

# RESEARCHING FAMILY LAW REFORM

## The authors respond

**A**n edited version of the Executive Summary of our recently published report, *The Family Law Reform Act 1995: The First Three*

*Years*, was published in the previous issue of *Family Matters* (no. 58, pp. 80-83). The editors invited readers to comment and, in addition, asked Lawrie Moloney of La Trobe University to review it. We have been provided with that review (pp. 64-72) and with one of the responses, a letter to the editor by Professor Patrick Parkinson (p 77), and given the opportunity to respond to their comments on our work.

Both are critical of our research, and focus in particular on our methodology and what they call selective reporting. We have some general responses to make about qualitative research – which both commentators appear to suggest is somehow a less valid form of research than quantitative research – as well as responses to some of the individual matters they raise. We do not propose to respond in depth to every point as to do so would likely generate a document no shorter than our final report. Rather, we will address some of the matters we consider to be inaccurate or unfair, or that deal with issues warranting a broader debate.

### *Methodologies*

The key criticism common to both Lawrie Moloney’s review and Patrick Parkinson’s letter concerns our methodology and the implication that it lacks rigour as it

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included both qualitative and quantitative methods. Indeed, Moloney goes so far as to suggest that qualitative research is a “relatively new phenomenon” in the social sciences, while Parkinson’s main concern seems to be with the fact that qualitative research requires the intervention of an interpretive act. But as Norman Denzin (1998b: 313) has pointed out: “In the social sciences there is only interpretation. Nothing speaks for itself.”

What we have done is consistent with modern research methodologies. Examining how the legislative changes have affected the practices of various “players” in the family law system is a legitimate, much-used, contemporary, and more effective way of analysing social problems than simply analysing “the privileged sites of legal reasoning” such as the interpretations of the reforms by the Full Court (Rose and Valverde 1998: 546). This approach was fashioned on the basis, as Justice Richard Chisholm (1996) suggested when the Family Law Reform Act 1995 was first enacted, that the effects of the reforms would owe much to the way in which they were used by professionals in giving advice to clients – that is, that they might make little or a great change depending on what the various users of the system did with them.

By pursuing our interest in how key players understood the reforms and how clients were advised, our approach ►

was similar to that taken by Dewar and Parker (1999a, 1999b) in Australia and Smart and Neale (1997, 1999) in the United Kingdom, except for the fact that we also undertook judgment reviews, court observations and incorporated quantitative data (using statistical material provided by the Family Court). Indeed, Moloney notes that our research drew upon “no less than 18 data sources” and seems to suggest that somehow there is something inappropriate about this. On the contrary, if multiple methods and/or multiple sources of data provide consistent findings, then we should be more confident of the results than we might be had we relied on only one approach.<sup>1</sup>

We return to issues of methodology, both as they arise in our response to the particular points made about our research, and in our concluding remarks.

### **Lawrie Moloney's review**

Lawrie Moloney commences by taking issue with our general proposition that there was no clear rationale for the reforms to which the Reform Act was a response (although he overstates our point: at no stage do we “categorically assert that there was never any need to consider reform”). We contrasted the situation surrounding the enactment of the Reform Act with that which gave rise to the Child Support Scheme (para 2.25 of our *The First Three Years* report). The Child Support Scheme clearly responded to a documented failure of non-custodial parents to provide financial support for their children. In Chapter 2 of our report, we reviewed the context against which the legislation was enacted in some detail with a view to identifying the variety of factors that led to the passage of the Reform Act.

Curiously, Moloney suggests that “the authors make no mention of the impact of research, noted in the *Patterns of Parenting After Separation* (POPAS 1992) report, that a large number of non-custodial parents were losing significant contact with their children”. On the contrary, this is discussed (para 2.3) and put forward as a significant factor – perhaps the strongest rationale – for the change of language that was one (but only one) of the features of the reform package. It is hardly likely that we would be unaware of that report since one of us was (as was Moloney) a member of the committee that wrote the report.<sup>2</sup> Acknowledging (as we did) the problem that a number of non-custodial parents failed to maintain contact with their children, and suggesting that a change of language might alter that situation, while worthy of note, is hardly itself a rationale for the far more radical changes to the substantive law that were made, including the “right of contact” (s 60B(2)(b)).<sup>3</sup>

One of our main concerns in Chapter 2 of *The First Three Years* was to review fully what was known about children’s wellbeing after separation and divorce, and to examine how, if at all, the research suggested that that situation was affected by contact with both parents. Moloney refers to “research suggesting that children who fared best after separation were more likely to be those who maintained a meaningful relationship with both parents”. This is precisely the kind of oft-stated claim that we wanted to explore in depth by way of a thorough literature review.<sup>4</sup> And we were fortunate that, six years after the 1992 POPAS report, perhaps the most comprehensive study to date (Rodgers and Pryor 1998), which reviewed 200 research studies of children’s post divorce adjustment over a period of 30 years, was ►

published while we were in the process of undertaking our research.

