



# Introduction, background and methodology

In 2006, the Australian Government introduced a series of changes to the family law system. These included the implementation of changes to the *Family Law Act 1975* (Cth) (*FLA 1975*) through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*SPR Act 2006*)<sup>1</sup> and increased funding for new and expanded family relationships services, including the establishment of 65 Family Relationship Centres (FRCs) and a national advice line. The reforms aimed to “represent generational change in family law” and to bring about “a cultural shift” in the management of parental separation, “away from litigation and towards co-operative parenting”.<sup>2</sup>

The policy objectives of the 2006 reforms were to:

1. help to build strong healthy relationships and prevent separation;
2. encourage greater involvement by both parents in their children’s lives after separation, and also protect children from violence and abuse;
3. help separated parents agree on what is best for their children (rather than litigating), through the provision by governments and other organisations of useful information and advice, and effective dispute resolution services; and
4. establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.<sup>3</sup>

In 2006, the Attorney-General’s Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)<sup>4</sup> commissioned the Australian Institute of Family Studies (AIFS) to evaluate the impact of the changes. The purpose of the evaluation was to assess the extent to which, by 2009, the reform package has been effective in achieving its policy objectives, where evidence was available to do this. The information collected in the course of the evaluation and associated research will also provide a baseline against which further changes can be compared.

This report presents the findings of the Institute’s evaluation of the impact of these changes some two to three years after the commencement of the “roll-out” of the reforms.

This chapter provides a brief overview of the family law system in Australia and the development of the 2006 family law reforms, a detailed description of the reforms and a discussion of the evaluation methodology adopted.

## 1.1 Background to the 2006 family law reforms

### 1.1.1 The *Every Picture Tells a Story* report

The impetus for the 2006 reforms came from the recommendations of an inquiry by the House of Representatives Standing Committee on Family and Community Affairs (2003; the *Every Picture Tells a Story* report).

<sup>1</sup> As this report is oriented towards a broad audience rather than a specifically legal one, references to provisions introduced by the *SPR Act* will be preceded by *SPR Act*, for the sake of simplicity and clarity. Technically, of course, such provisions are *FLA* provisions. However, given that different amendments to the *FLA* are discussed in this report, references are based on the amending Acts where appropriate and relevant.

<sup>2</sup> Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p. 1.

<sup>3</sup> For further details, see the 2007 Evaluation Framework, reproduced in Appendix B.

<sup>4</sup> At the time, the department was called the Department of Families, Communities and Indigenous Affairs (FaCSIA); however, for simplicity, it is referred to as FaHCSIA throughout this report, except when referring to publications issued under a previous departmental name.

An earlier report by the Family Law Pathways Advisory Group (2001; *Out of the Maze*) made a number of recommendations for changes to the way in which relationship breakdown was dealt with in Australia. The Australian Government's response (Family Law Pathways Taskforce, 2003) led to the then Attorney-General and the then Minister for Children and Youth Affairs to make a reference in June 2003 to the Standing Committee on Family and Community Affairs, requiring it to consider three questions in relation to family law matters (House of Representatives Standing Committee on Family and Community Affairs, 2003). These were:

- (a) given that the best interests of the child are the paramount consideration:
  - (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular 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;
  - (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents; and
- (b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children. (p. xvii)

The Standing Committee (2003) undertook a range of public hearings and received 1,716 submissions. In *Every Picture Tells a Story*, it made 29 recommendations. These included recommendations for legislative reforms, systemic change, a re-evaluation of the child support system and the implementation of measures to improve public understanding of the system and provide support for positive parenting and family relationships. The most relevant aspects of the recommendations for this report are summarised in the following sections, together with an explanation of whether or not they were implemented.

## Recommendations for legislative change

The committee did not recommend in favour of a rebuttable presumption of equal time with each parent. Rather, it suggested a range of changes to Part VII of the *FLA 1975*, central among them being the introduction of two presumptions. The first was a presumption *in favour* of equal shared parental responsibility (Rec. 1). The second was a presumption *against* shared parental responsibility in circumstances where there was entrenched conflict, family violence, substance misuse or established child abuse, including sexual abuse (Rec. 2). These recommendations reflected the committee's finding that "violence and abuse issues are of serious concern" (¶ 2.22).

As described in Section 1.2.5, the committee's recommendation in relation to the equal shared parental responsibility presumption was implemented (*SPR Act 2006* s61DA), with the issues of family violence and child abuse being dealt with by the creation of provisions outlining circumstances in which the presumption may be not applied (s61DA(2)) or rebutted (s61DA(4)), together with other provisions in relation to family violence and child abuse.<sup>5</sup>

Further changes reflecting the recommendations of the committee include the recognition in an Objects<sup>6</sup> clause of the need to ensure that parents are given an opportunity for "meaningful involvement in their children's lives" (*SPR Act 2006* s60B(1)(a)), the inclusion of an explicit obligation to consult on major long-term issues where there is an order for shared parental responsibility (Rec. 3, *SPR Act 2006* s65DAC), and changes to the language of "contact" and "residence" (Rec. 4). While the committee favoured the adoption of terminology such as "parenting time", the terminology implemented is based on the "person with whom a child is to live" (*SPR Act 2006* s64B(2)(a)) and "the time a child is to spend with another person" (e.g., *SPR Act 2006* s64B(2)(b)).

5 These included s60CC(2)(b), which makes "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence" one of two primary considerations in the list of "matters" a court should consider in determining what is in the child's best interests (s60CA). A similar provision is included in the Objects: s60B(1)(b).

6 The "Objects and Principles" clause at the start of Part VII, "Children", of the *FLA* (which deals with children's matters) are intended to outline the principles that guide the court's application of specific provisions (*B and B: Family Law Reform Act 1995* (1997) FLC 92-755 ¶ 9.54).

## Recommendations for systemic change

The committee's recommendations in relation to systemic change reflected a number of concerns. Key among them were the need for a system with clearer entry points and pathways so that separated families could more easily access services appropriate for their needs (e.g., Recs 10, 11) and the need for a mechanism whereby allegations of family violence and child abuse could be investigated in a timely manner by suitably qualified professionals (Rec. 16).

A central plank in its vision for a reformulated family law system was the creation of a Families Tribunal (Rec. 12). The role for this non-adversarial, multidisciplinary body was envisaged to be twofold. First, it would have a role in determining parenting disputes (Rec. 12), with only those involving entrenched conflict, family violence, child abuse and substance misuse to be decided by the courts. Second, it would have an investigatory role for allegations of family violence and child abuse (Rec. 16). Under the committee's proposal, participation of legal advocates and experts in decision-making proceedings in this tribunal would be at the sole discretion of the tribunal (Rec. 12), and its decisions would be reviewable by courts only on the grounds of natural justice or *ultra vires* (beyond power) (Rec. 17).

The Families Tribunal proposal was not implemented. Beyond the already existing services and protocols, the 2006 reform package made no provisions for the investigation of allegations of family violence and child abuse in the federal family law context. Nor did the reform package change the jurisdiction of the courts beyond establishing the legal framework for family dispute resolution (FDR) with exceptions.<sup>7</sup> According to the Australian Government's (2005) response to the *Every Picture Tells a Story* report, the Families Tribunal recommendation was not implemented because "it consider[ed] the committee's objectives [could] be better met through the new network of Family Relationship Services and through changes to court processes" (p. 12).

The reform package did, however, establish and provide additional or ongoing support for a number of family relationship and dispute resolution services, described in more detail in Section 1.2. These included the establishment of the FRCs and a national advice line.

In addition, the report recommended a simplification of the structure of courts exercising *FLA* jurisdiction to create one "federal court with family law jurisdiction with an internal structure of magistrates and judges" (Rec. 18). This was not implemented.<sup>8</sup>

## Recommendations concerning child support

In relation to child support, the committee recommended that a re-evaluation of the Child Support Scheme be undertaken by a ministerial taskforce. Largely on the basis of the resulting Ministerial Taskforce on Child Support (2005) report, *In the Best Interests of Children: Reforming the Child Support Scheme*, the Australian Government introduced a new Child Support Scheme, which entailed a new formula for the assessment of child support payments.

The changes to the Child Support Scheme aim to better balance the interests of both parents and be more focused on the needs and costs of children. Compared with the formula used in the initial scheme, the new formula takes greater account of the costs of children, each parent's income and the time they spend caring for children. The recommendations of the taskforce were implemented in three stages, with the final changes coming into full effect in July 2008.

<sup>7</sup> The nature of FDR, the issuing of certificates to permit individuals to proceed to court, and the circumstances in which exceptions to the requirement to attempt FDR are made, are described in detail in Chapter 5.

