

## CHAPTER

# 1

## INTRODUCTION

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### 1.1 INTRODUCTION

In this chapter our main aim is to introduce the book's overarching theme, namely the challenge of complexity in contemporary Australian family law. This complexity is manifested in a range of contexts, including the constitutional, jurisdictional and organisational contexts; ever-changing and increasingly complicated law and process; the diversity of families and their needs; and the complex and often competing interests relevant to policy formation, reform and the operation of the family law system (1.2). A second aim is to provide an outline of the book's structure (1.3).

One of the significant challenges in writing this book has been to strike the balance between our aim of ensuring its accessibility to a law student readership, while also providing a thematic, contextualised account likely to deepen student understanding and to appeal to a wider range of readers, including family law researchers, policy makers, and practitioners. This aim is rendered more onerous but also more interesting because of the complexities just mentioned.

### 1.2 THEMES

#### 1.2.1 STRUCTURAL COMPLEXITY AND FRAGMENTATION

Australia's federal system of government has historically given rise to significant structural complexity and fragmentation in the area of family law and continues to pose fundamental challenges to the attainment of a cohesive 'family law system'.

In essence, structural complexity arises from the limited power of the Commonwealth Parliament to legislate in relation to family law under Australia's *Constitution* (Chapter 2). The division of power to legislate in relation to family law across the federal/state divide

has underpinned the creation of a multilayered jurisdictional framework, with some family law issues (originally, marriage, divorce and disputes between separating spouses regarding parenting, property and child and spousal maintenance, extended over time to parenting disputes regardless of parental marital status and financial disputes on de facto relationship breakdown) now being matters falling within federal jurisdiction and other family law matters (for example, adoption, child protection, youth justice and laws regarding assisted reproductive technology) falling within state jurisdiction (Chapter 2).

Fragmentation is to a degree inevitable in a federal system of government, which by definition involves a federal/state division of the powers of government. In a federal system, fragmentation is also the inevitable product of the breadth of issues affecting families. Even if the Commonwealth Parliament had power to legislate in relation to ‘family law’, there would still be ongoing questions and challenges regarding where the line was to be drawn with regard to what is and is not covered by that term. However, it does lead to the unfortunate position that rather than being informed by the needs of families engaged in the current system, the development of an Australia-wide approach to any given family law issue depends on the location of legislative competence at federal level under a constitutional framework determined in 1901, along with any referrals of power from state parliaments to the Commonwealth Parliament that have taken place since then.

The difficulties that have arisen from this situation have been manifested in a range of areas, including the constitutional limits on the Commonwealth Parliament to legislate in relation to ex-nuptial children and in relation to financial disputes arising between separating de facto (cohabiting) partners (Chapter 2). These difficulties have been experienced less in Western Australia (WA) than in other states (Chapter 3), and over time have been reduced elsewhere through the referral of powers by the states, first in relation to ex-nuptial children, and most recently in relation to de facto financial disputes on relationship breakdown (Chapter 2). However, concerns still remain and, given the enormity of the task of rationalising structural fragmentation and overlap, progress is invariably incremental. Meanwhile, the jurisdiction of the family law courts has continued to expand, without necessarily the resources to support an increased caseload.

A clear illustration of this point is the interaction between state child protection law and process and federal family law and process relevant to the resolution of post-separation parenting disputes. Problems arise when a family that is the subject of state child protection proceedings is also the subject of an application for parenting orders at federal level. As discussed in Chapter 3, in this area there has been longstanding concern about the implications for vulnerable families of gaps and overlaps between federal and state laws, as well as organisations and agencies that interact with families affected by family violence and child abuse, with the result that those families are subjected to multiple interventions or none. A will to address this at the intergovernmental level is evident and there are indications of change, but the challenges of rationalising overlap, duplication and incoherence remain significant. While it is arguable that the interplay between policy at state and federal level in some areas, for example laws relevant to family violence, de facto financial disputes and relationship recognition (including marriage equality), has been of some advantage in providing multiple sites for debate and policy response and in this way

has supported positive change, overall structural fragmentation entails more disadvantage than advantage for families using Australia's family law system.