That study and the numerous others reviewed by us (see footnote 82 in Chapter 2) make it clear, as we said in our report, that: “The available research evidence established that multiple interacting variables (including the custodian’s financial circumstances and the level of communication and conflict between the parents), rather than the single factor of parent–child contact, influence children’s adjustment following parental separation” (para 2.26).

The point we were attempting to make was that there was no clear research evidence that a particular legally mandated method of organising post-separation parent–child living arrangements would enhance outcomes for children. Nor, conversely, was there any evidence that the current legal framework caused children harm.

On the issue of the reform background, Moloney also quibbles with our suggestion that there was a “desire to mirror” the English Children Act 1989. But the whole reform process (in which two of us were centrally involved) was premised upon the adoption into Australia of precisely that law, and the form of the request to the Family Law Council to examine and report upon the operation of the Children Act (para 2.4 of our report) shows how this framed the debate, despite the significant differences between the jurisdictions (Dewar 1996).

Moloney also criticises our decision not to include “the voices of children”. That of course would be a whole other research project and was not the project we undertook which involved mapping and following the way in which understandings of the legislation, largely by those who

work in the system (but also to a much lesser extent, adults affected by it), developed over the first few years of the Act’s operation. And as Moloney would be only too aware, any study that seeks the views of children needs to be designed with children at the centre of it, not including children as “just another data source”. Studying children also raises significant ethical issues about researching subjects who are below the age of being able to give informed consent.

Finally, we were somewhat surprised at his suggestion that it is “important to reflect on the necessary limitations of research which both questions the need for legislative change in the first place and then sets out to assess the impact of that change”. Is the argument that a researcher must approach a research issue with an uncritical acceptance of the merits of, in this case, a law that has been enacted? Moloney should be aware that there is considerable disagreement as to what the aims of the legislation are/were, or how they might be ascertained (probably the clearest analysis of this is by Justice Richard Chisholm 1996; see also some of the parliamentary debates referred to in our footnotes in Chapter 2).

Yet Moloney questions our finding that there was increased uncertainty and confusion about the implications of the new regime and states: “It is clear that the Reform Act was aimed at altering expectations regarding post separation parenting.” But is it so clear? The discussions by expert commentators at the time of the enactment of the legislation all drew attention to the *lack* of clarity in the aims (Chisholm 1996; Bailey-Harris 1996; Dewar 1996, 1997; Nygh 1996). One of those aims may well have been to alter expectations, but there were others, some of them contradictory.<sup>5</sup> We can assure ►

Moloney that many of those involved in the discussions and debates around the time of the enactment also questioned the need for legislative reform and would still find it hard to articulate any clear and obvious aims of the Reform Act. However, that has not stopped them working with, or undertaking research about, the legislation.

And we did not claim that increased disputation between parents is a direct result of that uncertainty. Indeed, we were very careful to avoid any suggestion that we could discern direct cause and effect relationships. Rather, we noted at some length (paras 3.37–3.43) that establishing any clear causal relationship was, in effect, impossible, given that so many other associated changes occurred over the three-year period of the research.

### ***Predictions and concerns***

Moloney suggests that the three main “predictions and concerns” listed are our “a priori hypotheses” which he attributes to our “starting position that there was no need for the reforms”. But as the footnotes to those headings make clear, what we set out to evaluate were the claims that were being made by key players in the policy debates, and in particular those that were published in the legal academic literature at that time. These were distilled and listed via the use of those headings.

The first hypothesis is essentially attributable to Chisholm (1996) as well as to a number of family law practitioners.<sup>6</sup> The second also comes from Justice Chisholm’s article, but is a view that was publicly shared by Dewar (1997) who has also published research on the Family Law Reform Act with similar findings (which we return to later in this discussion), as well as former Family Court Judge

the Hon Peter Nygh (1996). The third is a point made by the Australian Law Reform Commission in Chapter 9 of its report, *Equality Before the Law: Justice for Women* (ALRC 1994), as well as by a number of academic commentators (see our report, Chapter 3, footnotes 10-15).

### ***The parents***

One of the criticisms of the *First Three Years* report is that more women than men were interviewed, and that in those interviews, we focused extensively on the issue of violence.