<sup>8</sup> However, in 2008, the Attorney-General, the Hon. Robert McClelland MP, requested the AGD and Des Semple & Associates to conduct a review of the courts. The report of the review, *Striking the Right Balance: Future Governance Options for Federal Family Law Courts in Australia*, was released in November 2008 (Des Semple & Associates & AGD, 2008; the Semple report). After further consultation, the Government announced in May 2009 that it would substantively implement the recommendations of the Semple report by creating a single Family Court with two divisions (Attorney-General for Australia, 2009). The first division of this court will hear appeals and the more complex first-instance matters and the second division will hear all other first-instance matters.

## 1.2 The family law system after 1 July 2006

This section describes the key changes made to the family law system as a result of the 2006 reforms.<sup>9</sup> From 1 July 2006, the family law system comprised a range of government-funded and private organisations delivering family law services—including relationship assistance and advice, mediation or family dispute resolution (including that offered by legally qualified FDR practitioners), legal advice and court-based services—as well as the courts themselves and the supporting legislation. There was also an education campaign to inform people about the changes and how they might be affected by them.

### 1.2.1 Legislative and service delivery elements of the reforms

The legislative reforms comprised four main elements that:

- require parents to attend family dispute resolution before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse (*SPR Act 2006* s60D);
- place increased emphasis on the need for both parents to be involved in their children's lives after separation through a range of provisions, including the introduction of a presumption in favour of equal shared parental responsibility (*SPR Act 2006* s61DA, see also s60B(1)(a), s60CC(2)(a));
- place greater emphasis on the need to protect children from exposure to family violence and child abuse (*SPR Act 2006* s60B(1)(b), s60CC(2)(b)); and
- introduce legislative support for less adversarial court processes in children's matters (*SPR Act 2006* Division 12A of Part VII).

The amendments to the *SPR Act 2006* were accompanied by changes to the service delivery system. In addition to the FRCs, new services included Family Relationships Online (FRO) and the Family Relationships Advice Line (FRAL), a national telephone service.

### 1.2.2 The family relationships sector

The 2006 reforms were partly shaped by the recognition that many of the disputes over children following separation and divorce have their origins in, and are maintained by, family relationship difficulties, especially ongoing relationship issues between former partners. Many of the difficulties were recognised as being essentially relationship problems rather than legal ones. As such, they were seen to be better suited to community-based interventions that address disputes at this level.

The main systemic change implemented as a result of the 2006 reform process was the establishment of 65 FRCs throughout Australia and a national advice line. The first FRCs commenced operation from 1 July 2006 and, with one exception, the full complement was operational by July 2008. These centres aim to provide assistance for families at all relationship stages. They are staffed by independent professionals who, in a welcoming, safe and confidential environment, offer impartial referral, advice and information aimed at strengthening family relationships. They also act as a key service for the provision of FDR. A range of other services have been introduced or expanded as part of the Family Relationship Services Program (FRSP) and the following have been included in the evaluation:

- The **Family Relationship Advice Line (FRAL)** is a national telephone service established in July 2006 to assist families affected by relationship or separation issues. It provides information on family relationship issues and advice on parenting arrangements after separation. It also comprises a legal advice component and a telephone dispute resolution component.
- The **Telephone Dispute Resolution Service (TDRS)** was established in July 2007 and is a component of the Family Relationship Advice Line. It offers dispute resolution options to family members for whom face-to-face meetings are not appropriate or possible due to issues such as distance.

<sup>9</sup> The family law reform package announced as part of the 2005–06 Budget included funding to develop and implement a community education campaign to raise awareness of changes to the law and the reforms to the family law system. The national campaign focused on changes to the law, where additional information could be sought, and promotion of the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO) website. Advertising began around June 2006 and ceased in late 2007.

- **Family Relationships Online (FRO)** provides information about family relationships and separation and the range of services that can assist them to manage relationship issues, including services that help parents develop appropriate post-separation arrangements for children.
- The range of **family dispute resolution (FDR) and regional family dispute resolution (RFDR)** services was increased. These services are staffed by independent practitioners who assist members of families, including separated families, to manage or resolve some or all of their disputes with each other.
- The number of **Children's Contact Services (CCS)** has nearly doubled across Australia. Children's Contact Services assist children of separated parents to establish and maintain a relationship with their other parent or with family members. The services aim to provide a safe, reliable and neutral place to assist parents with the changeover of children. They also provide supervised visits to assist separated parents to manage contact arrangements, especially where there are concerns about safety.
- The **Parenting Orders Program (POP)** was expanded and works to assist separating families who are in high conflict over parenting arrangements. It uses a variety of child-focused and child-inclusive interventions, working intensively with all members of the family, where possible, to assist parents or carers to understand the effects of their conflict on the children. Family members, including children, receive a range of services as part of this program, such as counselling, FDR and group education programs.
- **Family relationship counselling services** have also been bolstered under the reforms. These services provide a broad range of assistance to family members, including helping people with relationship difficulties to better manage the personal or interpersonal issues relating to children and family during marriage, separation and divorce. The family counselling brief includes assistance in managing feelings of hurt, problems between partners or other persons in the family, new living arrangements, issues relating to the care of children and financial adjustments.
- **Mensline Australia** provides 24-hour counselling, information and referral services for men (and women who are concerned about men they know) with family and relationship concerns. The service is provided over the telephone and through electronic and other media. Under the 2006 changes, Mensline received increased funding to assist men who are contemplating separation or who have separated. Many of these men in turn have concerns about post-separation parenting arrangements.
- **Men and Family Relationships Services (MFRS)** have been funded to provide a broad range of assistance to men and their families. These services—which aim to help men to develop and maintain strong family relationships, or deal with conflict or separation—include family relationship counselling, relationship education and skills training for men, community development and community education activities, and information and referral. All family members, including partners, ex-partners, children, step-children, brothers, sisters, aunts, uncles, cousins and grandparents can use these services.
- **Specialised Family Violence Services (SFVS)** were given additional funding to use a whole-of-family approach to support those who have experienced or witnessed family violence, and to help those who use violent behaviour to change. These services consider the individual needs of each family member and provide assistance by referring clients to complementary services such as counselling, behaviour change groups and information sources.
- **Family Relationship Education and Skills Training (EDST)** has been designed to assist couples and families, including those with children, to develop skills to foster positive, stable relationships with their partner or family. Service providers run groups or courses for a broad audience or tailor programs for certain individuals, such as retirees or step-families. These services have an additional emphasis on access to home education resources, such as the *Keys to Living Together* series, as well as assisting couples to address relationship issues before serious problems develop.

### 1.2.3 The Child Support Agency

The Child Support Agency (CSA) is part of the Australian Government Department of Human Services and its role is to register child support cases, assess the level of child support payable based on the child support formula and collect child support payments. The CSA and FaHCSIA have been responsible for implementing the changes to the Child Support Scheme.

In June 2008, the CSA had almost 1.5 million customers (i.e., paying and receiving parents) and was transferring child support payments for over 1.1 million children. Separated parents can have one of three different types of support arrangements. The first is termed “self-administration”, which involves a “private arrangement” between parents that covers both the amount of child support payment and its transfer. “Private collect” involves cases that are both registered with and assessed by the CSA; however, parents’ payment transfers are made without the involvement of the CSA. “CSA collect” involves the CSA both assessing liability and collecting and transferring child support payments (CSA, 2009, pp. 1, 12).

## 1.2.4 The legal sector

### Court structure

There are three main courts exercising *FLA* jurisdiction: the Family Court of Australia (FCoA), the Federal Magistrates Court (FMC) and the Family Court of Western Australia (FCoWA).<sup>10</sup>

The FCoA was established in 1976 as a specialist family law court. It hears financial and parenting disputes at first instance, as well as determining appeals from its own first-instance decisions, those of the FMC and those of the FCoWA.<sup>11</sup>

The FMC began operation in 2000. Although the bulk of its work involves family law matters (Des Semple & Associates & AGD, 2008, ¶ 17), it also has jurisdiction in a range of federal law areas, including bankruptcy, migration and industrial relations. While it was originally intended that the FMC should hear less complex family law matters than the FCoA, some of the key formal distinctions between the jurisdictions of the two courts were altered over time so that by 2006 there was close to concurrent family law jurisdiction (Des Semple & Associates & AGD, 2008, ¶ 19–20). According to the Semple report, about 79% of family law applications are lodged in the FMC (¶ 18), apart from divorces and consent orders. The FMC handles most divorces,<sup>12</sup> while the FCoA deals with most applications that are initiated as consent orders, with these matters being dealt with by registrars.<sup>13</sup>

Western Australia has its own Family Court, which is invested with federal family law jurisdiction under s41 of the *FLA*. Accordingly, family law jurisdiction in WA is exercised mainly by the FCoWA, which has magistrates and judges hearing matters. The content of the substantive law that is applied in Western Australia to post-separation parenting arrangements—the *FLA* in relation to the children of married and formerly married couples and the *Family Court Act 1997* (WA) in relation to ex-nuptial children<sup>14</sup>—is no different to that which applies in the rest of Australia.<sup>15</sup>

### Legal services

The provision of legal services in the family law area is undertaken by a wide range of legal practitioners in private and publicly funded practice. Family lawyers in private practice operate either as solicitors (who provide advice and may engage in negotiation and litigation on behalf of the client) and barristers (who also provide advice and negotiation support, but specialise in court-based advocacy services).<sup>16</sup>

Other important sources of family law services are those provided by publicly funded legal aid commissions and community legal centres (CLCs). They receive state and federal funding to

<sup>10</sup> Jurisdiction in a limited range of family law matters is also exercised by state and territory courts of summary jurisdiction: *FLA* s39(5) and (9). State-based courts also have jurisdiction in financial and property disputes between separated de facto couples, although these matters became the subject of federal regulation on 1 March 2009 with the implementation of the *Family Law Amendment (De Facto Financial and Other Measures) Act 2008* (Cth). For an account of the constitutional context of family law jurisdiction, see Fehlberg, Behrens, and Kaspiew (2008, Chapter 2).

