

Family Law Reforms

Regina Graycar and Margaret Harrison

It is now more than a year since the children's provisions of the Family Law Act were extensively amended. Reference has been made to these changes in previous issues of *Family Matters*, but broadly speaking they fall into the following main areas.

The language of the various parenting provisions changes from that of custody/guardianship/access to residence and contact. This is arguably more than merely a terminology change, as a residence order simply determines with whom the child is to live rather than, as previously, who has responsibility for the child's day-to-day care. A contact order is similar in nature to the previous access order, but all other powers and responsibilities in relation to children are shared between the parents unless one or other obtains a specific issues order. 'Guardianship' is no longer an applicable concept.

The Reform Act emphasises parents' ongoing 'parental responsibility' for their children and moves away from the language of 'rights'. To the extent that 'rights' language appears in the new provisions,

The term 'parental responsibility' moves away from the language of 'rights'.

the rights referred to are those of children, not of parents. Significantly, the new Part VII contains an objects clause in which several articles of the United Nations Convention on the Rights of the Child are included. Key amongst these are that children have right of contact with both their parents, that parents share duties and responsibilities concerning the care, welfare and development of their children, and that parents should agree about the future parenting of their children. All of the principles mentioned in s.60B are expressed to apply, 'except when it is or would be contrary to a child's best interests'. To give effect to the exhortation that parents should agree, the Act allows them to make 'parenting plans' and these replace the earlier provisions relating to 'child agreements'.

The reforms emphasise private ordering. Related to the aim that 'parents should

agree about the future parenting of their children' a number of provisions stress the appropriateness of non-judicial forms of dispute resolution. To emphasise these, the Act refers to such processes as mediation and conciliation as 'primary dispute resolution', suggesting that non-judicial processes cannot be seen as 'alternative' to litigation. While the Court has always provided a range of both voluntary and compulsory conciliation services, and litigation rates have rarely increased beyond 5 per cent of all applications, these reforms stress community based, rather than court based services (Harrison 1997).

Finally, explicit mention is made throughout the Reform Act of the need to protect children from violence. There is a new provision to that effect in s.43 (one of the key object provisions), and a number of the subparagraphs in s.68F (the provision that contains a list of matters the Court must consider when determining what is in a child's best interests) refer to the need to protect children from violence, either directed at them, or at a member of their household – usually their mother.

Despite all of these changes, the broad structure of decision making in the event of a dispute remains focused on the question of what is in the best interests of the child. Section 65E provides: 'In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.'

The reforms received a considerable amount of publicity and were the subject of a major education campaign conducted by the Attorney-General's Department in conjunction with the Family Court and the profession. The terminology changes were the most obvious of the amendments, although there have been suggestions that these were merely linguistic and cosmetic, rather than substantial.

Research on effects of reforms

The Australian Research Council has provided funding to the University of Sydney and the Family Court of Australia to con-

duct research into the effects of these changes to the children's provisions of the Family Law Act.

The aims of the research are to: explore some of the underlying assumptions that led to calls for law reform; analyse the nature of the changes in law and assess the extent to which they involve changes of substance or merely changes to the nomenclature; assess the process by which the government came to decide to change the law; examine claims that the reforms may enhance rather than diminish conflict by creating unrealistic expectations on the part of contact parents about their role in decision making about children; examine claims that increased emphasis on non-litigated solutions fails to protect less powerful parties in negotiating family disputes; explore the implications for the Family Court of Australia in terms of the responsiveness of its processes to this set of reforms; and explore the implications for non-government organisations which will have a significantly increased role in the provision of child and family counselling and mediation under the new legislation.

The research project began in early 1997, several months after the legislation came into effect. Surveys are being carried out with legal practitioners and Court counsellors, and judges and registrars will also be asked to participate.

Early responses to the reforms

A key concern is that, despite an extensive media campaign aimed at increasing community awareness of the changes, there seems to be little understanding of their substantive effects and some considerable misunderstanding about them.

It is common to hear media commentators, both tabloid and more informed, refer to the reforms as a fundamental shift to dual or shared parenting.

Anecdotal evidence also suggests that there are clear misconceptions among those involved more closely through their own disputes. For example, a researcher undertaking court observations in Melbourne has described an incident in which a man who had previously been denied access to his children by the Family Court (notably, a rare event, indicating serious concerns about the children's welfare) arrived in a Melbourne Magistrate's court clutching a copy of the Reform Act on 11 June 1996 and demanded that the court now revoke the previous non-contact order and allow him to take his children to Queensland. He insisted that the principle

that a child had a 'right to contact with both parents' overrode any other provisions and, to the extent that they were inconsistent, overrode orders made under the previous provisions of the Act.

