

SOME SALIENT ISSUES IN



FAMILY LAW

KATE FUNDER
reflects on contributions in this issue
of *Family Matters* and comments on some
current debates in the realm

Respect for diverse cultural beliefs and practices and the administration of just and equal treatment before the law is nowhere more challenging than in the sensitive realm of family law. This edition of *Family Matters* offers a number of examples of the dilemmas of law in a pluralistic society. The issues discussed by contributors to this edition have many reflections in the continuing debates about projected reforms to the Family Law Act (1975) contained in the two Family Law Reform Bills currently under consideration. However, critical analysis of justice extends beyond Acts and Regulations to issues such as the criteria for the appointment of judges in a multicultural, two-gendered society, and to speculation about the effects of a more diverse judiciary on the administration of justice.

In her column 'News from the Family Court', Margaret Harrison describes a dilemma in a case before the Full Court of the Family Court of Australia concerning the custody of an aboriginal child. The judgement reads: 'Equal justice cannot be seen as being the same as identical treatment where it may result in disparate impact on particular individuals, in this case Aboriginal people. The treatment of individuals in a manner which recognises and responds to their relevant difference is just, and to ignore those differences accords them less respectful treatment than is given to others in the community.'

Any departure from 'equal' treatment, however, may readily be seen as preferential or discriminatory treatment and may hence violate the precept that justice must not only be done but be seen to be done. Yet injustices in outcomes (at least in part attributable to Australian laws) also offend this precept. Some salient issues in family law under current review are part of the context and content of this edition of *Family Matters*.

Indigenous law

An argument for access to justice for native people is put by the Chief Judge of the Family Court of Australia, The Hon Alistair Nicholson. In his article he argues for recognition of cultural diversity and respect for indigenous marriage and adoption customs as essential planks in ensuring access to justice for Aborigines and Torres Strait Islanders. He outlines how practices such as employing Aboriginal advisers can assist the Court to deliver justice and to serve the interests of Aboriginal and Torres Strait Islander children which may be in jeopardy. Although many people will readily endorse the call for respect and recognition of diversity in the cause of justice, the implementation of such precepts will no doubt be controversial. It is a controversy not to be shirked.

Gender

The dilemma of treating everyone the same before the law and reaching manifestly unjust outcomes, or accepting differences and risking the endorsement of inequalities in society is not confined to the multicultural facets of society. Although the 1970s and 1980s might be characterised in family law, as in education and employment policy, as decades driven by the goal of gender equality, the 1990s see a return to the question of how to have differential treatment to achieve equality and justice in outcomes. Sometimes referred to as the 'Equality Trap' (Mason 1988) this impasse was the subject of a recent paper by Associate Professor Regina Graycar at the Family Court Conference at Cooloom in September.

Her examples centred on matrimonial property distribution which is currently the subject of the Family Law Reform Bill No. 2. As examples of the dilemma, Graycar cites cases where

the undervaluation of women's contributions to marriage through their unpaid work is perhaps the nub of the problem. She cites the Institute's documentation (Funder, Harrison and Weston 1993; McDonald 1986) of the continuing costs of those contributions in later lost earnings and risk of poverty which family law is unable, and perhaps can never, redress.

As we await the outcome of the debate on the second Family Law Reform Bill which concerns property distribution, the issue of gender equality and gender differences remains lively. That many women do very badly from property distribution under the current law is incontrovertible; that a principle of equality has not proved sufficient to produce fair or equal outcomes is well documented. Although the solutions may not be so neatly stated, it is clear that the status quo will not do. To begin with, treating women as

The Role of Australia's FAMILY LAW COUNCIL

The Family Law Council, a statutory authority established under section 115 of the Family Law Act 1975, commenced to operate from 26 November 1976. The Council is an advisory body set up to advise the Attorney-General on the operation of the Family Law Act and related legislation, legal aid in family law, and any other relevant matter. It examines matters referred to it by

the Attorney-General, but it can also look into matters of its own motion.

The Council provides the Attorney-General with advice through reports or letters of advice, the latter being used when urgent advice is required or the issue under consideration is not a major one requiring wide public consultation; being a comparatively representative body, the Council is generally

able to give a quick and representative view in such circumstances. When it looks at major or complex issues the Council consults as widely as possible before reporting to the Attorney-General. Consultation is usually through the release of a discussion paper for public comment, after which a report to the Attorney-General is made.

The Council has produced a number of

equal depends on the valuation of unpaid contributions to the marriage partnership and their costs. Sadly, we do not yet have, in family law or anywhere else, the equivalent of a gold standard for unpaid work.

As another instance of issues raised within the broad context of review of family law, a paper at the same Family Court Conference, presented by Professor Marcia Neave, asked whether the gender of judges affects the delivery of justice. Professor Neave took up the argument that because men have historically dominated law making, law is gendered. She proposed that the law's gendered nature is mistaken for objectivity and impartiality and cited how criminal law failed to compensate women beaten in their own homes (see also the Australian Law Reform Commission's 1994 report). Professor Neave leaves open the question of whether the appointment of women judges would of itself change the judgements. In the domain of family law, Neave cites the law's refusal to recognise the economic value of domestic labour in dividing property as a gendered blind spot.