### 1.2.2 COMPLEXITY IN LAW AND PROCESS

A significant feature of Australia's family law system highlighted throughout this book is increasing legislative complexity. Indeed, legislative complexity is evident at every point: the structure and content of the parenting provisions of the *Family Law Act 1975* (Cth) (*FLA*) (including the way parenthood is defined); the introduction in 2008 of a significantly more complex Child Support Scheme (CSS), including a formula that is now applied by using an on-line tool; and financial provisions that have been added to incrementally over many years and now include de facto partner financial disputes determined by additional provisions that in most (but not all) ways mirror those applicable to spousal financial proceedings.

Following the enactment of the *FLA* in 1976, family law has been a site for ongoing legislative change. Since 1996, two main emphases have been to encourage private settlement (particularly in relation to parenting), and to encourage shared post-separation parenting (that is, sharing by parents who have never lived together or no longer live together of responsibility for making major decisions regarding their children (parental responsibility) as well as sharing their daily care (parenting time)) (Chapter 6). A third emphasis has been to protect family members who are victims of family violence and child abuse, although until 2012 this remained subordinate to the first two emphases. This has been of significant concern given empirical evidence showing that concerns about family violence and child safety arise in a substantial proportion of separated families, particularly those who use the family law system (Chapter 5).

Australia's family law system also manifests organisational complexity—that is, in the various fora in which law is applied, in varying degrees and ways. At the pinnacle since 2000 is a court system (outside WA) based on essentially identical jurisdictions exercised by two courts, the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCCoA), with different processes and one registry (Chapter 3). As discussed in Chapter 3, this position has been a source of concern particularly since 2009 for a range of reasons including the duplication of resources.

Further, while most parents resolve issues between themselves, since 2006 the extent to which parenting issues are addressed in community sector organisations has increased significantly, although legal advice and advocacy are still sought by a significant minority (Chapter 7). In addition, while most parents have some contact with the CSS, the majority have private arrangements for payment (Chapter 11). The majority of financial (property and maintenance) arrangements are also resolved without use of services, although a substantial minority have some contact with family law system professionals (Chapter 10). As noted in the previous section, for families affected by family violence and child safety concerns, interaction with both federal and state systems may be necessary.

As Dewar has summarised:

The picture is of a system polarised by pathways, by the dispositions of parties to agreement, by associated disparities of bargaining power, and disparities in access to legal advice and processes. The fundamental features of horizontalisation and

the relative autonomy of multiple sites of interpretation are intensified [since the mid 90s] in ways that seem to have more diverse results—positively in some cases, but negatively in others.<sup>1</sup>

As Dewar argues, access to advice and assistance is strongly influenced by socio-economic status. Ever-reducing legal aid budgets and narrow eligibility criteria mean that all but parents in the most straitened financial circumstances have to rely on their own resources to pay for legal and other professional support. This is a significant disincentive for many parents in the low-to-middle range economic brackets to pursuing what they may consider to be their legal entitlements. Family law is a jurisdiction in which self-represented litigants are a common occurrence (Chapter 3) and this can exacerbate the legal costs of the represented party, legal aid and the courts.

Against this background, the conclusions that can be drawn about the role that family law plays at a social and individual level are contested and uncertain. There are a number of reasons for this. Perhaps the most significant of these is the extent to which law does or does not influence the behaviour and actions of people who do not engage with the formal legal system and even those who do.<sup>2</sup> For example, recent research evidence suggests that a very small proportion of parents have any knowledge of the law relevant to their situation,<sup>3</sup> and that their understandings may well be inaccurate.<sup>4</sup> Further, such evidence also shows that a majority of separated parents do not engage with formal family law system services outside of the Department of Human Services, Child Support (DHS-CS) (Chapter 10). The extent to which people ‘bargain in the shadow of the law’<sup>5</sup> is thus variable, depending on their disposition and access to resources to inform their decisions, strategies and outcomes. Despite this, politicians continue to indicate faith in achieving social change through legislative activity. In recent years, this has been manifested in continuing attempts to guide the way decisions are made beginning with the introduction of the CSS in the late 1980s, and extending more recently to a more directive legislative approach to the exercise of broad judicial discretion in relation to the best interests standard in parenting matters.