<sup>11</sup> *FLA* ss94, 94A, 96. Under s96(1) of the *FLA*, an appeal lies from a court of summary jurisdiction to either the FCoA or the Supreme Court of the relevant state or territory.

<sup>12</sup> Family Court of Australia, Practice Direction No. 6 of 2003.

<sup>13</sup> Family Law Rules 2004 Rule 10.15(1A), Rule 18.05(1).

<sup>14</sup> Appeal from decisions where powers are being exercised under the state legislation are heard by the Western Australian Court of Appeal: *Family Court Act 1997* (WA) s210A.

<sup>15</sup> However, in some areas, state laws give the court powers that are not available to family court decision-makers in other jurisdictions: see *Family Court Act 1997* (WA) s36.

<sup>16</sup> This division is only relevant to states that have a split profession.

provide services in a range of areas, including family law. The programs operated by these commissions vary, but they typically encompass free advice-giving services over the telephone or face-to-face clinics, duty lawyer services based in courts, legally assisted mediation services and casework services where a matter is deemed suitable under legal aid guidelines. Assessment of suitability takes into account both the financial circumstances of the applicant and the nature of the matter for which legal assistance is sought. In some instances, casework services are provided by in-house legal aid commission lawyers and in other instances legal aid funds private practitioners to do the work.

In most cases (apart from situations in which parents are ordered to meet the costs by the court), legal aid funds the services of independent children's lawyers (ICLs), who have specialist accreditation auspiced by legal aid.<sup>17</sup> Some ICL practitioners are in-house, while others have ICL accreditation but are based in private practice.

Community legal centres receive government funding to provide a range of free legal services. These centres are located in each state and territory and are based in capital cities and regional areas. Some operate specialist services—for example in the area of tenancy law—while others operate on a more general basis. Specialist CLCs that provide advice exclusively to women operate in all states. These are funded in part to provide a service to women who may be eligible to receive advice and other services from legal aid commissions but are precluded from doing so. This occurs in instances where an ex-partner has obtained legal aid assistance (even if just obtaining telephone advice); ethical rules prevent legal services from being involved with both parties in a dispute (i.e., when they have a conflict of interest), which means the other party may not use the service, although both parties may still apply for a grant of legal aid.

CLC services may also provide free telephone advice, free legal advice in face-to-face clinics, duty lawyer services in courts, and casework services where clients meet criteria under the financial guidelines and those applied by the centre.

### 1.2.5 The legislative framework

In broad terms, the *SPR Act 2006* made changes in three key areas. First, it laid the legislative foundation for FDR with exceptions (*SPR Act 2006* s60I). Second, it changed the substantive framework governing parenting arrangements in Part VII of the *FLA*. Third, it introduced in Division 12A of Part VII a series of principles, together with duties and powers for judicial officers, for conducting child-related proceedings. The following sections provide an overview of the key elements of the changes in each of these areas.

#### Family dispute resolution with exceptions

The *SPR Act 2006* enshrined in statute the requirement for most separated parents in dispute over parenting arrangements to attend FDR. Previously, requirements for parties to attempt to resolve most disputes outside of court were imposed by the Family Court Rules.<sup>18</sup> Under s60I of the *SPR Act 2006*, parties are required to attend FDR to resolve disagreements over parenting arrangements prior to lodging an application with a court. Exceptions to this requirement include:

- applications for orders that are to be made with the consent of the parties (s60I(9)(a)(i));
- applications for orders in proceedings in which a certificate issued by an FDR practitioner has already been filed (r12CAB of the *Family Law Regulations 1984* (Cth)); and
- circumstances in which there are reasonable grounds to believe that:
  - there has been child abuse by one of the parties to the proceedings (s60I(9)(b)(i));
  - there would be a risk of abuse to the child if there was a delay in an application being made to the court (s60I(9)(b)(ii));
  - there has been family violence by one of the parties to the proceedings (s60I(9)(b)(iii));
  - there is a risk of family violence by one of the parties to the proceedings (s60I(9)(b)(iv));
 and

<sup>17</sup> These lawyers are appointed by the court in certain cases where it is determined that the child's interests should have independent representation. Their role is spelt out in *FLA* Division 10 of Part VII.

<sup>18</sup> The Family Law Rules 2004 R1.03, R1.05. Rule 1.05 of the Federal Magistrates Court Rules 2001 provides that in a particular case the FMC may apply the Family Law Rules if it considers its own to be insufficient, and R10 of the Federal Magistrates Court Rules allows the FMC to make orders in relation to primary dispute resolution at the first court date.

- the application is made in circumstances of urgency (s60I(9)(d)).

In these circumstances, the parties may lodge an application in court. However, judicial officers also retain the discretion to refer such parties to FDR (s60I(10)). Further, there is an obligation on courts to ensure such parties have obtained information about how they may be assisted by FDR, even where any of the above mentioned issues are relevant (s60J).

If attempts to reach an agreement in FDR are unsuccessful or a matter is judged at the outset not to be suitable for mediation (see s60I(8)), then an FDR practitioner may issue a certificate to their clients that will then enable them to access the court system. There are five grounds for issuing such certificates:

- one party attended FDR but the other party did not (s60I(8)(a));
- a matter was considered inappropriate for FDR by the practitioner (s60I(8)(aa));
- FDR was attended by both parties and a genuine effort was made to resolve the dispute (s60I(8)(b));
- the parties attended FDR but one party or both parties did not make a genuine effort to resolve the dispute (s60I(8)(c)); and
- the parties began FDR but the FDR practitioner became aware it would be inappropriate to continue FDR (s60I(8)(d)). This ground was added in 2009 and was inserted by Item 1 of Schedule 4 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

The requirement to attend FDR was phased in over a two-year period. From 1 July 2007, new applicants into the court system were required to attend FDR unless they satisfied one of the exceptions, including establishment of circumstances of urgency. This requirement applied from 1 July 2008 to all litigants, even if they had previous court orders.

## Parenting arrangements

The *SPR Act 2006* changed the substantive law applicable to the resolution of parenting disputes. Two aspects of these changes are particularly significant. First, there is strengthened legislative support for shared parenting after separation with the introduction of a presumption in favour of equal shared parental responsibility (s61DAA). Second, greater emphasis was given to the need to protect children from harm from exposure to abuse, family violence and neglect (e.g., s60B(1)(b), s60CC(2)(b)). The provisions reflecting these aspects are described below, after a brief overview of key aspects of the legislative framework that were applicable prior to 1 July 2006.

### The *Family Law Reform Act 1995* (Cth)

The *SPR Act 2006* reflects the second generation of shared parenting reforms enacted by Australian legislature. The first-generation reforms were implemented in 1996, through the *Family Law Reform Act 1995* (Cth) (*Reform Act 1995*). These amendments were aimed at breaking down “ownership notions” and counteracting the popular belief that “the child is a possession of the parent who is granted custody”.<sup>19</sup> The 1995 changes had two key aspects.

First, the concept of “parental responsibility” was introduced, which was automatically vested in each parent, regardless of marital status or whether the parent had ever lived with the child (s61C). This referred to “all the duties, powers, responsibilities and authority which by law, parents have in relation to children” (s61B). Under the previous regime, parental responsibility was divided into (a) guardianship (decision-making power in relation to long-term issues), which was unrelated to whom the child lived with; and (b) day-to-day decision-making authority, which accompanied orders about whom the child lived with. Thus, the *Reform Act 1995* was designed to break the nexus between living arrangements and parental responsibility and imposed an obligation on parents, regardless of marital or relationship status, to “share duties and responsibilities concerning the care, welfare and development of their children” (s60B(2)(c)).

