adversarial.

Clearly, *Out of the Maze* provided an expanded vision of family law as a system. At the same time however it supported, perhaps by default, an ongoing disconnect between litigation and non-litigation processes. It could be argued therefore that although the *Out of the Maze* report endorsed the use of two non-litigation processes (self-help and support) whenever possible, it also retained a vision of processes in more challenging cases whereby decisions were reached only after ambit claims and

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8 This critique, inevitably inadequate in the space available, does not mean to underplay the considerable difficulties that moving from adversarial processes has entailed. Nor, as a number of commentators have noted, is it a simple case of a process being clearly “adversarial” or “not adversarial”. As O’Ryan (2004, p. 10), a judge of the Family Court of Australia put it: “The Family Court is aiming ... to move from being adversarial with slight elements of inquisitorial procedure, to significantly less adversarial procedure with significant elements of inquisitorial procedure.”

Significantly, Harrison (2007, p. 8 note 52) cites the following reflections of former Chief Justice Alistair Nicholson in a paper delivered to the ACT Council of Social Services in 2006.

... I reasoned ... that countries that otherwise represented the cradle of European civilisation could not have consistently got everything wrong since Napoleon’s demise and thought that some insights might be gained from that system.

counter-claims had been considered in an essentially adversarial setting, sometimes at great financial and emotional cost to the parents and the children. This was to be the filter through which debates linked to key social changes would continue to take place.

The following sections discuss family law responses to the changing role of parents (which is closely linked to the changing roles of women and men); to the issue of family violence and abuse; and to the growing emphasis on children's rights.

## Parenting, gender and family law

In the first year of its existence, the court clarified its formal position regarding any presumed link between gender and parenting. In its judgment in the case *In the Marriage of Raby*, the Full Court of the Family Court (cited in Dickey, 1997) noted:

We are of the opinion that the suggested "preferred" role of the mother is not a principle, a presumption, a preference or even a norm. It is a factor to be taken into consideration where relevant. (p. 395)

Despite such statements, "gender bias" became and has remained a common criticism of the Family Court. To address such criticisms at a more empirical level, the Family Court commissioned two outcome studies of defended hearings some 12 years apart.<sup>9</sup> In the first study, Horwill and Bordow (1983) drew on 100 consecutive defended cases from the Sydney and Melbourne registries of the court. In the second, Bordow (1994) reported on the results of 294 defended cases gathered from judges throughout Australia with the full support of the then chief judge. The raw results have been variously reported, but possibly the clearest summary of the outcome of both studies can be found in the pie charts constructed by Bordow (1994, p. 255). Among other things, these charts indicate that in both studies, men were "successful" in contested applications for custody (as it was then called) in 31% of the cases. As they were primarily quantitative studies, the authors were able to make only generalised comments on what if any gender-based approaches to parenting disputes were apparent in the judgments.

Moloney (2001a) conducted a qualitative analysis of all Family Court appeal judgments in closely contested parenting cases heard between 1988 and 1999. His findings were similar to those that had been earlier articulated by Berns (1991) in a non-randomised sample<sup>10</sup> of 19 parenting judgments delivered between 1976 and 1990. Berns likened the attitude of judges in these cases to that of Rousseau (1911), who had portrayed mothering as a genetically endowed full-time occupation.<sup>11</sup> The evidence, Berns (1991) suggested, pointed to a dominant judicial discourse over this period in which:

... mothers are (by nature or compulsion) strong and loving and willing to sacrifice their own freedom and interests to the needs of their children ... [On the other hand, fathers] must ultimately find any interference with their freedom and autonomy irksome and difficult to maintain. (p. 243)

In another qualitative study of relatively early Family Court judgments in Australia, Hasche (1989) concluded that her findings confirmed those of Polikoff (1983a; 1983b) in the United States, and Boyd (1987) in Canada:

... that judges penalise mothers who are in paid employment for not spending sufficient time with their children and that judges attach significance to a father's remarriage in terms of the availability of substitute female care. (Hasche, 1989, p. 220)

These findings tend to reflect the difficulties faced by family courts in capturing the degree of social change at any point in time, or in accurately reflecting the lag between the reality and the public perceptions of such change. O'Hare (1995) for example found that most women surveyed in her American study continued to view breadwinning as the crucial role for husbands and fathers. Closer to

9 The data for these studies were gathered in 1980 and 1992.

10 Berns (1991) was clear about the sampling limitations and purpose of her inquiry, which she noted:

... does not constitute a sustained criticism of the actual decisions reached by the court in the custody and access cases examined ... My concern is not with the outcomes but with the modes of discourse and reasoning and the ways in which those discourses reconstruct and legitimate conceptions of masculinity and femininity. (p. 223)

