

Executive summary

Background

In 2006, the Australian Government introduced a series of changes to the family law system. These included changes to the *Family Law Act 1975* (Cth) through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*SPR Act 2006*) and changes to the family relationship services system. In broad terms, the aim of the reforms was to bring about “generational change in family law” and a “cultural shift” in the management of parental separation, “away from litigation and towards co-operative parenting”. The changes were partly shaped by the recognition that the focus must always be on the best interests of the child and that many of the disputes over children following separation are driven primarily by relationship problems rather than legal ones and are often better suited to community-based interventions.

The policy objectives of the 2006 changes to the family system 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 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.

The changes to the service delivery system included the establishment of 65 Family Relationship Centres (FRCs) throughout Australia, the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO), funding for new relationship services, and additional funding for existing relationship services. The legislative changes comprised four main elements that:

- require parents to attend family dispute resolution (FDR) before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse;
- 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;
- place greater emphasis on the need to protect children from exposure to family violence and child abuse; and
- introduce legislative support for less adversarial court processes in children’s matters.

In 2006, the Australian Institute of Family Studies (AIFS) was commissioned by the Australian Government Attorney-General’s Department and Department of Families, Housing, Community Services and Indigenous Affairs to undertake an evaluation of the impact of the 2006 changes. The evaluation has involved the collection of data from some 28,000 people involved or potentially involved in the family law system—including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers—and the analysis of administrative data and court files. This evaluation provides a more extensive evidence base about the use and operation of the family law system in Australia (and arguably internationally) than has previously been available.

Findings

Post-separation relationships

- Among parents who separated after the 2006 changes, 62% reported having a friendly and cooperative relationship with the other parent, 19% a distant relationship, 14% a highly conflictual relationship and 5% a fearful relationship (7% of mothers and 3% of fathers).
- Around two-thirds of these separated mothers and around half of the fathers reported that their child's other parent had emotionally abused them prior to or during separation. One in four mothers and around one in six fathers reported that the other parent had hurt them physically prior to separation. Around one in five parents reported safety concerns associated with ongoing contact with the child's other parent. Safety concerns were strongly associated with a history of physical hurt or emotional abuse.
- Around half of mothers and around one-third of fathers indicated that mental health problems, the misuse of alcohol or drugs, or gambling or other addictions were apparent before the separation.

Use and effectiveness of new and expanded services

- Overall, pre- and post-separation service use since the 2006 changes increased significantly.
- About half of the parents in non-separated families who had serious relationship problems used services to assist in resolving these problems. There was less use of services to support relationships by couples who had not faced serious problems (about 10%).
- About two-thirds of parents who separated after the 2006 changes had contacted or used family relationship services during or after separation.
- Separated parents who used services were more likely than separated parents who had not used services to have issues that impacted negatively on their relationships—especially family violence, mental health problems or drug and alcohol misuse issues.
- Family dispute resolution services frequently deal with high-conflict complex cases.
- Overall, relationship services clients provided favourable assessments of the services they attended. Pre-separation services were regarded very highly by clients. At the post-separation level, over 70% of FRC and FDR clients said that the service treated everyone fairly (i.e., practitioners did not take sides) and over half said that the services provided them with the help they needed. This can be considered to be a quite high level of satisfaction, given that these cases often involve strong emotions and high levels of conflict, and usually lack easy solutions.
- The considerable increase in the use of relationship-oriented services, both pre- and post-separation, suggests a cultural shift in the way in which problems that affect family relationships are being dealt with.

Coordination of the family law system and family law pathways

- Progress has been made in moving towards a more coordinated series of services across the family relationship and legal sectors, and FRCs have generally become highly visible gateways to the family law system. Nevertheless, pathways through the system need to be more clearly defined and widely understood. In particular, there is evidence that some families with family violence and/or child abuse issues are on a roundabout between family relationship services, lawyers, courts and state-based child protection and family violence systems.

Family dispute resolution

- The use of FDR post-reform is broadly meeting the objectives of requiring parents to attempt to resolve their disputes with the help of non-court dispute resolution processes and services. About two-fifths of parents who used FDR reached agreement and did not proceed to court. Most who did not reach agreement at FDR had sorted out parenting matters a year or so after separation mainly via discussions between themselves.
- There is evidence of fewer post-separation disputes being responded to primarily via the use of legal services and more disputes being responded to primarily via the use of family relationship services. This is further evidence of a cultural shift whereby a greater propor-

tion of post-separation disputes over children are being seen and responded to primarily in relationship terms.

- There is also evidence that encouraging the use of non-legal solutions, and particularly the expectation that most parents will attempt FDR, has meant that FDR is occurring in some cases where there are significant concerns about violence and safety. This suggests the need for continued careful monitoring of screening and intake processes. These cases require sophisticated triage. Recourse to a court-based pathway is not necessarily the option that such families decide to take, for a range of reasons. Decisions about how disputes are resolved in such cases are complex; it cannot be automatically assumed that FDR is inappropriate.
- Protocols between lawyers and FDR practitioners that encourage cooperation are likely to increase the chances of making the best judgments about proceeding or not proceeding with FDR.

