

Child Support Report

The long awaited Report of the Parliamentary Joint Select Committee which examined the operation and effectiveness of the Child Support Scheme was released in late 1994. A major characteristic of the Scheme is its removal of most issues relating to the assessment and enforcement of child maintenance matters from the jurisdiction of the Family Court. Nevertheless, a number of the report's conclusions and recommendations are of considerable interest to the Court – and to the men and women who are its clients.

Given the long-standing involvement of the Australian Institute of Family Studies in the evolution and monitoring of the Child Support Scheme, much of the report is also pertinent to the Institute. Both the Court and the Institute provided written and oral submissions to the Committee, as did more than 6000 other organisations and individuals.

The Inquiry focused mainly on issues relating to the administration of the Scheme by the Child Support Agency and formula issues relevant to administrative assessment.

The report describes the Scheme as being a 'qualified success' on the basis of its performance to date, but has some caustic comments to make about the less than ideal compliance rate. However, it also identifies one of the most successful aspects of the Scheme as being the change in community attitudes brought about by the emphasis on parental responsibility to pay child support.

Several of the 163 recommendations made by the Committee relate to gaps in knowledge about the populations of parents affected by the Scheme. Calls for the collection of additional information were prompted by concern over the lack of detailed material about (1) reasons for non-payment, (2) the financial impacts on payers and payees of their obligations under the Scheme, (3) the interaction of social security, family law, child support and taxation laws and policies, and (4) their impacts on decisions about separation, participation in the paid workforce and the establishment of second families.

A further recommendation refers to the regular evaluation of the impact of the Scheme over time which, the report suggests, should be carried out by an independent research organisation under the guidance of a three-person supervisory committee. In making this recommendation the report notes that five evaluations had taken place since the Scheme's introduction and suggests



In this occasional column
MARGARET HARRISON
keeps us up to date on family law issues, recent decisions of the Family Court of Australia, and the implications these have for families.

that it is 'imperative that this evaluation process is continued on a regular basis in the future' (p.107).

The report refers to the formula percentages adopted at the Scheme's inception as 'arbitrary', and comments that the costs of children material (specifically the Lee and Lovering studies) 'not only produce widely divergent results but are also dated and possibly misleading' (p.78). The Committee therefore recommends that the Minister for Social Security commission an independent study into the costs of children, including a critical evaluation of the current child support formulas [recommendation 116].

As mentioned in the previous issue of *Family Matters* (p.8), the Family Court has recently endorsed the usefulness of the Lee scale, and referred positively to those calculations in its response to the Joint Select Committee Report. (See Gregg Snider's article elsewhere in this issue outlining plans for the re-examination of the costs of children.)

It is not possible to examine the report in any detail in this column, nor to analyse the impacts of the recommendations. However several proposed changes to the formula will, if implemented, reduce the amounts payable for children by liable parents, in some instances substantially. These include the following recommendations.

- *Recommendations 118 and 119*
 The income that custodial parents may earn before the amount payable by the non-custodian starts to be taken into account should be reduced to the applica-

ble pension cut-off point (\$19723) from the current figure of \$33259. Where income exceeds \$19723, child support should be withdrawn at the rate of 50 cents in the dollar.

- *Recommendation 123*
 The component of non-custodial parent's income which is exempt from child support under the formula be increased by 20 per cent from \$8221 to \$9865 (the single pension rate).
- *Recommendation 121*
 The maximum income level on the income of non-custodial parents above which no child support is payable should be reduced from two-and-a-half times average earnings (\$83147 per annum) to twice average earnings (\$66518).

The two-volume Report of the Joint Select Committee on Certain Family Law Issues is available from the Australian Government Publishing Service. References to page numbers are to Volume 1, Recommendations and Conclusions.

Family Law Act Reforms – Property Provisions

As mentioned in the last issue of *Family Matters*, proposed reforms to the Family Law Act are contained in two separate Bills – the first dealing with primary dispute resolution and children's matters, the second to property and financial disputes.