11 The ... tender care she owes her children are such obvious and natural consequences of her position that she cannot without bad faith refuse to listen to the inner sentiment which is her guide, nor fail to recognise her duty in her natural inclination. (Rousseau—translation by Foxley, 1911, p. 149)

home, de Vaus's (1997) survey of Australian family values summarised both men's and women's views on mothers in the paid workforce with the observation that:

Overall the acceptance of mothers [in the paid workforce] is conditional on her responsibility to her children and her family. (p. 6)

On the basis of such surveys, therefore, it could be argued that the Family Court's judgments at this time were broadly reflective of public expectations, but at the same time may not have been responding adequately to the less obvious shifts in expectations from some of the parents (mainly fathers) who found themselves in the family law system.

Partly as a result of these difficulties, the Family Law Council's (1992) report, *Patterns of Parenting After Separation*, attempted to soften the distinction between one parent (usually the mother) being seen as the "real" parent, while the other (usually the father) was seen as a visitor. The report recommended a change in legislative language because the terms "custody" and "access" were thought to suggest both a proprietorial and a de facto gendered attitude to parenting after separation. The report emphasised "cooperative parenting" after separation, resolution of disputes through mediation and the use of parenting plans rather than traditionally formulated orders.

Changes along these lines incorporated into the *Family Law Act 1975* (Cth) by the *Family Law Reform Act 1995* (Cth) were associated with an increase in the proportion of men who formally signalled a wish for a greater post-separation parenting role in the lives of their children via applications to the court. Many did this through contravention applications, which were at that time one of the few litigation remedies available to parents seeking to restore or increase the amount of parenting time they had previously been granted as a result of previous orders.

Rhoades, Graycar, and Harrison (2000) found that the number of contravention applications by fathers almost doubled (from 786 to 1,734) in the year after the legislation was enacted. This number continued to increase by an average of 11% of applications per year over the next 3 years. When the authors studied a small sample (6%)<sup>12</sup> of the 1,765 applications filed in 1998–99, they found that the applications were dismissed in 45% of the cases and that in a further 17% of cases they were considered to be of a minor nature. "Make up" contact orders (i.e., additional time to compensate for time lost) were made in 10% of this sample. The authors noted without further comment that:

Several judges and judicial registrars who were interviewed commented that contravention applications frequently had no merit and were often pursued as a way of "controlling" the resident parent's life rather than expressing a genuine grievance. (p. 96)

Moloney (2001b) and Parkinson (2001) expressed concerns about a number of the core claims made in this report. Within the context of what Parkinson described as a relentlessly negative portrayal of separated and divorced fathers, both authors pointed to what they saw as significant sampling issues and a proclivity to offer interpretations of the data based on evidence that was limited or insufficiently transparent. Dewar and Hunter (2001), on the other hand, broadly supported the findings of Rhoades and her colleagues, noting among other things that they were consistent with those of earlier work by Dewar and Parker (1999). At the core of many of the concerns expressed by researchers such as Dewar and Hunter (2001) is the question of making decisions, especially at the interim phase that are both child focused and safe.

## Family violence, child abuse and family law

Following her review of the Family Court's first 20 years, Star (1996) concluded that during this period there had been an inadequate recognition of family violence in Australian law generally and in the Family Court in particular. Family law's quite muted response to issues of family violence until the mid-1990s<sup>13</sup> probably reflected society's general ignorance of, or unwillingness to acknowledge, both the existence and seriousness of "violence in the home". In addition to the extent to which the question *was* brought to the court's attention, it has been suggested by Graycar (1995) that the "no fault" philosophy had become such a central tenet in family law that the concept had spilled over into considerations concerning custody of children and property distribution.<sup>14</sup> These sentiments were

<sup>12</sup> It is not clear how this sample was obtained.

<sup>13</sup> However, the issue of child sexual abuse, which correlates with family violence, was formally raised earlier than this (see Family Law Council, 1988; Parkinson, 1990).

<sup>14</sup> See also the remarks made by Fogarty (2006) noted earlier.

echoed in early judgments at first instance (see *In the Marriage of Heidt* in 1976) and in the Full Court of the Family Court (see *In the Marriage of Smythe* in 1983). According to Star, the Report of a 1908 Joint Select Committee had proposed amendments that would take violence into judicial consideration, but this was never acted upon. It was not until a Full Court judgment in *In the Marriage of Jaeger* in 1994 that a connection between violence and outcome was less ambiguously endorsed.