The second key area of change was in relation to the way arrangements for children to spend time with their parents were described and made under the legislation. In keeping with the goal of breaking down notions of ownership, the *Reform Act 1995* changed the terminology

<sup>19</sup> Explanatory Memorandum, *Family Law Reform Act 1994*, General Outline, ¶ 3.

from “custody” to “residence” (s64B(3)), and “access” to “contact” (s64B(4)). Further, the child’s “right to know and be cared for by both their parents” (s60B(2)(a)) and their “right to contact on a regular basis with both their parents and other people” significant to their care welfare and development (s60B(2)(b)) were inserted through a new Objects provisions in the Act. These changes reflected Australia’s obligations as a signatory to the UN Convention on the Rights of Child (Office of the United Nations High Commissioner for Human Rights, 1990).

Notwithstanding the changes to the legal formulation of parental responsibility, residence and contact, the guiding principle under the *Reform Act 1995* remained focused on the interests of the child, and the wording of the “paramountcy principle”<sup>20</sup> was changed from “welfare” to “best interests” (s65E). The factual issues relevant to determining children’s best interests were set out in a statutory list (s68F), which included: the wishes of the child, the nature of the relationships in the family, the likely effects of changes in the child’s circumstances, the practical difficulty and expense of a child having contact with a parent, parental capacity and parents’ attitudes to the child, and the need to protect the child from harm and family violence.

### The *Shared Parental Responsibility Act 2006* (Cth)

The 2006 amendments to the *FLA* also focused on changing the legislative provisions governing parental responsibility and time arrangements, while retaining the child’s best interests as the paramount consideration in parenting matters (s60CA). The intention was to “increase the visibility” of this provision (Explanatory Memorandum, ¶ 44). Further changes were introduced to ensure that greater emphasis was placed on protecting children from harm (Explanatory Memorandum, ¶ 35, 36, 48, 49).

The Objects provisions were expanded, with the addition of an Object providing for children to have the “meaningful involvement” of both parents in their lives (s60B(1)(a)) and a provision enunciating children’s right to be protected from harm through exposure to abuse, violence or neglect (s60B(1)(b)). These two aims were restated as the two “primary considerations” (s60CC(2)) in the reformulated list of factual matters relevant to best interests determinations, which now has a partially hierarchical structure that includes a series of “additional considerations” (s60CC(3)), expanding what was the s68F welfare checklist in the previous framework.

In terms of parental responsibility, the new framework introduced a presumption in favour of “equal shared parental responsibility” (s61DA), with a nexus between the application of the presumption and considerations in relation to time arrangements (s65DAA). The presumption may be rebutted by evidence satisfying a court that it would not be in a child’s best interests for both parents to have equal shared parental responsibility (s61DA(4)), and it is not applicable where there are reasonable grounds to believe a child’s parent, or another person in the parent’s household, has engaged in child abuse or family violence (s61DA(2)). Where the presumption is applied and orders for shared parental responsibility are made, the courts are obliged to consider making orders for children to spend equal or substantial and significant time with each parent (s65DAA). They are required to consider whether such arrangements are “reasonably practicable” (s65DAA(1)(b)) and in the child’s best interests (s65DAA(1)(a)). The insertion of these provisions reflected the Government’s intention to emphasise the importance of a child having a meaningful relationship with both parents and having both parents exercising decision-making responsibility for children (Explanatory Memorandum, ¶ 120).

Also pertinent to the strengthened emphasis on shared parenting in the post-1 July 2006 Part VII of the *FLA* are:

- a shift away from the notion of a “right to contact” (*Reform Act 1995* s60B(2)(b)) to the concept of “meaningful involvement” (*SPR Act 2006* s60B(1)(a));
- a child “spending time” (*SPR Act 2006*, e.g., s60B(2)(b)) with each parent rather than one parent being a “residence” parent (*Reform Act 1995* s64B(3)) and the other having “contact” (*Reform Act 1995* s64B(4)); and
- the explicitly stated obligation for parents to make decisions jointly (*SPR Act 2006* s65DAC(2)) and to consult on major long-term issues in relation to a child (*SPR Act 2006* s65DAC(3)) where a court order provides for two or more persons to share parental responsibility.

<sup>20</sup> Prior to the *Reform Act 1995* (Cth), the paramount, or most important, principle in decision-making was the “welfare of the child” (*FLA* s64(1)(a)).

## Protecting children from family violence and child abuse

As noted earlier, the need to protect children from family violence and child abuse was given increased emphasis in the new scheme through recognition in the Objects (s60B(1)(b)) and in the primary considerations of the *SPR Act 2006* (s60CC(2)). Importantly, matters in which there are reasonable grounds to believe that there has been family violence and child abuse are exceptions to two key aspects of the legislation: the requirement to attend FDR prior to filing a court application (s60I(9)(b)) and the application of the equal shared parental responsibility presumption (s61DA(2)) (as noted above). However, courts still retain discretion to refer parties in such circumstances to FDR (s60I(10)) and may make orders for shared parental responsibility where the presumption is not applied or rebutted (*Goode and Goode* (2006) FamCA 1346).

Provisions further underpinning the increased emphasis on protection from exposure to family violence and child abuse include:

- an obligation on the court to take prompt action where documents are filed alleging child abuse or family violence in connection with an application under Part VII of the *SPR Act 2006* (s60K); and
- a power for the court to make orders for state and territory agencies (i.e., child protection agencies) to provide information about notifications, assessments and reports relevant to child abuse or exposure to family violence in relation to a child to whom *FLA* proceedings relate (s69ZW).

Other new provisions relevant to the issue of family violence and child abuse include s117AB, which obligates a court to make a costs order where a party is found to have “knowingly made false allegations or statements” in proceedings under the *FLA*. While this provision does not specifically refer to family violence and abuse, its enactment was intended to address concerns that allegations of family violence may be “easily made” in family law proceedings (Explanatory Memorandums ¶ 215).

## Conducting child-related proceedings

Another significant aspect of the 2006 legislative reforms was the implementation of a series of provisions designed to ensure that child-related court proceedings are conducted in a more child-focused and less adversarial way (Explanatory Memorandum, ¶ 327). These changes were based on the FCoA’s Children’s Cases Program, which piloted a set of case management practices designed to reduce adversarialism and increase child focus in court proceedings involving children (Harrison, 2007).

Division 12A of Part VII of the *SPR Act 2006* articulates in legislation the duties and powers of the court—and the principles that guide the application of these duties and powers—to manage proceedings relating to parenting orders. Key principles include:

- the court must consider the needs of the child and the impact of proceedings upon them in determining the conduct of the proceedings (s69ZN(3));
- the court is to actively direct, control and manage the proceedings (s69ZN(4));
- the proceedings should be conducted in a way that safeguards the child against family violence, child abuse and neglect, and the parties to the proceedings against family violence (s69ZN(5));
- the proceedings are to be conducted in a way that promotes cooperative and child-focused parenting by the parties (s69ZN(6)); and
- proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible (s69ZN(7)).

The duties articulated in Division 12A include:

- deciding which issues may be disposed of summarily and which require full investigation (s69ZQ(1)(a));
- deciding the order in which issues should be decided (s69ZQ(1)(b)); and
- giving directions and making orders regarding procedural steps (s69ZQ(1)(c)), subject to deciding whether a step is justified on the basis of likely benefits considered against the cost of taking it (s69ZQ(1)(d)).

Powers set out in Division 12A include the ability, at any stage after a matter has commenced and prior to final determination, to:

- make a finding of fact (s69ZR(1)(a));
- determine a matter arising from the proceedings (s69ZR(1)(b)); and
- make an order in relation to an issue arising out of the proceedings (s69ZR(1)(c)).

### 1.2.6 The influence of law on negotiated and litigated outcomes

The impact of the changes to the family law system needs to be understood in the context of broader social trends. Since the establishment of the *FLA* in 1975, there have been significant social changes that have interacted with the family law system. As outlined in Appendix A, key changes include:

- an increased level of paid employment of women, although the employment rate of mothers remains much lower than that of fathers, and mothers are much more likely than fathers to be employed part-time;
- some decrease in the rate of paid employment of men;
- in recent decades, an increase in the amount of time that fathers spend with their children, although fathers continue to spend much less time with children than do mothers;
- an increase in the proportion of children growing up in single-parent families;
- increasing awareness of issues of violence, child abuse and other dysfunctional<sup>21</sup> behaviours in families generally, and the impact these have on family law processes;
- an increased emphasis on child development and the impact that poorly handled separation processes can have on this aspect of childhood; and
- increasing awareness of the importance of fathers in their children's lives.