To question the appointment of judges is, however, to step behind the actual law as the source of justice or injustice. Thus Neave's paper, along with papers in this issue of *Family Matters*, draws our attention to the ways in which family law is embedded in assumptions of normality which come into high relief when gender, ethnic and cultural differences are examined. If the questioning and review process itself is to have validity, it too will need to be based on the widest possible consultation as part of a continuing reappraisal and reform process.

Child support

Reappraisal is nowhere more evident (and on an international as well as national scale) as in the review of child support. The history of child support schemes is a tale of three countries and the cross fertilisation of



ideas in search of a solution to the non-payment of child maintenance. Although the rates of payment differed slightly, it was nevertheless true that family law was flouted in all three countries – Australia, the United Kingdom and the United States – and the norm of non-payment was soundly established. (In Australia it stood at more than 65 per cent regular non-compliance.)

The shared problem led to some common approaches and shared solutions. Approaches advocated in the 1980s by Garfinkel (1994) and others in the United States were adapted in Australia (Harrison, Snider, Merlo 1990) and were later adapted in England (see Craig *et al.* in this issue). The debate about motives, justice, and effectiveness of the various schemes is intense and some of the current Australian furor is presented in Alexander's paper in this issue. She concludes that the Australian Scheme is valid in purpose and structure; what it needs is administrative overhaul at a more basic level than that considered by a recent Parliamentary Committee (Commonwealth Parliament 1994).

For complexity, Child Support Schemes are renowned; as innovations they are surprising examples of bold policy initiatives; as magnets for strong opinion they are almost unsurpassed. Yet they have had too little systematic evaluation based on hard data derived from national samples over a reasonable time frame. The Parliamentary Committee was without such data in evaluating the many submissions which drew attention to the complexity of nurturing and supporting children in different households; they were also without adequate data on the interaction between financial transfers and loving relationships between children and parents. The latter is a particularly significant gap in our current knowledge.

major reports on family law and related issues including such matters as child sexual abuse, administration of the Family Court, parenting after separation, family mediation, arbitration in family law, representation of children in family law, bankruptcy and family law, magistrates in family law, female genital mutilation, and sterilisation of children.

A high proportion of the Council's recommendations have been implemented by successive governments. In its *Annual Report 1994-95* the Council said that about eight out of ten of its recommendations which had been considered by government had been fully or partly implemented.

As well as its advisory role the Council also

scrutinises family law legislative amendments and generally monitors the operation of the family law system.

In addition to the Chairperson, the Council comprises 11 part-time members including judges, relationship counsellors, Commonwealth and State Government employees, barristers and solicitors, social workers and others. Members are appointed for three-year terms and reappointments are rare, thus ensuring that the Council has a regular infusion of new ideas and enthusiasm.

The Council maintains close links with the Australian Institute of Family Studies, the Australian Law Reform Commission, the Family Court of Australia, the Family Court of

Whether one considers that family law leads or follows social and economic trends; whether one sees the Family Law Act or the Child Support Scheme as fundamentally flawed or as major pieces of social legislation, it is clear that family law is an aperture through which we have a broad view of family and child policies. This issue of *Family Matters* presents some of that array in the hope of furthering informed debate.

References

- Australian Family Law Council (1994), *Female Genital Mutilation: A Report to the Attorney General*, Family Law Council, Canberra.
- Australian Law Reform Commission (1994), *Equality before the Law: Women's Equality*, Report No. 69, Australian Law Reform Commission, Sydney.
- Commonwealth Parliament (1994), Joint Select Committee on Certain Family Law Issues, *Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme: Recommendations and Conclusions*, AGPS, Canberra.
- Funder, K., Harrison, M., & Weston, R. (1993), *Settling Down: Pathways of Parents After Divorce*, Australian Institute of Family Studies, Melbourne.
- Garfinkel, I. (1994), 'The child support revolution', Paper in the Proceedings of the 106th Annual Meeting of the American Economic Association, Boston MA, January, *American Economic Review*, vol.84 no.2, May.
- Harrison, M., Snider, G., Merlo, R. (1990), *Who Pays for the Children? A First Look at the Operation of Australia's New Child Support Scheme*, Australian Institute of Family Studies, Melbourne.
- McDonald, P. (ed.) (1986), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies, Melbourne, with Prentice Hall, Sydney.
- Mason, M. A. (1988), *The Equality Trap: Why Working Women Shouldn't be Treated Like Men*, Touchstone, New York.

Kate Funder is a Principal Research Fellow of the Australian Institute of Family Studies.

Western Australia and the Law Council of Australia. The Council meets four times a year around Australia, including regional cities. It operates a system of sub-committees to do detailed studies of the various issues it is examining.

If you would like further information about the Council or its published reports please contact: The Director of Research, Family Law Council, Level 3, 50 Blackall Street, Barton ACT 2600. Telephone (06) 250 6375. Fax (06) 250 5917.

**– Jennifer Boland
Chairperson
Family Law Council**