Consistent with the broad approach to “domestic violence” (as it was called) during this time, Horwill and Bordow’s (1983) research into outcomes of contested “custody cases” (the language of the day) made no reference to allegations of violence and child abuse. It was perhaps a sign of the times in which this report was written that the authors described the sort of cases that proceeded to defended hearings in the Family Court in the following terms:

It should be noted that defended cases in general can be regarded as atypical because of the “selection” process involved in getting to that stage—a process affected by such things as how people respond to the conciliation process, how the parents’ lawyers see the case and its prospects and the advice they give, parents’ ability to pay the costs involved, their ability to cope with a lengthy time of uncertainty and conflict, and their determination to push their view as far as possible. (Horwill & Bordow, 1983, pp. 369–370)

When Bordow (1994) set out to replicate this study, the words “violence” and “abuse” were again not mentioned in reporting of the results. However, the summary of findings includes the following:

Another atypical feature of defended custody cases is the presence of a significant number of allegations of physical and emotional misconduct by one or both of the parents. (p. 262)

The word “misconduct” sits uneasily in the context of a spate of later research findings in Australia and overseas<sup>15</sup> that increasingly named serious violence and abuse as a significant issue in a percentage of family separations and in a percentage of child-related applications made to the Family Court.<sup>16</sup> Most of the research and commentary on violence and abuse in the context of family law dates from the mid-1990s. There were, however, significant exceptions.

In a thought provoking article in the first edition of the *Australian Journal of Family Law* (AJFL), for example, family violence was linked to violence that had at that time been perpetrated against the Family Court itself (Abrahams, 1986). Over the next 8 years, this key Australian journal published six articles on family violence and child abuse (Alexander, 1988; Chappel & Strang, 1990; Ingleby, 1989; Parkinson, 1990; Simpson, 1991; Behrens, 1993). A more sustained interest in how family violence and child abuse should be dealt with in the context of family law became evident in AJFL in 1994, when questions of mediation, power and violence were explored and debated (Astor, 1994; Gribben, 1994; Wade, 1994) and forensic questions relating to child sexual abuse were discussed (Tilmouth, 1994). That year also saw the then Chief Justice of the Family Court begin to speak loudly and consistently on questions of family violence and abuse. Nicholson (1994) noted, for example that:

We have listened to the call from voices in the women’s sector particularly for procedures to appreciate the hidden nature of abuse and the severe impediments to disclosure. (p. 198)

The next year (1995) saw an edition of AJFL devoted entirely to the question of violence and abuse in the context of family law, and in the year that followed, Keys Young (1996) was commissioned by the Australian Government Attorney-General’s Department to undertake a study into the issue of family violence and the practice of mediation. Keys Young consulted with staff in 12 of the Australian Government funded community-based family mediation services, and conducted exit surveys with clients in all states. The ensuing report suggested that a broad range of violence was common in families presenting for mediation and that agencies tended not to identify a considerable number of these cases. On the other hand, the report found, as two major reports had also found a little earlier,<sup>17</sup> that women in many of the cases identified as involving violence, reported satisfaction with the mediation processes and with the outcomes.

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15 These are identified and critiqued in the AIFS report *Allegations of violence and child abuse in family law children’s proceedings* (Moloney et al. 2007).

16 Parkinson (1995), however, has noted that Bordow (personal communication, 1994) revealed that in this same sample of cases 22% contained affidavits that alleged violence towards the wife (presumably by the former husband or partner), while 2% of cases contained allegations of violence by the wife’s new partner. In addition, 7% of the cases contained allegations of child sexual abuse by the father and another 3% contained allegations of abuse (type unspecified) towards children by others, such as stepfathers or family relatives.

17 See Love, Moloney, & Fisher (1995); Moloney, Fisher, Love, & Ferguson (1996)

Cleak, Bickerdike, and Moloney (2006) reported on the recruitment of professionals from family violence services to support women who had suffered abuse but nonetheless wished to resolve post-separation disputes without litigating. They noted that the Keys Young report had helped to galvanise the mediation sector into adopting more systematic and more reliable instruments and protocols to assist in the identification of family violence and to make a judgment about victims' capacity to participate effectively in family mediation. One important development that occurred shortly after the Keys Young report was published was that specialist intake and screening for family violence and abuse became a requirement for government accreditation of family dispute resolution programs.