The first Bill is expected to be passed in the winter session of Parliament and several of its provisions have been the subject of a Senate Committee inquiry and report. The progress of the property reforms has been considerably less smooth, and their passage in the same session no longer appears possible.

The Attorney General has announced that there will be a six-month period between the passage of the amendments and their implementation, and that the two Bills will come into effect as one 'package'. There is therefore no prospect of alterations to the law coming into effect before January 1996, and the more likely date is mid-1996.

Strong criticism of several aspects of the reforms contained in the second (Property) Bill has delayed it. Particular objections

have been made to the presumption of equal contribution to the marriage, to the emphasis on pre-nuptial contracts, and to the failure to itemise violence as a relevant factor when considering how property may be allocated between the parties.

The criticisms have seen the formation of an unlikely alliance between feminist lawyers, family law practitioners and academics. In all cases concern is being expressed that the implementation of the reforms will disadvantage women. The major complaint about the presumption of equal contribution to the marriage as a starting point is that it will also be seen as an equal end point, with 50/50 outcomes becoming the norm rather than the exception, as they are now.

Two books published by the Australian Institute of Family Studies – *Settling Up: Property and Income Distribution on Divorce in Australia* (McDonald 1986) and *Settling Down: Pathways of Parents after Divorce* (Funder, Harrison and Weston 1993) – documented the financial disparity between men and women at marriage breakdown, with women being shown to be particularly financially vulnerable. This was reflected in differences in standards of living, which persisted over time and were largely attributable to women taking major child rearing responsibilities during the marriage and thereby reducing their income generating capacity. The disparity continued for un-repartnered women caring for children who were not significantly assisted by the payment of child support. Nevertheless, most women had received a greater than half share of the assets and would have been even more disadvantaged had an equality of sharing model been in place.

The Bill as drafted makes it clear that the assumption of equal contributions is rebuttable where the Court is satisfied that they were not in fact equal. The Court is required to regard financial and non-financial contributions as being intrinsically equally significant.

The Family Court has supported the inclusion into the legislation of an assumption that the parties have contributed equally to the marriage as a whole. It argues that such a provision will remove the need for argument where one spouse maintains that the other made either no or a very minor contribution to the marriage, and will enhance the value of non-financial contributions, which are most commonly made by women but which both men and women tend to minimise.

The Court sees this aspect of the reforms as being valuable as long as their intention is clearly explained in education and media campaigns. As most people bargain in the law's shadow rather than have their dispute resolved by a judge, it is obviously vital that the provisions and their intent are carefully spelled out.

The increased emphasis on private ordering, particularly by way of pre-nuptial agreements, has also raised a number of hackles. The major objective of such agreements in the Bill is to prevent designated property from being the subject of a property order. A major concern is that agreements entered into before a marriage takes place are intrinsically different from those entered into at the end of a relationship and therefore should be treated more circumspectly. Other concerns include the uncertain and possibly indefinite nature of their duration, which makes it almost impossible to foresee events which may render the agreements unfair. They are also seen as having the potential to be oppressive (particularly to women) and to promote and complicate litigation.

Australian Law Reform Commission Parent-Child Contact and the Family Court

This project has had a lengthy gestation period. It was conceived in late 1990 when the Family Law Council was asked by the Attorney-General to examine and report on legal aid costs and related issues in repetitive access cases coming before the Family Court. The Attorney was particularly concerned at that time that an unknown number of 'notorious' cases, characterised by extremely high conflict levels and extensive and protracted litigation, were damaging the welfare of the children involved and using an inordinate proportion of the Court's resources to seemingly no good effect.

In an effort to broaden the reference and include some empirical data, the Family Law Council requested assistance from the Australian Law Reform Commission and a joint project was designed. Without stressing the nature of the difficulties encountered subsequently, it should be noted that the collection of sufficient and reliable empirical data from Court files ultimately proved to be impossible.

