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INTRODUCTION

The analyses of John Dewar, and of Rae Kaspiew and colleagues, extracted here, encourage us to think more conceptually about the development of Australian family law and the role of law in regulating families. Students commencing a Family Law elective subject may find these articles initially difficult to digest—if so, we would suggest returning to them throughout the subject or at the end. Rosemary Hunter’s article provides an insightful overview of the changing emphases in Australian family law since the enactment of the *Family Law Act 1975* (Cth) (*FLA*).

1.2.1 STRUCTURAL COMPLEXITY AND FRAGMENTATION

Although written in 2010, and thus after the 2006 amendments (which introduced major changes in relation to post-separation parenting law and process: Chapter 6) but before the 2012 amendments (in relation to family violence: Chapter 5), John Dewar’s observations regarding the Australian family law system and its reform remain apposite.

John Dewar, ‘Can the Centre Hold?: Reflections on Two Decades of Family Law Reform’

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Since it is clear that further reform of the law in this area is going to be needed, it is worth asking what lessons we have learned from past experience that should now inform any future law reform effort.

As I said at the beginning, I think we should begin by appreciating the complexity of the task, and the nature of the system we are seeking to regulate. In particular, we need to acknowledge that it is fragmented and compartmentalised into relatively autonomous sites of legal interpretation and self-application; and that family law speaks to actors in all of these fora who believe that they need to know at least something about their legal entitlements, but who are unlikely in the vast majority of cases to engage in any formal process of advice seeking or adjudication to find out what they are. This is the ‘horizontalised’, ‘broad reach, low intensity’ system that emerges from the research findings I outlined earlier.

I want to pick out three challenges to be addressed.

The first relates to the kind of law we make in family law. Family law presents primarily a regulatory rather than an adjudicative task, in the sense that it provides guidance mostly to lay people in the practical resolution of issues or disputes. Yet this fact is not recognised in the way we write family laws. Indeed, as we have seen, current law in Australia is so complex that many lawyers struggle to make sense of it. The law that non-lawyers, acting in informal settings to resolve disputes, think they are applying, to family law issues may bear only a tangential relationship to what the law actually is.

And yet this is not what clients of the system say they want. Research conducted by AIFS [the Australian Institute of Family Studies] in the early 2000s showed that levels of client satisfaction with the family law system were affected by the early availability of easily accessible information about procedures and entitlements, the degree of coordination in service delivery and access to clear and honest advice. The evidence of the recent research suggests that these criteria are far from met—that the law itself is too complex to be conveyed to all but specialists, and the simplified messages that radiate beyond that are inaccurate and often harmful.

So, there may be a case for a new approach to the thinking about the sort of law that family law should be. The challenge is to reassert the normative authority of family law over the system as a whole, or over the multiple systems it incorporates—the ‘meta-regulatory’ task I referred to at the beginning. Is it possible, for example, to move away from traditional modes of legislation, for which lawyers and courts are the primary audience, to thinking instead about different communicative and regulatory techniques that speak more directly to the parties themselves, no matter where they are situated in the system? Can we mitigate the arbitrariness of the current system, the accidental conferment or removal of bargaining endowments that turn on entry points and pathways? Is there anything to be learned, for example, from regulatory studies of John Braithwaite and his colleagues, as a way of rethinking the tasks and techniques of the law in family law? Some work has been done in this area already, looking at the impact of ‘norm form’ (that is, rules compared with discretion) on the negotiating and bargaining behaviour of family law parties and their advisors. The study found that while norm form itself had no observable impact on this behaviour, the factors most conducive to promoting settlement were the degree to which the norm was comprehensible to the lay person and predictable to the lawyer. This suggests that the aim should be for parties to be able to bargain in the light of the law—that is, with a full understanding of its objectives and its likely results—rather than its shadow. Although this work offered no support for the hypothesis it set out to test, it suggested that thinking about family law’s mode of operation as a normative and regulatory system is worth further investigation.

The second challenge concerns the role law and legal norms can play in enabling, supporting or inhibiting inter-professional collaboration. This collaboration should be an important feature of an integrated system, to avoid clients being bumped around the system and having to start again when they move from one domain of one profession to another, and to encourage collaboration between professionals in constructing arrangements that will work in law and in real life. Here, the way in which a legal framework describes the professional responsibilities of lawyers, and the way in which the law itself sets out the criteria for decision-making, will closely affect the extent to which lawyers will feel able to take a broader view of, for example, the needs of a child. A lawyer’s primary knowledge base is the law. So, is there a way of reconstructing the legal framework in post-separation parenting cases that seeks explicitly to draw on child welfare knowledge, which in turn will provide a basis for lawyers and other family relationship professionals to work more effectively together?