There is clearly some confusion about the work we did with parents. First, it is important to note that there were two separate samples of parents. Moloney focuses attention only on the group of parents that were interviewed – the (smaller) sample of parents who were affected by domestic violence – although Parkinson clearly understood that there were two separate groups.

The larger and (first in time) sample comprised 82 parents who were clients of family law solicitors who agreed, via their lawyers, to complete questionnaires we left with the solicitors (para 4.9 of our report). That sample was made up of 49 women and 33 men. While the sample contains fewer men than women, it is not wildly unbalanced and reflects the clients who were willing to fill in the questionnaires. We did not purport to draw generalised conclusions from the responses of these parents.

However, we did two things with that material. First, we commented on an interesting divergence between the views of/language used by the men and the women in their responses to the final open-ended question about their understanding and experience of the law. We provided two examples of the men’s comments and two of the women’s comments as illustrations of the themes that were reflected ►

(paras 4.11-4.14). The use of case examples is standard practice in qualitative research and is used frequently by other socio-legal scholars of the family such as Carol Smart (Smart and Neale 1999). Second, we also noted that all of the respondents – men and women – used the language of custody and access even though they had been legally advised about residence and contact – that is, that the new terminology and concepts had not penetrated with those who had actually discussed their issue with legal advisers.

The second sample – the 65 parents who were interviewed about their contact arrangements – had a very different purpose and genesis (para 3.16). This sample came via a “snowballing” method/technique, designed to follow up on anecdotal evidence already collected second-hand from other sources (mainly solicitors and judges). That second-hand anecdotal evidence, which was reported upon at some length in our interim report (Rhoades, Graycar and Harrison 1999), suggested that women who have concerns about the father’s capacity to care for the children were now being pressured into not raising those concerns. For example, as noted in our report: some solicitors had told us about women being pressured to agree to contact in legal aid conferences since the reforms; some solicitors said that they were afraid to ask for “no contact” any more because their client might appear “hostile” and it would prejudice her case; and some judges had said that lawyers seemed reluctant to ask for “no contact”. So we decided to follow up on that issue by speaking to parents who had contact orders or arrangements, focusing on those with consent agreements, with a view to ascertaining how these had come about and evaluating their workability. Their stories were quite telling about a particular experience of the system under Reform Act conditions.

We thought it was important to include them, and they confirmed information we had gathered from the other sources we relied upon.

At no time did we claim this sample of interviewed parents to be representative, and we also made it clear that it consisted of far greater numbers of women than men. Indeed, we expressly noted that: “It was obvious that the population of parents . . . could not and would not be representative of the wider group of those who have experienced separation. We do not suggest that their experiences are generalisable to a larger population.” (para 3.21) Nevertheless, we maintain that interviewing that small number of mainly women about their experiences was a valid part of our research and, as we stated in the report, provided powerful accounts of how they viewed their experiences.

It is unfair of Moloney to say, “It is not surprising that the report provides few examples of fathers wishing to be caring”. The larger of the two samples of parents comprised 82 parents, including 33 men (note that we did not ask about violence in that sample). Had a theme of “fathers wanting to be caring” emerged from that sample, we would have reported it. But it didn’t. What there was, and what we reported on, was: (1) a theme of both men and women feeling unfairly treated by the legal system; (2) that for men that theme related more to feelings of inequality of treatment compared with mothers, while for women that complaint had more to do with a lack of appreciation for the actual practice of contact-operative caregiving; and (3) that the new terminology did not seem to have penetrated.

The second sample of parents focused specifically on the interaction of the right of contact principle and issues of violence, but this part of the research was designed precisely for that purpose – that is, to explore that particular ►

issue. While that provides a valid picture of that issue, at no stage did we claim that it represents more than a small part of the whole picture.

### *Interim hearings and children's best interests*

Our findings on changes in practice at interim hearings are perhaps those which, given his concerns about method, Moloney would find most clearly proven since they are demonstrated solely by court decisions – that is, the dramatic decline in the number of cases in which no contact orders were made, as compared with the almost negligible change in outcome at final hearings.

This is consistent with other research that has looked at the practice of interim decision-making. Our research shows that it is probable that “arrangements are being sanctioned at the interim stage that would not withstand closer scrutiny”, as Dewar and Parker (1999b: 109) so succinctly put it. Our research and theirs shows that this is most likely to be the case where allegations of violence are raised at interim hearings because there is no process for testing those allegations at that stage. Dewar and Parker suggested that the “downplaying” of violence, particularly at the interim stage, is likely a result of the provisions about violence being “outweighed . . . by the general statement of the child’s right to contact in s 60B(2)(b)” (Dewar and Parker (1999b: 104). Therefore, there is real reason to be concerned about the safety of children as a result of this (Dewar and Parker 1999a and 1999b; Hunter et al. 2000).