The discussion in Appendix A, on family law and social change, and the preceding discussion of the 2006 amendments to the *FLA*, raise the issue of how legislation influences outcomes reached by negotiation and litigation. The relationship between these two issues in any area of law is neither simple nor uni-directional. This is especially so in an area such as family law in the contemporary Australian environment, for several reasons. First, only a very small minority of matters ever proceed to judicial determination. Most are settled either without any engagement with legal or relationship services, or after legal advice has been obtained and perhaps legal assistance with negotiation has occurred, or after legal action has been initiated but settlement negotiations have taken place (see Chapter 4). Second, in the current system there are numerous sources of legal and non-legal advice and assistance, with FRCs being a new initiative in the family law landscape. These services and the professionals who work in them have an important role to play in forming parents' understanding of their options. Third, the norms established by the legal framework (i.e., the "best interests" criteria in relation to children) are open-ended and the application of legal principles to the facts of any particular case are influenced by the way in which judicial discretion is exercised in the small minority of cases that are decided by judges.<sup>22</sup>

In such cases, the legislative framework and the principles established in case law have a direct influence on judicially determined outcomes, although the interpretation of the law can vary between decision-makers and courts (see Dewar & Parker, 1999; Parkinson, 2007). More complex is the question of what influence the legislative framework has on outcomes that are not litigated but are arrived at in private negotiations. The *SPR Act 2006* imposes a range of obligations on judges, legal practitioners and FDR practitioners to act in ways consistent with the aims

<sup>21</sup> The Encarta World English Dictionary defines "dysfunctional" as: (a) failing to perform the function that is normally expected; (b) unable to function emotionally as a social unit; and (c) unable to function normally as a result of disease or impairment. In this evaluation, the term refers to behaviours that are outside what might normally be expected and that have the potential to negatively affect one or more family members. Use of the term makes no assumptions with respect to aetiology. As the definition suggests, the behaviour may have its origins in a mental health problem or another impairment, in difficulties with social relationships, or in causes that are unknown.

<sup>22</sup> The 2006 amendments reduced the scope of judicial discretion though the introduction of the presumption of equal shared parental responsibility (s65DAA). However, as noted, the child's "best interests" remain the overriding criterion (s60CA). Eminent commentators offer varying approaches to the potential interpretation of the legislation: see Chisholm (2007) and Parkinson (2007).

of the Act. For example, courts have an obligation to consider ordering parents to attend FDR, even when one of the exceptions applies to their situation (s60I(10)). Advisers—defined as legal practitioners, family counsellors, FDR practitioners or family consultants (s63DA(5))—have an obligation to inform people they could consider entering into a parenting plan and making arrangements for children to spend equal or substantial and significant time with each parent (s63DA). Moreover, legal practitioners have a very clear obligation to explain to their clients the nature of the law and its applicability to their particular situation. However, practitioners’ understandings of the law vary and the extent to which such advice or other principles in legislation and case law influence non-litigated parenting agreements is uncertain.

There is a body of research and theory that has engaged with this question in the past several decades, with a range of studies and articles having been published in Australia and internationally (e.g., (Batagol & Brown, in press; Byas, 2004; Dewar & Parker, 1999; Ingleby, 1992; Mnookin, 1979; Sarat & Felstiner, 1995; Trinder, 2003). These sources suggest that, apart from the law, a wide range of factors influence arrangements made by negotiation, including the nature and quality of legal advice and negotiating assistance, a desire to avoid the transaction costs—financial and emotional—that accompany litigation, and the social, cultural and economic backgrounds of the parties involved in the negotiations. A further important influence is posited to be the endowment of power, from various sources, including law, that each party brings to negotiations (Mnookin, 1979). Other studies suggest that for some parents, legal principles are irrelevant (e.g., Byas, 2004; Trinder, 2003).

An influential theory in the area of family law, emanating from the work of Mnookin and Kornhauser (1979), has posited that individuals bargain “in the shadow of the law”—that is, that the legal rules applicable to a particular dispute influence outcomes in private negotiations, along with other factors, including individuals’ values. This theory suggests that in privately resolved disputes litigated outcomes establish benchmarks that inform those involved in negotiations about the reasonable parameters for settlement.

Empirical research has demonstrated that links between the law and the outcomes negotiated in its shadow are complex and less than clear. In the specific context of Australian family law and the predecessor of the *SPR Act 2006* (the *Reform Act 1995*), Dewar and Parker (1999) suggested the aptness of the shadow metaphor was complicated by the fact that different understandings of “what the law says” were being applied in different practice contexts. On the basis of research examining the impact of the *Reform Act 1995*, Dewar and Parker found that “understandings and interpretations of the new provisions were fragmented between and even within the different professional interpretive communities [e.g., court counsellors, lawyers, judges, registrars]” (p. 113). Moreover, they argued that even if such a shadow existed, it was mediated by too many other factors (such as legal aid policies, court processes or personal professional styles) to have a decisive effect.

In summary, this discussion indicates that the link between legislation and human behaviour is complex, with a range of factors potentially influencing whether parties reach arrangements through discussion, negotiation or litigation. The large-scale quantitative data collections and smaller scale qualitative data collections on which this present evaluation is based provide a broader and more detailed picture of the parenting arrangements that have been made—with and without legal assistance, and in and outside of courts—than has ever been available previously.

### 1.3 Evaluation methodology

As outlined earlier, the purpose of this evaluation is to examine the extent to which the legislative and service sector changes brought about by the 2006 family law reforms were fulfilling the four core policy objectives of the reform package. This section provides an overview of the approach adopted. More detailed descriptions of the methodology employed for each component of the evaluation, including questionnaires and data collection instruments, are provided in Appendix C.

### 1.3.1 Key questions guiding the evaluation

The four policy objectives of the reforms (see page 1) encompassed a range of more specific goals, so a series of questions were developed against which the success or otherwise of the reforms might be evaluated.<sup>23</sup> The questions that were used to guide the evaluation are:

1. To what extent are the new and expanded relationship services meeting the needs of families?
  - a. What help-seeking patterns are apparent among families seeking relationship support?
  - b. How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?
2. To what extent does FDR assist parents to manage disputes over parenting arrangements?
3. How are parents exercising parental responsibility, including complying with obligations of financial support?
4. What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?
5. What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?
6. To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?
7. To what extent are children's needs and interests being taken into account when these parenting arrangements are being made?
8. How are the reforms introduced by the *SPR Act 2006* working in practice?
9. Have the reforms had any unintended consequences—positive or negative?

### 1.3.2 The evaluation design and data sources

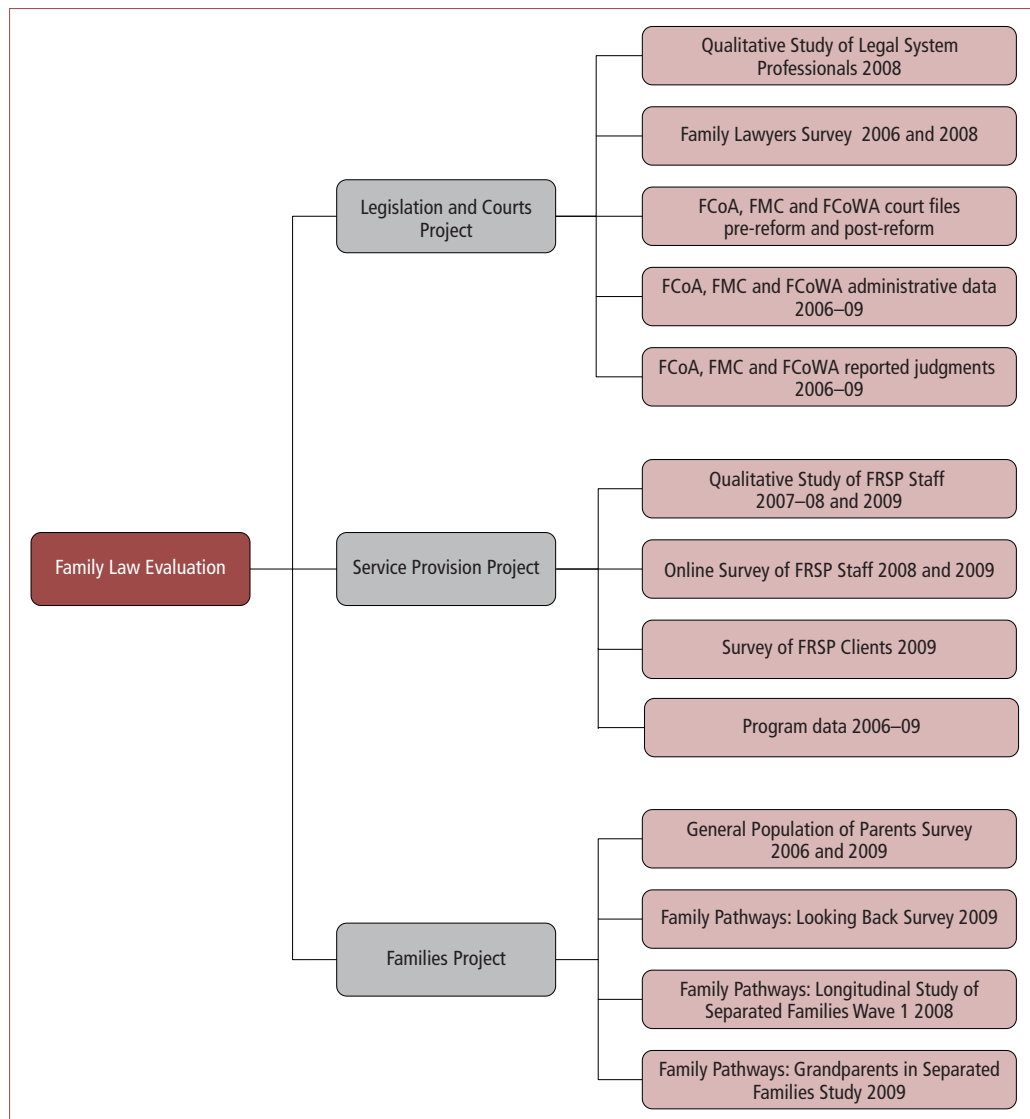
In recognition of the wide-ranging nature of the objectives, and in order to achieve a rigorous evaluation design, the evaluation methodology entailed a multidisciplinary approach utilising a broad range of data sources generated through a variety of collection methods. Information was collected from a wide range of people and services involved in the family law system. The evaluation design was based on three main projects, each focusing on a particular aspect of the reforms. The three projects were:

- the **Legislation and Courts Project (LCP)**, which examined the implementation of the legislative reforms;
- the **Service Provision Project (SPP)**, which examined changes to the service delivery system; and
- the **Families Project**, which examined, in the main, experiences of separated families.

Through the studies in these projects, the impact of the reforms was examined from a number of angles. The evaluation was designed so that, as far as possible, there were multiple sources of information on key evaluation questions. This form of “triangulation” allows conclusions to be drawn with more confidence because, wherever possible, no single source of evidence is relied upon exclusively. Some of the studies also provide scope for pre- and post-reform comparison.

Each of the three projects was based on a variety of data sources, including a large-scale longitudinal study of 10,000 separated parents, two quantitative studies based on general samples of parents, analysis of data from pre- and post-reform court files, surveys with staff and clients of services funded under the FRSP and several qualitative studies looking at the experiences of grandparents and legal system and service sector professionals (see Figure 1.1). In addition, administrative data from family relationship services and the courts were used in the evaluation. Specifically, information was obtained from:

<sup>23</sup> In the 2007 Evaluation Framework (see Appendix B), it was noted that it may not be possible to answer some of the questions and that some changes (if they occur) may take much longer than others to surface, with some being “generational”. In response to new issues that have emerged during the course of the evaluation, some refinements have been made to the original evaluation questions. The questions set out in this section are a distillation of the original research questions and are presented in this way at this point for conciseness.



**Figure 1.1** Data collected in the course of the evaluation

- parents who had separated prior to the 2006 reforms (baseline or pre-reform data)—2,005 parents;
- parents who separated after the 2006 reforms—10,002 parents;
- nationally representative surveys (pre-reform and post-reform) of all parents (including separated parents)—5,000 parents in each survey;
- grandparents who had an adult child who had separated—562 grandparents;
- clients of services funded as part of the family law system—3,251 clients;
- relationship service providers, including managers and staff employed in different types of relationship services—1,668 service providers;
- surveys of family lawyers (pre- and post-reform)—367 lawyers pre-reform and 319 lawyers post-reform;
- surveys of judicial officers, registrars, lawyers and family consultants—184 legal professionals;
- administrative program data related to government-funded family relationship services;
- administrative data from the FCoA, the FMC and the FCoWA;
- published judgments; and
- court files from the FCoA, the FMC and the FCoWA (pre- and post reform)—739 pre-reform and 985 post-reform, a total of 1,724 court files.

Input about the impact of the reforms on parents and children was also sought from a range of groups representing parents in the family law system.<sup>24</sup> The information provided by these groups provided an important way of checking whether there were issues that were identified by the representative groups that needed to be explicitly considered in the evaluation using the survey and administrative data.

### 1.3.3 Evaluation challenges and issues

Many challenges present themselves in any evaluation of the impact of a policy initiative. Determining causality and the associated issue of identifying competing explanations for any changes are critical issues. For instance, social forces other than those set in motion by a single policy initiative may help explain outcomes. The evolving social forces relevant to the present evaluation include trends in relationships and in the responsibilities assumed by fathers and mothers, along with increasing social awareness of and concern about family violence (see Appendix A).

Furthermore, the evaluation focuses on the first three years of the operation of the reforms, a period in which some key aspects of the changes were still being implemented. Some changes are likely to evolve gradually and the pace of some may increase or decrease in response to changing social attitudes. Further, some social changes may be “generational”.

This evaluation provides a comprehensive means of assessing the extent to which change is occurring in a range of important areas, including: the advice that legal practitioners give to parents; the way in which relationship service practitioners go about their role; the extent to which clients believe that services have provided appropriate assistance; the pathways that parents use in arriving at their parenting arrangements; the nature, workability, stability and safety of different parenting arrangements; the quality of the relationship between separated parents; and, most importantly, the wellbeing of children whose parents separate.

As indicated above, the evaluation itself was being conducted in an evolving operational and social context. Operational changes include the staged implementation of the following key aspects of the reforms:

- FDR with exceptions (s60I) became fully applicable to all applications relating to family law children’s matters on 1 July 2008.
- Court processes were in a state of flux at 1 July 2006, with a backlog of pre-reform matters being cleared from court lists immediately prior to the periods in which some data collection (interviews and focus groups with family law system professionals) was taking place. Further, the docket system (whereby each judge is responsible for the case management of their own cases) was being implemented in the FCoA as the LCP data collection was proceeding.
- The service delivery roll-out was completed in 2008, meaning that the full complement of FRCs only became operative on 1 July 2008.<sup>25</sup>

The evaluation has attempted to take account of these factors. Indeed, the two qualitative studies of managers and staff in relationship services have capitalised on this timing issue by examining the adjustments that were being implemented across the roll-out period.

The next sections provide a brief outline of each of the three evaluation projects and their respective components. Detailed information about each project and the methodologies used are available in Appendix B.

### 1.3.4 The Legislation and Courts Project

The LCP was designed to gather data on the impact that the legislative changes have had on: (a) advice-giving practices; (b) negotiation and bargaining among those who sought the advice and assistance of lawyers; (c) how the main new legislative provisions were applied in court decisions; and (d) how court filings were affected by the reforms. A further priority was to ex-

<sup>24</sup> The groups were: Dads in Distress Inc., Lone Fathers Association of Australia, National Council of Single Mothers and Their Children Inc. (NCSMC Inc.), The Shared Parenting Council of Australia, Sole Parents’ Union, and Women’s Legal Service Australia.

<sup>25</sup> One service commenced operation later in 2008 due to accommodation issues.

amine what, if any, unintended consequences may have arisen as a result of the changes. The LCP encompassed five components:

- the Qualitative Study of Legal System Professionals (QSLSP) 2008;
- the Family Lawyers Survey (FLS) 2006 and 2008;
- analysis of FCoA, FMC and FCoWA judgments, 2006–09;
- analysis of FCoA, FMC and FCoWA court files, pre- and post-1 July 2006; and
- analysis of FCoA, FMC and FCoWA administrative data, 2004–05 to 2007–08.

### Qualitative Study of Legal System Professionals

The QSLSP 2008 conducted interviews and focus groups with family law system professionals in order to gather data on their experience of the reforms. A total of 184 professionals participated in interviews and/or focus groups between April and October 2008. In order to gain insights from as many angles on the legal system and court process as possible, participants were drawn from the following professional groupings: FCoA judges; federal magistrates; FCoWA judges and magistrates; FCoA registrars; family consultants operating in the FMC, FCoA and FCoWA; barristers; and solicitors from private practice, legal aid and community legal centres.<sup>26</sup> The discussions focused primarily on the impact of the changes made to Part VII of the *FLA* by the *SPR Act 2006*. The data obtained in this study provide valuable insights into how the law is being applied in advice-giving practices and litigation and what impact it has had on the bargaining dynamics in family law more generally.

### The Family Lawyers Surveys

The purpose of the FLS 2006<sup>27</sup> was to provide baseline (pre-reform data) about lawyer practices and attitudes at the time of the implementation of the reforms. The FLS 2008 substantially repeated and extended the FLS 2006, thereby allowing pre- and post-reform shifts to be gauged. The FLS 2008 allowed important insights from the QSLSP 2008 to be tested in a quantitative format.

Together, the two surveys examined such issues as:

- the level of support among family lawyers for the underlying philosophical concepts in the legislation;
- systemic matters, including referral patterns and views of some aspects of the service delivery system (including FRCs and FDR);
- the operation of key aspects of the substantive provisions governing parenting arrangements in the *SPR Act*, including the impact of the changes on advice-giving practices;
- the level of understanding parents and system professionals have of the application of the presumption of shared parental responsibility and the operation of the exceptions;
- the adequacy with which the system handles family violence and child abuse; and
- the extent to which the child support reforms have affected negotiations over parenting arrangements.