By the late 1990s, Brown et al. (1998) had declared family violence to be part of the Family Court's core business. An important initiative of the Court that arose from the research of Brown and her colleagues was the instigation of a pilot project, called "Magellan" to try and reduce the number of court interventions, to reduce the time taken to resolve the matter, and to increase the coordination and quality of information available from each of the intersecting parties involved in investigating and presenting evidence to the court in complex matters involving allegations of sexual abuse or serious physical abuse of children. The Magellan pilot program commenced with 100 cases from June 1998 to December 2000. The evaluation of the pilot showed promising results (Brown et al., 2001). Since 2003, the Magellan case-management approach has been progressively rolled out nationally—though it is not available in all registries of the court. Higgins (2007) compared cases that had progressed through Magellan (prior to the broad 1 July 2006 changes to the family law system) with cases in registries where Magellan had not yet been implemented. His results showed that Magellan was a positive, innovative response to a chronic jurisdictional problem whereby information, and expertise, on child abuse cases brought to the family law courts often reside with state/territory child protection authorities.

Under Magellan, state and commonwealth jurisdictions have cooperative protocols for investigating and making recommendations about alleged abuse within agreed-upon time frames. Significantly, an expanded version of this concept in Western Australia (called Columbus) has focused on allegations of violence in addition to allegations of child abuse. The careful evaluation of the Columbus project (e.g., Murphy & Pike, 2003) suggests that this approach has had a number of significant positive spin-offs, including the creation of a more integrated approach to abuse and violence within the Family Court of Western Australia itself.

An Australian Institute of Family Studies examination of allegations of child abuse and family violence in family law children's cases (Moloney et al., 2007) set out to build on earlier studies (e.g., Kaspiew, 2005) and to produce baseline data on this issue prior to the passing of the *Shared Parental Act 2006*. The study examined: (a) the prevalence and nature of allegations of family violence and child abuse in children's proceedings initiated in 2003; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.

The study found that 48–55% of cases in samples of clients who made or responded to allegations within the Family Court or the Federal Magistrates Court, but who did not proceed to a judicial hearing, and 63–79% of cases in samples that went as far as judicial determination in the Federal Magistrates Court or the Family Court, contained allegations of spousal violence. In addition, 22–24% of cases in the non-judicial determination samples, and 11–46% of cases in the judicial determination samples, contained allegations of parental child abuse. Across courts and samples, the tenor of allegations was most commonly classified by the research team as "severe" (i.e., suggesting significantly injurious or abusive circumstances).

Despite these high rates of often quite serious allegations, there was frequently little evidentiary material to support allegations (especially in the non-judicial determination samples). Except for cases in the Family Court judicial determination sample, there were fairly high rates of non-response to allegations of spousal violence; and when responses were made, they generally contained low levels of detail and low levels of corroborative evidence. These data suggest that much of the legal advice being given and most of the legal decisions being made in this pre-reform environment appeared<sup>18</sup> to be taking place in the context of widespread factual uncertainty.

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<sup>18</sup> A cautionary note is required here. The total number of files examined was 300 and the locations were confined to Melbourne and Adelaide. It is possible that a larger sample may have told a different story or that samples taken from other states may have revealed different patterns of practice.

The small percentage of allegations of spousal violence or parental child abuse that were accompanied by detailed evidence of strong probative weight did appear to impact on court orders. But without such detail or without such evidence (by far the most common scenario) allegations did not seem to be formally linked to outcomes. For the majority of cases in this sample, the parenting orders made in cases in which violence or abuse were alleged were indistinguishable from the orders made where no such allegations had been made.

## The impact of an increased emphasis on children's rights

Rodham's (1973) view, noted earlier, of children's rights as a "slogan in search of a definition" could be said to have characterised family law in Australia for much of the first 20 years of the operations of the Family Law Act. Between 1976 and 1994, the recommended grounds for ordering what was then called "separate representation" for a child were, broadly speaking, confined to situations in which the child was thought to be at serious risk and/or situations that were in the unusually complex category. These criteria, outlined by Lambert (1980), were effectively endorsed by the Joint Select Committee's (1992) report on the operations and interpretation of the Family Law Act. Although the criteria were significantly expanded in the judgment, *Re K* in 1994, the then Chief Justice suggested the following year that the representation of children continued to be a "Cinderella" area of family law (Nicholson, 1995 cited in Keough, 2000, p. 29).

The question of how to represent children in family law proceedings also proved to be problematic. Almost 10 years after the passing of the legislation, Broun (1985) observed, perhaps with provocative intention, that the representation of children in family law cases remained a legal absurdity because, in effect, children had no legal standing in family law proceedings. Keough (2000) has reported and commented on key early judgments and statements regarding the role and even the legitimacy of appointing "separate representatives" for children in family law cases. Although the judgments worked towards clarifying the role and improving the status of the children's lawyer, they all alluded to systemic difficulties within the legislation itself in placing children's needs at the centre of parenting disputes.