This finding, which emerged clearly by the time we published our interim report, was also central to our decision to explore further the interaction between contact and domestic violence via a targeted survey of parents with consent arrangements.

### *Contact applications and contravention applications*

Lawrie Moloney fails to distinguish between two discrete issues – the increase in the number of disputes about contact, and the increase in the number of applications for contravention orders. It is simply a misrepresentation to attribute to us, as he does, the following statement: “There has been an increase in the number of disputes about contact and ‘many such applications are without merit’.”

This one sentence deals with two quite separate issues. The number of applications for contact has indeed increased substantially. So also has the number of applications for contravention orders (Form 49 applications). Just as our plan to interview parents with consent agreements about their experiences developed out of information we obtained from a number of sources, so also our focus on the increasing use of contravention applications was something that developed out of our more general observations of duty lists in a number of registries. It became clear to us that an increasing number of contravention applications was being made, and also that a high proportion were dismissed. Our figures show that more than half were found to be “without merit” – that is, either dismissed absolutely, or technically found but seen as trivial and no penalty imposed. The figures relating to disposition of such applications demonstrate clearly, as did the interviews with judicial personnel, that a majority of such applications are indeed found to be “without merit”. We did not make a similar claim about contact applications.

Our findings on the contravention issue influenced changes to the Family Law Amendment Bill 2000, just prior to its final passage through Parliament, so as to make ►

more realistic the new parenting enforcement regime that now forms part of the Act. The legislation now gives the court more opportunity to take account of important contextual factors such as whether the order breached was made by consent or as the result of a contested hearing, and whether the parties were represented, when hearing contravention applications and deciding what action if any to take in such cases.

### *The limits of reviewing judgments*

The final point made by Moloney that we wish to address is his use of the term “biased sampling” where he again draws disproportionate attention to our interviews with a small number of people who had consent agreements. He claims that it is not only men who want to exercise control over their former partners who litigate. But what he does not seem to appreciate (aside from how small and specific was this aspect of our research) is that those cases that actually proceed to final judgment are almost invariably those that are most intractable; and they are the cases that are far more likely to involve violence or abuse than the vast majority of cases that settle in “the shadow of the law”.

We were only too aware that a review only of “judgments” would skew the research toward those “problem” cases (note the claim by Brown et al. 1998 that in recent times the court’s “core business” has become violence). That is precisely why we chose to use so many different ways of mapping the way the Act was operating – for example, interviewing solicitors, Family Court and private counsellors and mediators, judges and judicial registrars, in addition to analysing judgments.

### *Patrick Parkinson’s letter*

In his letter to the editor, Patrick Parkinson makes much of our repeated use of one quote to illustrate a theme that emerged frequently, as if somehow this itself proved a lack of “rigour” in our research.

He also criticises our choice of interviewing more women than men, while conceding that we administered “a reasonable number of written surveys of both men and women”. Like Moloney, he does not seem to appreciate the different purposes for which we used these different methods. If we had claimed that the parent interviews were representative and a statistically valid random sample, his concern would be well warranted. But we made no such claim: we simply chose to explore further a theme that had emerged from our findings from a much broader array of sources (see our interim report).

What is most extraordinary in Parkinson’s response is his suggestion that there is material that can usefully be drawn from the research “where it is possible to disentangle the evidence from the authors’ interpretation of it”. This takes us back to our starting point about the validity of different research methodologies.

Our research used both quantitative and qualitative methods and it used a number of different techniques to enable as broad a picture as possible to be painted of the post-Reform Act landscape.

Focusing on the qualitative aspects, there are two points to be made. First, the literature on qualitative research (which is not, as Moloney claims, a “relatively new phenomenon”) makes it clear that interpretation is central to

it – and indeed, to all social science research as well as to any “legal” research. Second, we wonder why Parkinson does not appear to have the same concerns with other Australian research that has used similar methods to ours, and drawn similar conclusions.