A paradox that arises from this is that, particularly since 1996, legislative reform has increasingly emphasised the importance of private settlement while simultaneously establishing more prescriptive guidelines in complex legislation likely to be understood

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- 1 John Dewar, ‘Can the Centre Hold?: Reflections on Two Decades of Family Law Reform’ (2010) 24 *Australian Journal of Family Law* 139, 147.
  - 2 For example, Ira Ellman, ‘Why Making Family Law Is Hard’ (2003) 35 *Arizona State Law Journal* 699; John Eekelaar, ‘Uncovering Social Obligations: Family Law and the Responsible Citizen’ in Mavis Maclean (ed.), *Making Law for Families*, Hart Publishing, Oxford, 2000, pp 9–28; Dewar, above n 1, Rae Kaspiew, Matthew Gray, Lixia Qu and Ruth Weston ‘Legislative Aspirations and Social Realities: Empirical Reflections on Australia’s 2006 Family Law Reform’ (2011) 33 *Journal of Social Welfare and Family Law* 397.
  - 3 For example, John de Maio, Rae Kaspiew, Diana Smart, Jessie Dunstan and Sharnce Moore, *Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011*, Australian Institute of Family Studies, Melbourne, 2013; Bruce Smyth, Bryan Rodgers, Jeromey Temple, Vu Son, Marian Esler and Allan Shephard, ‘An Ex-Couples Approach to Understanding Bargaining over Child Support and Parenting Time’, paper presented at the Australian Institute of Family Studies Conference, Melbourne, 7–9 July 2010.
  - 4 Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009.
  - 5 Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

only by those versed in law. This paradox is also evident in attempts to direct the advice provided by family law system professionals who assist separated families in making parenting arrangements. It is thus evident that the Federal Government has sought to encourage private arrangements and also to influence the content of those arrangements.

Three aspects of these strategies are worthy of comment in light of the themes of this book. The first is the tension that this approach raises for the neutrality of mediated outcomes and the process itself (Chapter 7). The second is that the arrangements reached by most people are inconsistent with the directions provided in the legislation. While this may or may not be problematic, it raises a significant question regarding the influence that law can be expected to have. Third, the law has its closest application in adjudicated cases yet the majority of families that are the subject of adjudication have features that are inconsistent with the operation of legislative provisions designed with a range of users in mind, including those who are cooperative and agree privately (Chapter 7).

A further layer of complexity relates to the guidance that is offered by decided case law to legal practitioners and the public alike, which is increasingly hard to fathom. The sheer volume of decided cases is enormous, and since 2007 no longer involves selection 'for publication' by the FCoA, which along with the FCCoA aims to release reasons for almost every final judgment (Chapter 3). While the increased transparency of decision making is positive, the lack of selection among released cases also means that there is no longer a sense of the Court identifying cases that may offer useful guidance beyond their own factual context. In parenting cases the legislative framework and decision-making pathway are more prescriptive than ever before, but are also more complex and repetitive (see Chapter 8), leading to longer and more formulaic written judgments. Furthermore, the presence of self-represented litigants at appeal stage results in both property and parenting cases that are not well argued and have an impact upon the ability of the resulting decisions to articulate guiding principles.

### 1.2.3 COMPLEXITY OF FAMILY FORMS AND NEEDS

Social complexity arising from family diversity is evident at a range of levels: the 'chaos of intimacy',<sup>6</sup> diversity in values (meaning there is no homogenous view on the preferred way to partner or raise children); diversity arising from cultural, Indigenous and religious background and socio-economic status; and complexity arising from the spectrum of individual and family functioning (families who engage most deeply with the family law system being less likely to be high functioning). Also relevant are individual factors, and the personal characteristics that affect the way each member of a separated family may or may not adjust to their changed circumstances following relationship breakdown.