The two surveys were conducted online, with the first taking place in mid-2006 and the second from mid-November 2008 to early February 2009. Both samples were recruited with the assistance of the Family Law Section of the Law Council of Australia. The first comprised 367 participants. The second comprised 319 participants.

### FCoA, FMC and FCoWA judgments

The aim of this component was to examine how key aspects of the *SPR Act 2006* were interpreted in judgments. A primary focus was tracking and analysing key full bench appeal judgments, as these represent binding interpretations of the law. The development of appellate jurisprudence is contingent on a number of practical eventualities. Primarily, individual litigants

<sup>26</sup> Quotes in this report are attributed to “judicial officers” and may refer to judicial officers from any of these three courts except where specific court practices are being discussed (Chapter 13 and Chapter 14).

<sup>27</sup> This study was designed and implemented by Bruce Smyth, Lawrie Moloney and Richard Chisholm.

must be prepared to mount and fund an appeal. Such decisions may be influenced by a range of factors, including whether resources—both financial and personal—are available to the individual litigant, and the advice given by their legal advisers as to what their chances of success may be. Further, the way an appeal is framed and argued influences, to a significant extent, the way in which an appeal bench frames its decision. In the area of family law, first-instance judgments are heavily dependent on the way in which a court exercises its discretion in making orders reflective of factual findings and the way in which orders may be framed to meet the best-interests criteria. The grounds for interfering with a first-instance judgment on an appellate basis are comparatively narrow. For these reasons, the development of appellate jurisprudence occurs on an ad hoc basis and this is reflected in the comparatively small number of full bench judgments on significant points of law relevant to this evaluation that are reported here.

Apart from full bench appeal judgments, there were two other categories of judgments relevant to this component. First, appeals from the FMC heard by a single judge of the FCoA appeal bench were analysed to shed further light on how key aspects of the legislation are being interpreted. Second, a range of first-instance judgments from the FCoA, the FMC and the FCoWA were analysed to assess how the legislation was being applied in judicial decision-making and to illustrate the way in which key legislative provisions are being applied in practice.

### FCoA, FMC and FCoWA court files

The aim of this component was to gather systematic quantitative data from court files (FCoA, FMC and FCoWA). Part 1 involved the collection of data from matters initiated and finalised *after* the reforms (total of 985 files), including matters finalised by consent (752 files) and judicial determination (233 files) in the FCoWA and the Melbourne, Sydney and Brisbane registries of the FMC and the FCoA. Part 2 involved the collection of data from matters initiated and finalised *prior* to the reforms (739 files: 188 judicial determination files and 551 consent files) in the FCoWA and the Melbourne Registry of the FCoA and the FMC.

Information collected in both Part 1 and Part 2 data collections included:

- orders that were made concerning parental responsibility and the allocation of the child's time between parents; and
- basic demographic information about the applicants, respondents and children: age, gender, occupation, region and country of birth.

The data collection for Part 1 was more extensive in order to gain detailed insight into how the legislative framework was being applied. The additional information included:

- the nature of the orders sought by the applicant/respondent for time arrangements and parental responsibility;
- the extent to which each party's application was reflected in the orders made;
- the nature of any factual issues, including those concerning family violence and child abuse, that were raised in proceedings and the evidence that was used to support them;
- similarities and differences in the outcomes and procedural profiles of the matters handled in the three courts;
- the application of the courts' costs jurisdiction;
- whether an ICL was appointed; and
- whether a family report was done.

### FCoA, FMC and FCoWA administrative data

The purpose of this component was to obtain and analyse administrative data held by courts to inform the evaluation's analysis of broader trends in the use of court services in the context of the 2006 reforms. The FCoA, the FMC and the FCoWA supplied a range of reports extracted from their CaseTrack database covering each financial year from 2004–05 to 2007–08. These reports included pre- and post-reform data concerning the following issues:

- applications for final orders (categorised by children only, property and children, and property only cases);
- application for consent orders (categorised by children only, property and children, and property only cases—data available for FCoA only);

- orders for ICLs;
- matters involving self-represented litigants (data available for FCoA and FMC only);
- applications for enforcement orders;
- lodged Notices of Child Abuse and Family Violence (Form 4); and
- number of Magellan Cases started (financial year 2007–08).<sup>28</sup>

### 1.3.5 The Service Provision Project

This part of the evaluation provides information on the operation and effectiveness of the delivery of family relationship services, including FRAL, FRCs, and early intervention and post-separation services that were funded as part of the reform package. Information on services was obtained from service providers and clients.

The services included in the evaluation can be categorised as early intervention services (EIS) or post-separation services (PSS). The early intervention services are: Specialised Family Violence Services, Men and Family Relationships Services, family relationship counselling, Mensline and Family Relationship Education and Skills Training. The post-separation services are: FRCs, FDR, Children's Contact Services, the Parenting Orders Program, FRAL, and the Telephone Dispute Resolution Service (a component of FRAL).

The components of the Service Provision Project are: the Qualitative Study of FRSP Staff; the Online Survey of FRSP Staff; the Survey of FRSP Clients; and analyses of administrative program data (FRSP Online, FRAL, TDRS and Mensline).

#### Qualitative Study of FRSP Staff

This component of the SPP collected information via in-depth interviews with managers and staff of family relationship services funded under the new and expanded service delivery system. The purpose of this aspect of the evaluation was to evaluate the roll-out of the new and expanded services. It also helped to identify any other issues that needed to be explored by other components of the evaluation.

Two data collections were undertaken. The first was undertaken between August 2007 and April 2008 and the second took place from February to November 2009. These studies provide information about the extent to which changes have occurred in the operation and performance of the service sector during the roll-out period.

The Qualitative Study of FRSP Staff 2007–08 involved interviews with organisational CEOs, managers and staff (137 participants in 57 interviews) from the first 15 FRCs, 8 early intervention services, 8 post-separation services, Mensline and FRAL. The 2009 study involved interviews with managers and staff<sup>29</sup> from all of these services, with the addition of staff from a further 10 FRCs, a further 10 post-separation services and the Telephone Dispute Resolution Service.

The Qualitative Study of FRSP Staff 2007–08 collected data relating to the following issues:

- the purpose of the service, target population and the type of environment in which it operates;
- the extent to which the service has been implemented as planned and reasons for any deviation from plans;
- the extent to which the service is being used by various sub-groups in the target population;
- the extent to which cooperative links have been made with other service providers and/or programs; and
- service providers' views of the aims of the service, its operation and its overall effectiveness.

The Qualitative Study of FRSP Staff 2007–08 focused, to a considerable extent, on experiences connected with the initial roll-out of services. The Qualitative Study of FRSP Staff 2009 was more

<sup>28</sup> Magellan is the case management system used in the FCoA for matters involving allegations of serious sexual or physical abuse.

<sup>29</sup> The CEOs of organisations responsible for the management of individual services were not specifically sampled for the second wave of the qualitative study; however, they were welcome to take part if they wished.

focused on assessing ongoing issues that emerged from the 2007–08 interviews. These issues included:

- family violence and child protection/child abuse and neglect;
- responses to the introduction of “shared parental responsibility”;
- responses to the requirement to attend dispute resolution unless certain exceptions apply;
- appropriateness of referrals into the services;
- relationships with legal services and courts; and
- community networking.

### Online Survey of FRSP Staff

The principal aim of the Online Survey of FRSP Staff was to provide information on: (a) the effectiveness and appropriateness of the new and expanded services established as part of the family law reforms; and (b) the perceptions of staff across the FRSP concerning the impact that the reforms are having on their day-to-day work with families.

The surveys were delivered predominantly online, with hard copies of the survey being made available for those for whom Internet access was problematic.

The first Online Survey of FRSP Staff focused on staff working in services that had commenced operation on 1 July 2006, or that had been in operation prior to this date. Data collection for the Online Survey of FRSP Staff 2008 took place between January and April 2008, with 532 completed questionnaires received from respondents employed in a range of service types and roles. The number of individuals invited to participate in this wave, as reported by participating organisations, was estimated to be 1,873. Based on this figure, the response rate is estimated to have been 28%.

The second Online Survey of FRSP Staff took place between April and June 2009. All staff employed in the types of FRSP services funded under the reforms were invited to take part. A total of 854 responses were received from an estimated population of 2,447.<sup>30</sup> Based on this figure, the response rate is estimated to have been 35%.

The main areas covered in both surveys were:

- background information about the service;
- professional background information about the respondent, including the job they performed;
- respondents’ perceptions about the efficacy of the service, including:
  - efficacy of the assessment of client/caller needs;
  - networks/working relationships with the community;
  - networks/working relationships (including referrals) with other services, including the legal profession and the courts;
  - the ability of the service to respond to client/caller needs; and
  - how well the service screened for and responded to family violence and child abuse;
- respondents’ perceptions of the impact of the family law reforms on service delivery to families, including any unintended consequences; and
- respondents’ perceptions about the impacts of the reforms on the clients/callers, including children and cases involving family violence.