Shared parental responsibility and shared care time

- The philosophy of shared parental responsibility was overwhelmingly supported by parents, legal system professionals and family relationship service professionals. However, many parents did not understand the distinction between shared parental responsibility and shared care time.
- A common misunderstanding is that equal shared parental responsibility allows for “equal” shared care time, and that if there is shared parental responsibility then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and time is expressed in the legislation.
- This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50–50 “custody”. This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Lawyers were more concerned about this issue than family relationship service professionals.
- More positively, the changes have also encouraged more creativity in making arrangements that involve fathers in children’s everyday routines, as well as special activities in arrangements made either by negotiation or litigation.
- Although only a minority of children had shared care time, the proportion of children with these arrangements has increased. This is part of a longer term trend in Australia and internationally.
- The majority of parents with shared care-time arrangements thought that the arrangements were working well both for parents and the child. While, on average, parents with shared care time had better quality inter-parental relationships, violence and safety concerns were present for some.
- Generally, shared care time did not appear to have a negative impact on the wellbeing of children except where mothers had safety concerns. Irrespective of care-time arrangements, safety concerns had a negative impact on children’s wellbeing. However, the negative impact of mothers’ safety concerns on children’s wellbeing was exacerbated where they experienced shared care-time arrangements.

Family violence, child abuse, mental health issues and substance misuse

- For a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drugs are relevant.
- The evaluation provides evidence that the family law system has some way to go in being able to respond effectively to these issues. However, there is also evidence that the 2006 changes have improved the way in which the system is identifying and responding to families where there are concerns about family violence, child abuse and dysfunctional behaviours. In particular, systematic attempts to screen such families in the family relationship services sector and in some parts of the legal sector appear to have improved identification of such issues.
- The link between mothers’ safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need for these sectors to have a more explicit focus on identifying the minority of highly vulnerable cases in which

concerns about child or parental safety must take priority in decisions about care-time arrangements.

The court system and the *SPR Act 2006*

- Total court filings in children's matters have declined, and a pre-reform trend for an increasing proportion of filings being made in the Federal Magistrates Court (FMC) and a corresponding decrease in filings in the Family Court of Australia (FCoA) has continued since the 2006 changes.
- Legal system professionals had concerns arising from the parallel operation of the FMC and FCoA, including the application of inconsistent legal and procedural approaches and concerns about whether cases are being heard in the most appropriate forum.
- The FCoA, the FMC and the Family Court of Western Australia (FCoWA) have each adopted a different approach to the implementation of Division 12A of Part VII of the *Family Law Act 1975*. The FMC processes have changed little (although this court is perceived to have an active case management approach, pre-dating the reforms) and the FCoA and FCoWA have implemented models with some similarities, including limits on the filing of affidavits and roles for family consultants that are based on pre-trial family assessments and involvement throughout the proceedings where necessary.
- While family consultants and most judges believed that the FCoA's model is an improvement, particularly in the area of child focus, lawyers' views were divided, with many expressing hesitancy in endorsing the changes. Concerns include a lack of resources in the FCoA, leading to delays, more protracted and drawn-out processes, and inconsistencies in judicial approaches to case management.
- The new substantive parenting provisions introduced into Division 12A of Part VII by the *SPR Act 2006* were seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice. Because of the complexity of key provisions, and the number of provisions that have to be considered or explained, judgment-writing and advice-giving have become more difficult and protracted. There was concern that legislation that should be comprehensible to its users—parents—has become more difficult to understand, even for professionals. There was also concern that the complexity of the new provisions, together with the presumption of equal shared parental responsibility, have to some extent diverted attention from the primacy of the best interests of the child, particularly in negotiations over parenting arrangements.

Conclusion

The evaluation evidence is that the 2006 reforms to the family law system have had a positive impact in some areas and have had a less positive impact in others. Overall, there is more use of relationship services, a decline in filings in the courts in children's cases, and some evidence of a shift away from an automatic recourse to legal solutions in response to post-separation relationship difficulties.

Many separated families are affected by family violence, safety concerns, mental health problems and issues linked to the misuse of addictive substances. These families are the predominant users of post-separation services and the legal sector. Resolution of post-separation issues for such families presents a challenge for the family law system. A key challenge faced by the system is determining for which vulnerable families FDR may be helpful and for which it is not appropriate.

Effective responses to families where complex issues exist entail ensuring they have access to appropriate services to not only resolve their parenting issues but also to deal with the wider issues that affect them. Such responses involve identifying the relevant issues and assisting family members to use the services, advice, and dispute resolution and decision-making processes that best fit their circumstances.

Effective responses should ensure that the parenting arrangements that are developed in families with complex issues are appropriate to children's needs and do not put their short- or long-term wellbeing at risk. The evidence of poorer wellbeing for children where mothers have safety concerns—across the range of parenting arrangements, but particularly acutely in shared care-time arrangements—highlights the importance of identifying families where safety

concerns are pertinent and assisting them to make arrangements that promote the wellbeing of their children.

This evaluation has highlighted the complex and varied issues faced by separating parents and their children and the importance of having a range of services that can effectively respond. This requires a family law system that operates in a coordinated, timely and child-focused manner. Ultimately, while there are many perspectives within the family law system and, many conflicting needs, it is important to maintain the primacy of focusing on the best interests of children and protecting all family members from harm.