Existing approaches are limited in the extent to which they can respond to diversity manifested in this range of ways, as illustrated by current family law approaches to defining family relationships (Chapter 4), and the struggle of the family law system to cope with the spectrum of vulnerability that characterises those who have most need to access it (Chapters 5, 6 and 7). This spectrum includes a proportion of families with an entrenched

<sup>6</sup> John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.

level of vulnerability and disadvantage, commonly including issues related to family violence, child safety, substance misuse, and mental ill-health. This proportion increases as families proceed through the family law system (Chapters 5 and 7).

Indeed, many matters dealt with in the family law system, particularly by courts and to a significant but lesser extent in family dispute resolution (FDR), have similar features to those dealt with in the child protection system, albeit to a generally less extreme extent. The problem here is that the legislation and the system are predicated on private law system principles and resourcing levels, while child protection is invariably conceived of as a state law matter with a state-funded infrastructure. What has become increasingly obvious in recent years is the need for family law agencies and processes to be adapted to address the level of complexity manifested by many users, particularly in cases of family violence and child abuse given the prevalence of these harms in the community generally, including in separated families. In the federal sphere, this is reflected in legislative reform since 2012 to better identify and address the issues that arise in family violence and child abuse cases. Additionally, there has been increasing focus on better and more extensive screening for family violence and child safety across the system (Chapter 5).

To a large extent, our understandings of complex family dynamics (including but not limited to family violence) have been developed through the social sciences, ranging through clinical, empirical and theoretical perspectives based in psychology, psychiatry and sociology. This highlights the extent to which family law is an interdisciplinary arena. This has been the case since the enactment of the *FLA*, which included the establishment of the specialist FCoA in 1976. The marriage between family law and social sciences is, however, a complex and not always agreeable one. In recent years, this has been manifested in research documenting the tensions and challenges of cross-disciplinary practice in family law.<sup>7</sup>

In addition, two further issues regarding the use of social sciences evidence in family law disputes have assumed particular significance in recent years. The first is the contested and evolving relationship between family law policy and practice and social science research. Social science evidence comprises a varied, ever-developing and contingent body of work. In fact, so diverse and extensive is the literature in areas relevant to family that reaching conclusions that will apply in every case is untenable. Indeed, the capacity for social sciences to offer consistent and coherent guidance either at the general level of policy or the specific level of practice in family law has become the subject of recent debate (Chapter 6). The second aspect is the extent to which social science research can validly be drawn on to inform decisions in individual cases. In recent years, the use of social sciences research

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7 Helen Rhoades, Hilary Astor and Ann Sanson, 'A Study of Inter-Personal Relationships in a Changing Family Law System' (2009) 23 *Australian Journal of Family Law* 10; Rae Kaspiew, John De Maio, Julie Deblaquiere and Briony Horsfall, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases*, Australian Institute of Family Studies, Melbourne, 2012; Lawrie Moloney, Rae Kaspiew, John De Maio, Julie Deblaquiere, Kelly Hand and Briony Horsfall, *Evaluation of the Family Relationship Centre Legal Assistance Partnerships Program Final Report*, Australian Government, Australian Institute of Family Studies, Melbourne, 2011; Georgina Dimopoulos, 'Gateways, Gatekeepers or Guiding Hands? The Relationship between Family Relationship Centres and Legal Practitioners in Case Management and the Court Process' (2010) 24 *Australian Journal of Family Law* 176.

in judicial decision making has been the subject of appellate court concern<sup>8</sup> as well as academic critique.<sup>9</sup> A central concern is the tension between the task of judicial decision making on a case-by-case basis and the fact that the findings of social science research reflect general conclusions drawn from the sample studied, and influenced by the methodology used to collect and analyse data as well as the values applied in that data's interpretation. A detailed consideration of these matters is beyond the scope of this book, but the issue needs to be acknowledged as part of the contemporary landscape.