Despite this set-back, the Australian Law Reform Commission released an Issues Paper in December 1994 and held consultations in most capital cities in early 1995 with academics, judges, court staff, and representatives from interested external agencies.

The imminent changes to the Family Law Act, and particularly to its terminology, resulted in the project metamorphosing from Intractable Access to Parent Child Contact. However, the main focuses of the inquiry remained the identification of the characteristics and causes of difficult access cases, the development of recommendations aimed at reducing the adverse effects of conflict and

repetitive litigation on children and families, and the saving of Family Court and legal aid resources.

There were two inter-related threshold issues – how can difficult contact cases be defined and what is their incidence? Are some cases of such a nature (for example, because one or both of the parties is intransigent or psychotic or excessively anxious) that the dispute will remain unresolved *regardless* of the measures taken by the Court? Or would improved identification procedures, more intensive case management, or individually directed therapy help at least some of these people – and consequently their children – to overcome the impasse?

The Issues Paper provided a useful compendium of information and research relating to the importance of 'successful' (or at least workable) access, barriers to its occurrence and some possible responses and options to difficult cases. It also considers problems relating to enforcement of access orders, and the role of approaches provided by arbitration, conciliation and mediation to difficult cases.

The Final Report on Difficult Contact Cases and the Family Court will be issued by the Australian Law Reform Commission in late May.

Significance of International Treaties

Australia ratified the United Nations Convention on the Rights of the Child in December 1990. As its provisions have not been incorporated into our municipal law by statute, ratification itself does not create any individual rights or obligations. So what significance does the Convention have for Australian law, and particularly for our children and young persons?

This question was at the centre of a recent decision of the High Court in the matter of *Minister of State for Immigration and Ethnic Affairs and Ab Hin Teob* (unreported) which dismissed an appeal from the Full Court of the Federal Court. Two judges of the Full Court had previously relied heavily on Australia's ratification of UN Convention on the Rights of the Child in determining that a decision-maker who had refused to grant an entry permit to a father who was primarily responsible for the care of five children under the age of ten years had given insufficient attention to their best interests.

Article 3 of the Convention provides (inter alia) that in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

Article 9 of the Convention requires a signatory to ensure that a child shall not be separated from his or her parents against their will, 'except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. In any such proceedings all interested parties shall be given an opportunity to participate and make their views known.

The facts of the case are as follows. The respondent was a Malaysian citizen married to an Australian. He was initially granted a temporary entry permit and subsequently applied for a grant of resident status. This application was rejected because of a conviction for importing and possessing heroin which occurred in the intervening period. He was sentenced to six years imprisonment, the sentencing judge accepting that his wife's addiction to heroin had played a part in Mr Teoh's criminal activities. An application for reconsideration of this decision was rejected, leaving him subject to deportation.

The argument before the Federal Court was that the application had been refused without consideration of the hardship that would be caused to Mr Teoh's wife and their young children were he to be deported. The evidence provided in support of the application for review claimed that Mr Teoh was a responsible and caring parent who was the sole breadwinner for the family, had been a major help to his wife, and was the only person who could keep the whole family together in the face of his wife's addiction.

By a four to one majority the High Court allowed the respondent's appeal. In a joint judgement with Deane J, Mason CJ (with whom Gaudron J agreed) held that the fact that UN Convention on the Rights of the Child was not incorporated into Australian law did not strip it of all legal significance, and that its provisions should not be excluded for this reason alone.

In the fact situation before the Court, Mason CJ and Deane J found that the official who reviewed the decision to deport Mr Teoh had weighed up the seriousness of the respondent's convictions against the compassionate claims that his family would face a very difficult and bleak future without him. Although the outcome of the decision might not have altered, had the review officer been guided by the articles of the Convention she would have regarded the best interests of the children as the primary consideration.