Australia ratified the United Nations Convention on the Rights of the Child in December 1990. In its judgment in *Re K*, the Full Court noted that:

In developing these guidelines, we have had regard to the provisions of the United Nations Convention on the Rights of the Child and in particular Article 9 and 12 thereof ... we are satisfied that all of the guidelines that we propose are not only consistent with the requirements of Articles 9 and 12, but further these objectives. *Re K [1994] FLC 92-461*

However, both the status of the child and the status of the children's lawyer have remained difficult to reconcile with traditional adversarial processes, which, despite the many modifications that have been introduced over the years, continue to default to a position in which adult-oriented concerns find their way to the forefront of the negotiation and litigation processes. The funding required to expand the role of legal representation of children in the sort of situations envisaged in *Re K* has also been an ongoing problem. In 2001, the *Out of the Maze* report (Family Law Pathways Advisory Group) noted that although the Australian Law Reform Commission and the Family Law Council had considered these matters and had made broad-ranging recommendations, much remained to be done. It recommended:

That the development of clearly defined roles for, and responsibilities of, child representatives be given urgent priority, with adequate funding allocated to support implementation. (Recommendation 21)

The other major way in which children have been directly represented in litigation has been via Family Reports, written by independent court-appointed experts, usually recruited from the ranks of psychology or social work. Although there have been questions relating to issues such as hearsay evidence and the extent to which cross examination would be permitted, the use of independent expert witnesses to report primarily on the needs, perceptions and attachments of children in dispute has not generally proved to be problematic. It could also be said that compared with the practice of reports being supplied by experts employed (and paid for) by one side to the dispute, the possibility of reports of such an independent nature being available to the courts has been a potential positive.

That potential, however, has been tempered by the fact that the timely supply of sufficient reports has, from the very early days of the court's existence, been a problem (Star, 1996). For many years, there were difficulties in juggling the competing needs of judges' requirements for interim reports and reports for final hearings. There were also difficulties in deciding what percentage of the court's resources

should be taken up by the assessment and reporting functions of its family court counsellors (as they were then called) and amount of time they should devote to the more potentially preventative work of conducting conferences (or what later became known as mediation).

The problem of the timely supply of Family Reports appears to have continued. In the study of allegations of violence by Moloney et al. (2007), most of which were in the serious allegation category, the majority of cases that did not proceed to final judgment had no independent Family Report to assist the negotiations or the decision-making. Even in those cases that proceeded to a final hearing, a substantial minority did not have the assistance of a Family Report.

On the broader question of focusing on children's rights in the family law system, the *Out of the Maze* report made the following observation:

[T]he Advisory Group has determined that the current arrangements are unbalanced. There is not enough ... focus on the best interests of the children, or on child-inclusive practices in services. (Family Law Pathways Advisory Group, 2001, p. 15)

In the same year, however, the Australian Government funded a professional development program for the community-based sector that offered further training to professionals to assist separated parents to resolve disputes in ways that focused directly on their children's needs (Webb & Moloney, 2003). This initiative led to the Children in Focus program and the widespread promotion of child-focused and child-inclusive practices (Moloney & McIntosh, 2004). These interventions and the educational resources that underpin them (e.g., McIntosh, 2005; McIntosh & Moloney, 2006) have since become common practice in family dispute resolution. McIntosh and her colleagues have now completed wave four of a longitudinal study of outcomes for high-conflict families who had participated in child-focused and child-inclusive family dispute resolution. The most recent of these (McIntosh, Wells, Smyth, & Long, 2008) provides encouraging evidence with respect to the efficacy of these interventions.

## Conclusion

Gender, patterns of care and paid work, violence and other family dysfunction, and the rights of children, have been key issues underpinning family law since the FCoA opened its doors in 1976. As we have expanded our knowledge base of each of these areas and of the ways in which they interact, the need to link social sciences with family law principles and processes has become increasingly compelling.

The 2006 reforms represent the most recent attempt to have family law reflect the social realities of family life. They have attempted to respond in the best way possible to a range of competing needs—to focus primarily on the needs, attachments and wishes of children of separation, to keep children and parents safe, and to support ongoing parenting and other meaningful relationships between children and those who care for them.

Importantly, the 2006 reforms built in an evaluation component designed to empirically test its basic aims after 3 years. The time frame is of course too tight to definitively answer key questions such as whether or not there has been a cultural shift with respect to post-separation parenting and dispute management processes. On the other hand, the time frame has permitted important data to be gathered from parents, services, lawyers and courts. These data do provide important insights that can inform practice. Just as importantly, they provide invaluable baseline data against which future progress in family law and broader questions related to cultural change can be assessed.

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