### 1.2.4 COMPLEX INTERESTS

Family law policy, practice and decision making deal with a range of public and private interests. The private interests at stake include those of the individuals within separated families. The public interests include those of governments, courts and organisations that provide services to those families and the broader community, and taxpayers who fund the costs of assisting separated families.

Amid all of these interests are those of children. The centrality of their needs in informing family law policy and practice continually needs to be re-emphasised. In among the competing range of individual, organisational and political interests in shaping family law policy and practice, children are the stakeholders who have the least opportunity to engage in public debate, yet it is their interests that are most often directly affected.

Policy debates tend to be adult-focused and driven by the particular imperatives of institutions, organisations and political groups. In recent years, debates in significant family law areas including child support and parenting laws have been polarised along gender lines. This polarity allows little scope for consideration of children's needs and perspectives in developing policy. There is a risk that children's needs and perspectives will be deployed to support the arguments of adults, rather than being considered in their own right. A central challenge for family law policy, reform and practice in the contemporary era is to better accommodate children's interests in practice and policy, while also being sensitive to the variable extent to which children may wish to and be able to participate in these areas given their developmental stage, disposition and family circumstances.

## 1.3 STRUCTURE OF THE BOOK

One of the challenges in writing this book has been to strike the balance between our aims of providing a coherent and accessible overview of the law in this area to students, while also engaging in a depth of analysis that continually exposes contradictions and encourages a deeper understanding of family law, and provides a thematic, contextualised account that draws on a range of empirical, interdisciplinary, and theoretical perspectives.

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8 For example, *McGregor and McGregor* [2012] FamCAFC 69; *Maluka and Maluka* [2011] FamCAFC 72.

9 For example, Zoe Rathus, 'A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making' (2012) 26 *Australian Journal of Family Law* 81; Richard Chisholm, 'Risks in Using Social Science Publications' (2012) 26 *Australian Journal of Family Law* 78.

Given our primary audiences, the *topic areas* covered by this book are those typically covered in university family law courses, namely:

- the constitutional and jurisdictional frameworks;
- relationship recognition (including the law of marriage and divorce);
- family violence;
- resolving disputes between adults (usually parents) over children's care (including processes);
- the obligation of parents who no longer live together to financially support their children; and
- the consequences of marriage and de facto partner relationship breakdown, for property distribution and maintenance (including processes).

We acknowledge that our coverage reflects a selective view of the range of issues affecting families that could be included in a definition of 'family law' (not extending, for example, to the law on child protection outside the context of relationship breakdown, adoption, abortion, and assisted reproduction). The scope of this book, however, is considerably wider than that covered in the usual university family law course curriculum.

The *structure* of the book has also been influenced by our primary audiences, with the topic order offering no real surprises to family law teachers. The constitutional (Chapter 2) and jurisdictional (Chapter 3) chapters are really two sides of the same coin: the focus of Chapter 2 is 'what matters the federal government *could* make laws about' (the 'macro' perspective), while Chapter 3 is concerned with 'what grants of jurisdiction to courts *have been made*'<sup>10</sup> (the 'micro' perspective, being the powers of particular courts in the family law 'system'). These chapters provide the wider context for Chapter 4, which examines the sorts of 'family' relationships that are recognised by state and federal law (including the law of marriage and divorce) and the ideologies of family that underlie the operation of law in this area. Our placement of Chapter 5, which deals with family violence, after our chapter on relationship recognition and family ideology but before our chapters on parenting orders and financial aspects of relationship breakdown, is consistent with the empirical reality that violence is a significant issue in both intact and separated families, and is a core aspect of many parenting and financial disputes.

With this backdrop in mind, we then consider broader social context, process and substantive law for the resolution of parenting disputes (Chapters 6–9). Our consideration of financial aspects of relationship breakdown similarly addresses the broader social context (Chapter 10) followed by child support (Chapter 11) and process and substantive law for the resolution of financial (property and maintenance) disputes between separated married and de facto partners (Chapters 12–15). We conclude in Chapter 16 with some thoughts about the future of Australian family law.

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<sup>10</sup> Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials*, 3rd edn, Butterworths, Sydney, 2004, p 227.