The Teoh decision has implications for the Family Court where issues related to UN Convention on the Rights of the Child are raised. The joint judgement of Mason CJ and Deane J includes a statement that the provisions of the Convention are relevant to the exercise of a statutory discretion. Much of the work of the Family Court involves the exercise of discretion conferred by the Family Law Act. As the States are also effected by the

Convention's ratification, the decision also impacts on practices and procedures in areas such as child protection, and is particularly relevant to the decisions of Children's Courts.

Opposition to the children's provisions of the Family Law Act amendments has already been mounted on the basis that the proposed section 60B(2)(b) which provides that children have a right to have contact on a regular basis with both their parents and with other people responsible for their care, welfare and development is inconsistent with article 9 of the Convention, as it is not expressed to be subject to the interests of the child.

Economic Circumstances of Women after Separation

The recent decision of *Mitchell* [unreported] provides an interesting commentary on the potentially significant role of relevant research findings in financial disputes.

The Full Court (Nicholson CJ, Fogarty and Jordan JJ) was called upon to consider a wife's appeal against the dismissal of her application for maintenance and against an order dividing the net property of the parties as to 90 per cent to her and 10 per cent to the former husband.

The parties had been married for nearly 30 years, were in their mid-50s, and had two adult offspring. The wife had worked intermittently since the birth of the first child, as a nurse and also for several years in her husband's business. At the time of the hearing she was employed two days per week in a physiotherapy centre.

On the issue of spousal maintenance, the trial judge had found (1) that the wife had not taken sufficient steps to persuade the Court that she had made proper efforts to increase her income, and (2) that the size of the property order eliminated her need for ongoing financial support. On the second point the Full Court found that given her age, previous standard of living, the financial circumstances of her former husband, the expenses of the sale of the property and responsibility for her legal proceedings, the amount to be received did not disqualify the wife from obtaining maintenance.

On the first point, the Full Court examined what was identified as the significant gap between theory and reality for people in middle age, who were seeking employment but were lacking experience and confidence, had been out of the skilled workforce for many years, and were competing for jobs in the context of current high unemployment. In particular, the judgement averted to the loss of security, missed promotions and inability to retrain, together

with reduced self-confidence, which the Court was required to take notice of and apply in a realistic way.

Reference was made to the decision of *Moge* (1992) 43 RFL (3d) 345 in which the Supreme Court of Canada accepted evidence of research which showed the relative financial deprivation of women and the children in their care after marriage breakdown, and identified its cause as being women's interrupted work patterns due to child raising.

The majority judgement in *Moge*, which was delivered by L'Heureux-Dube J, referred to a number of (largely North American) studies and commentaries which examined the general economic impact of divorce on women. She described this impact as 'a phenomenon, the existence of which cannot reasonably be questioned and should be amenable to judicial notice subject to other expert evidence which may bear on them, as background information at the very least'.

The Full Court in *Mitchell* agreed with the principle set out by L'Heureux-Dube J, and cited the two previously mentioned Institute books *Settling Up* and *Settling Down* as providing the Australian body of research. By taking judicial notice of material, the Court accepts that it is widely established and understood and may be adopted without formal evidence of its existence having to be presented.

In *Patsalou* (1995) FLC 92-580 the Full Court affirmed the correctness of the trial judge's taking of judicial notice of articles and research material which examined the impacts of inter-spousal violence on children.

Graycar (1995) identifies the *Moge* decision as providing an example of a court taking account of the realities of women's lives rather than making assumptions about them in the absence of fact which, previous case law suggests, has previously been an all too frequent occurrence.

In the Australian context, cases such as *Mitchell* and *Patsalou* illustrate an application of scholarship and empirical research to judicial decision-making which should serve to increase the profile of research and integrate it more into the jurisprudence of family law.

Reference

Graycar, R. (1995), 'Matrimonial property law reform and equality for women: discourses in discord?', 25 VUWLR, pp.9-30.

Margaret Harrison, is the Senior Legal Associate to the Chief Justice of the Family Court of Australia. She is an observer at Family Law Council meetings and a member of the Council's Medical Powers, Child Support, and Children and Family Services Committees.