It has been suggested that the Australian reforms were intended to effect a change in 'attitudes and perceptions' rather than a change in the legal rules governing parental responsibility for children.

The English Children Act, whose private law provisions formed a basis for much of the Australian reforms, has not been the subject of any detailed evaluation, despite its having been in operation since October 1991.

Dewar (1996) has pointed out that: 'There has been no research in the United Kingdom into the effects of the private law aspects of the legislation on patterns and outcomes in children cases. We do not know, for example, whether the legislation has encouraged more fathers to seek residence or contact and whether, if there has been, they have been more successful, either in court or out, than previously. Nor do we know whether custodial parents now face greater scrutiny and control by the other parent, nor how legal co-parenting is working in practice.'

However, Dewar notes that there have been significant shifts in relation to contact in the United Kingdom, and that there is now a 'much stronger presumption in favour of contact than previously'.

This concern has also been expressed

by former Family Court judge, the Hon Peter Nygh (1996:4) who suggests that the reference to a 'right' to contact 'may be seen as creating a rebuttable presumption in favour of contact'. He also expresses concern that the notion of parental responsibility leaves it unclear to what extent a visit to the contact parent would enable that parent to make decisions such as change of school, change of name,

religion or medical treatment. In his view, the twin themes that underpin the UK legislation are 'enhanced fathers' rights and reduced court involvement' (Nygh 1996:22).

Family Court Justice Richard Chisholm (1995) has suggested that the Australian reforms were intended to effect a change in 'attitudes and perceptions' rather than a change in the legal rules governing parental responsibility for children. He notes that the Act had 'no reform background' and, in particular, that there were no arguments 'advanced that the [Family] Court has been too ready to make orders relieving some or all parental responsibilities from parents'.

Chisholm (1995) suggests there are a number of possible readings of the legislation. First is what he calls 'word association' – that is, removal of terms associated with 'winning and losing'. Second, there is the role of 'exhortation and standard setting' and he notes that the effectiveness of exhortations depends on 'how lawyers use it in communications with clients'.

Finally, he suggests that the Reform Act may bring about a change in how the issues for decision are framed – for example, from 'who gets custody' to 'what parenting orders should be made'. But, with others, he predicts the possibility of increased litigation over specific issues such as 'choice of school, religion, haircuts, and the like, where under the previous law these matters were often determined by whichever parent was awarded custody'.

The strength of these early perceptions will be tested over the three-year period of the research project, as measured against reported and unreported judgements and Court statistics. Survey responses received from judges, practitioners and Court staff will also be analysed over different time periods.

References

- Chisholm, R. (1996), 'Assessing the impact of the Family Law Reform Act 1995', *10 Australian Journal of Family Law*.
- Dewar, J. (1996), 'The Family Law Reform Act (Cth) and the Children Act (UK) compared: twins or distant cousins?', *10 Australian Journal of Family Law*, 18 at 23.
- Harrison, M. (1997), 'Resolution of disputes in family law: should courts be confined to litigation?', *Family Matters*, no. 46, Autumn 1997.
- Nygh, P. (1996), 'The new Part VII: an overview', *10 Australian Journal of Family Law*.

Regina Graycar is Professor of Law, University of Sydney.

Margaret Harrison is the Senior Legal Adviser to the Chief Justice of the Family Court of Australia.

Relocation Dispute Decided

Margaret Harrison

The possible impacts of the reforms to the children's provisions of the Family Law Act have been considered recently by the Full Court of the Family Court in the case of *B and B: Family Law Reform Act*. (For a previous discussion of the law's response to re-location cases see Sandor 1995).

The dispute centred around the intention of a mother with custody under the

'old' law to move from northern Queensland to central Victoria with the children of her former marriage in order to re-marry. The two children, aged 12 and 10 at the time of the appeal, had lived with their mother since the separation in early 1991. Their father lived in the same area and had had significant contact with them since that time. When the mother advised the father of her proposed move he sought custody

of the children and she applied for a variation of the access arrangements.

The first hearing

The matter was heard first in September 1996, several months after the Family Law Reform Act came into operation. Its principles, objectives and substantive provisions were therefore relevant to the decision. At the hearing the wife indicated