The survey collected a mixture of qualitative and quantitative data. A number of questions were modified between the first and second waves to reflect key developments regarding the reforms that had occurred between the waves, as well as to provide data that can be compared, whether directly or thematically, across the waves and also between the family relationships and legal sectors.

### Survey of FRSP Clients

The Survey of FRSP Clients 2009 was undertaken during September and October 2009. Clients who had attended services between January 2008 and April 2009 and had agreed to be contacted

<sup>30</sup> This figure is based on estimates provided by organisations invited to take part.

by the service provider for research purposes were invited to complete the survey online or via a telephone interview.<sup>31</sup>

The survey sought to explore the extent to which the new and expanded services have contributed to the core policy objectives of the reforms and explored the following broad research questions:

1. Has attending the service helped clients to build strong, healthy relationships?
2. For those parents who have separated, has attending the service helped to encourage greater involvement by both parents in their children's lives?
3. Has attending the service helped separating parents agree on parenting arrangements for their children?
4. How easy or difficult was it to access the service (including referral pathways)?

## Analyses of administrative program data

In addition to the perceptions of service delivery and the reforms collected from service staff and clients, program data were also collected and analysed from FRSP Online (which collects data about service delivery from all services funded under the Family Relationship Services Program), FRAL (including the TDRS) and Mensline.<sup>32</sup> These data provide the context to the information collected from service providers and clients, allowing for the numbers of clients seeking assistance and their presenting needs to be mapped during the course of the evaluation period.<sup>33</sup>

### 1.3.6 The Families Project

The Families Project comprised a number of studies of families (both cross-sectional and longitudinal):

- the General Population of Parents Survey (GPPS) 2006 and 2009;
- Family Pathways: The Longitudinal Study of Separated Families Wave 1 (LSSF W1) 2008 and Wave 2 (LSSF W2) 2009;
- Family Pathways: Looking Back Survey (LBS) 2009; and
- Family Pathways: The Grandparents in Separated Families Study (GSFS) 2009.

This series of individual studies included surveys of parents in general and of parents who have experienced separation. Other components focused on grandparents with a grandchild living in a separated family. Together, this suite of studies sought to understand how changes to the family law system and changes to the Child Support Scheme affected the lives of families, particularly separated parents and their children.

## The General Population of Parents Surveys

Two nationally representative telephone surveys were undertaken, each of 5,000 randomly selected participants from the general population of parents with at least one child under the age of 18 years. The first GPPS was conducted in mid-2006 and was designed to provide baseline data against which post-reform data can be compared. A second GPPS was conducted in early 2009 using a new sample of participants. Among other issues, the surveys examined parents' views about the quality of their relationships with their partners and their children, help-seeking behaviour and grandparents' involvement with their children.

## Family Pathways: The Longitudinal Study of Separated Families

The Longitudinal Study of Separated Families is a national study of some 10,000 parents (with at least one child under 18 years old) who separated after the introduction of the reforms in July 2006. The study involves the collection of data from the same group of parents over time. These parents had (a) separated from the child's other parent between July 2006 and September

<sup>31</sup> The survey was restricted to clients aged 18 years or older.

<sup>32</sup> De-identified unit record data were provided from FRSP Online. Summary data by quarter were provided for FRAL and Mensline.

<sup>33</sup> Data were provided for the period from 1 July 2007 to 1 April 2009.

2008;<sup>34</sup> (b) registered with the Child Support Agency in 2007;<sup>35</sup> and (c) were still separated from this parent at the time of the first survey. Where the separated couple had more than one child together who was under 18 years at the time of the survey, most of the child-related questions that were asked focused on only one of these children (here called the “focus child”).<sup>36</sup>

The LSSF W1 2008 took place between August and October 2008, up to 26 months after the time of parental separation.<sup>37</sup> The final overall response rate for LSSF W1 2008 was 60.2%.<sup>38</sup> An equal gender split was achieved. The majority of participants were aged between 25 and 44 years (74%) and were born in Australia (83%).

A second wave of interviews for the LSSF was conducted between September and November 2009. In addition, adolescent children of parents participating in the LSSF were also surveyed following Wave 2. This adolescent survey obtained information about their experiences and opinions relating to parental separation. The second wave of data from the LSSF and the adolescent survey data will be used in a subsequent report to be undertaken in 2010.

Information collected as part of this study will contribute to understanding the long-term effects of family law policy and will provide a picture of what life is like over time for separated parents across a broad range of family arrangements, from shared care through to less frequent contact.

### Family Pathways: Looking Back Survey

The LBS 2009 is a national study of some 2,000 parents with at least one child under 18 years old who separated between January 2004 and June 2005, prior to the introduction of the reforms. The study involved a one-off interview with parents who were registered with the CSA in 2007.

Parents were interviewed for this study between March and May 2009, some 3.7 to 5.2 years after separation. The final overall response rate was 69% and an almost equal gender split was achieved. The majority of participants were aged between 25 and 44 years (72%) and were born in Australia (83%).

The cross-sectional study design provided a snapshot of the reflections of separated parents about what life was like for them during and after separating in the pre-reform period and about the pathways they followed.

### Family Pathways: The Grandparents in Separated Families Study

The GSFS 2009 focused on grandparents with at least one grandchild aged 2–10 years old whose parents had separated between January 2004 and December 2008. The key purpose of this study was to examine grandparents’ perceptions of the family law reforms and the impact of parental separation on the relationship between grandparents and their grandchildren.

The study involved three components: an initial Victorian-based survey that collected data from as many grandparents in Victoria as possible; focus group interviews with 50 grandparents who had completed the initial survey; and a national online survey. Following recruitment advertisements placed in Victorian-based newspapers, grandparents completed a brief survey (online, by telephone or through a mail-out). A selection of eligible grandparents were then invited to take part in a focus group study. The focus groups were designed to explore—in greater depth than was possible with the survey—grandparents’ experiences before and after the separation of their children and their views about the impacts of the family law reforms. Following completion of the initial Victorian-based survey, further recruitment advertisements were placed in national publications inviting grandparents Australia-wide to complete a slightly modified version of the online survey.

<sup>34</sup> All except 4% of the sample had separated between July 2006 and December 2007.

<sup>35</sup> The survey included both “private collect” and “agency collect” parents.

<sup>36</sup> The focus child was the first child aged under 18 years listed in the CSA database.

<sup>37</sup> The average length of time since separation for the sample was 15 months.

<sup>38</sup> Response rate is defined as interviews completed as a proportion of interviews and refusals.

## 1.4 Structure of this report

Chapter 2 provides an overview of families using the family law system, including socio-economic and demographic characteristics and the extent to which these families reported experiencing a range of family dysfunctions, including violence, substance misuse and mental health issues. Chapter 3 focuses on the use and effectiveness of family relationship services and how the patterns of service use have changed since the 2006 changes to the family law system. Chapter 4 examines the pathways used by separated parents to sort out their parenting arrangements and how these have change following the 2006 changes. Chapter 5 considers the operation of FDR, including the appropriateness of referrals into FDR services and how the exceptions to attempting FDR are working.

Chapter 6 examines community opinions about different care-time arrangements (including shared care time) and describes the prevalence of different arrangements and the extent to which shared care time has changed since the 2006 changes to the family law system. Chapter 7 describes how the characteristics of families, the quality of inter-parental relationships, and the presence of family violence vary according to care-time arrangements. Parents' views about the flexibility and workability of different care-time arrangements are also examined in this chapter. Chapter 8 examines the question of parental responsibility and the extent to which parents share such responsibility. The chapter focuses on decision-making about issues affecting the child and financial support and also the nature of parental responsibility orders made by courts.

Chapter 9 considers how the legislative provisions about parental responsibility and care time operate, from the perspective of family lawyers and other service providers. In Chapter 10, the focus is on how the family law system deals with families where there are concerns about family violence or child safety and in Chapter 11 the links between reports of family violence, child safety concerns and child wellbeing are examined. The focus of Chapter 12 is grandparenting and the 2006 changes to the family law system.

Chapters 13, 14 and 15 focus on the legal and court systems. Chapter 13 examines the impact the 2006 changes have had on the FCoA, the FMC and the FCoWA. Issues examined are how the case management system in each court operates, changes in filing patterns and the implications of having the FCoA and the FMC operating in parallel. Chapter 14 examines how Division 12A of Part VII, "Principles for conducting child-related proceedings", has been implemented by the courts. Chapter 15 discusses the application of the 2006 changes to the legislation.

Finally, Chapter 16 summarises the key evaluation findings and conclusions based on these.