For example, the research by Dewar and Parker and their team used only qualitative methods and relied on far smaller samples of various groups (judges, lawyers, mediators etc: four of each) to reach conclusions similar to ours about the direction in which the reforms appear to be moving. In one publication about their research, these authors note: “These limitations, and particularly the geographical and numerical limits of the sample and the lack of quantitative data, prevent the making of quantitative conclusions or generalisations. Further, the accuracy of the data is inevitably mediated by our selective reporting of responses.” (Dewar and Parker 1999e: 96, and see also pp. 100-102; see also Dewar and Parker et al. 1999a)

Yet their research is frequently cited as authoritative and we are not aware of any published concerns about their methodology. (We stress that by using this example, we are not intending to criticise their research: the important criterion for us is transparency – making clear what claims the researchers are and are not making.)

### *Some concluding thoughts*

Perhaps the key to our report being singled out in this way is provided by Parkinson’s puzzling references to gender and feminism. He claims that we need to “move beyond the gender war and produce a body of research which by its rigour [a term he does not define] and balance provides a base of undisputed knowledge [sic] upon which sound policy can be developed”. And he hopes that his comments will be read not as critical of us as individuals or of feminist legal scholarship.

But perhaps the fact that he felt the need to refer to feminist legal scholarship is precisely what the concerns come down to. This is a highly politicised area and the subject of much impassioned but often ill-informed discussion (Kaye and Tolmie 1998a, 1998b; Graycar 2000). It is not uncommon in that political terrain for work done by those identified as “feminist” to be viewed as tainted, as if somehow that label is sufficient to detract from what would otherwise be seen as authoritative. The inference of course is that there is knowledge (“undisputed”) and there is “feminist” or some other adjectivally qualified form of knowledge or information.

Those who are openly associated with a certain form of scholarship, or a particular way of seeing the world, or a particular form of politics, are somehow seen as “having a position” and therefore not impartial or rigorous, while others who claim “objectivity” in a world where all ideas are in fact mediated via context, background, politics etc, and who hide the “baggage” they bring to their work, are somehow more “neutral”. This positivist view of the world has long since been debunked in the social sciences and, although not entirely, almost completely in the law.

Both Lawrie Moloney and Patrick Parkinson raise the valuable point that those of us who work in the law and those who work in the social sciences should work better and more closely together, and we welcome an ongoing dialogue between our disciplines.

And yet, despite all the theoretical literature on research methodologies to which we would happily refer them in furthering this discussion, our concluding comment takes us back to our legal origins. It comes from a judgment of the Supreme Court of Canada where the issue of judicial impartiality, objectivity and neutrality came in for some rare judicial scrutiny (*R v RDS* [1997] 3 SCR 484). While the issue here concerns research methods, we believe it is valuable to reflect on how an analogous issue in relation to claims of bias against a judge has been approached by members of the highest court in Canada.

Justices L'Heureux-Dube and McLachlin (now Chief Justice of Canada) referred to noted jurist Benjamin Cardozo's *The Nature of the Judicial Process* (1921) in their concurring judgment (*R v RDS* [1997] 3 SCR 484, paras 34-35):

“. . . where he affirmed the importance of impartiality, while at the same time recognising the fallacy of judicial neutrality . . . Cardozo recognised that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in Commentaries on Judicial Conduct (1991), at p. 12, “there is no human being who is not the product of every social experience, every process of education, and every human contact”. What is possible and desirable, they note, is impartiality: . . . True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”

Our confidence that we approached *our* task with an open mind is bolstered by the remarkable similarities between our findings, and those of other (non-feminist identified) researchers.

### Endnotes

- 1 “The use of multiple methods, or triangulation, reflects an attempt to secure an in-depth understanding of the phenomenon in question. Objective reality can never be captured. Triangulation is not a tool or strategy of validation, but an alternative to validation. The combination of multiple methods, empirical materials, perspectives and observers in a single study is best understood, then, as a strategy that adds rigour, breadth and depth to any investigation” (Denzin 1998a: 4).
- 2 Reg Graycar was a member of the Family Law Council from 1992 to 1996; Margaret Harrison has been an observer on the Family Law Council for more than 20 years, and was a member of the Committee that worked (with Lawrie Moloney) on POPAS.
- 3 The substantive reforms are outlined at para 2.10.
- 4 Compare the discussion by Justice Graham Mullane (1998) reporting on his own survey of the use of “research” as authoritative data in judgments.
- 5 Indeed, we were taken to task (quite rightly, in our view) by Justice Richard Chisholm at the International Society of Family Law Conference, in Brisbane in July 2000, for setting out a list of aims on a PowerPoint display in our presentation about this research that suggested, somewhat misleadingly, that there *was* a clear and coherent set of aims.
- 6 Such as Richard Ingleby; Garry Watts (*The First Three Years*, Chapter 3, footnotes 2-3). See also Bailey-Harris (1996).

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