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The third challenge relates to how the system handles violence. An interesting feature of the current Australian system is that it appears to recognise that violence changes everything—it disapplies some presumptions about sharing of parental responsibility that would otherwise apply, and opens up access to the inner core of the legal system and its adjudicative processes. On the face of it, this would seem to instigate a kind of acoustic separation—effectively, the creation of different fora and application of different norms to different actors, depending on the history and complexity of the relationship, and the power imbalances likely to exist between parties. The problem is that just as violence changes everything, so everything depends on violence being properly identified, understood and responded to by all actors in the system; and, as the Chisholm Report suggests, this is precisely where the Australian system has failed. The management of violence, and allegations of violence, need to be the most important feature of all aspects of the system—legislation, resourcing and professional formation—if this is to work.

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I think we now have enough experience of what works, and what doesn't, in family law, policy and administration to approach the next wave of reform with greater confidence in, and perhaps with greater expectations of, what can be achieved. I think we now need to think a little more adventurously about what family law should become and its modes of operation. In order to do this well, I believe that we need to embrace the complexity of family law systems while continuing to aim to strike a balance between a responsive and coherent normative framework, so that a coherent 'centre' can be reconstituted. Above all, we are going to need researchers to work with policy makers to provide constant iterative feedback on what is working, what isn't and where unintended consequences occur.

1.2.2 COMPLEXITY IN LAW AND PROCESS

While also written after the 2006 amendments and before the 2012 amendments, Kaspiew and colleagues' observations regarding the relationship between law reform and so change also remain current. Their conclusions relate to the Australian Institute of Family Studies' Evaluation of the 2006 amendments (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), often referred to throughout our book.

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, 413–15

[T]he discussion in this article highlighted some tensions in the way the legislation operates as suggested by the empirical findings of a major evaluation of significant changes to the Australian family legislation. Two sets of findings in particular underline a central paradox about the impact the legislation appears to have had. The first concerns the broad messages about shared parenting in the legislation and the fact that though these principles have very significant social support, care arrangements embodying these principles are evident among less than a fifth of separated parents some 15 months after separation.

The second set of findings relates to the prevalence of shared care arrangements among families where there has been a history of family violence and/or one or both parents reports ongoing safety concerns. The uptake of shared care arrangements among families with ongoing safety concerns and/or a history of family violence has been similar as among families without such issues, despite explicit legislative provisions indicating that shared care is not automatically the best option for these families and evidence of greater reliance on the formal family law system by these families. In combination, the Evaluation and some other recent studies have highlighted the varied nature of the families that have shared care. One group has the characteristics adverted to earlier (higher than average educational attainment, mothers in the work force, geographical proximity, higher than average paternal involvement with children prior to separation) while other group has less positive attributes, including a reported history of family violence, ongoing safety concerns and conflictual and acrimonious relationships. The empirical evidence suggests that system involvement (and the influence of the legislation) has tended to 'produce' (or at least not discourage or prevent) shared care arrangements among this latter group, which McIntosh et al. hypothesize lack the psycho-emotional 'equipment' to make them work for the benefit of the children. The Evaluation evidence indicates that based on mothers' reports, children in shared care where there are ongoing safety concerns have significantly lower wellbeing than children where there are ongoing safety concerns who are in primary mother care. Detriment for children in sustained shared care arrangements where parents lack the capacity to maintain flexible arrangements has also been indicated in the studies by McIntosh and colleagues.

The paradox therefore is that the legislation, in some areas, appears to have had an impact that is the reverse of that intended. While it is not possible to draw direct causal connections, there are a number of findings that contribute to an understanding of how this has come about. First, a history of family violence among separated couples is very common and ambiguous. While more parents than not report such a history, there is considerable variation in the impact it has on the inter-parental relationship into the future. For many parents it correlates with relationships that are distant, full of conflict or fearful into the future, but a solid proportion also report post separation relationships that are friendly or co-operative. Thus, there is significant diversity in the experience of family violence and identifying and responding to this complex phenomenon involves significant practice challenges.

Secondly, the shared parenting messages and their exceptions are embedded in a complex legislative framework from which one message—about shared parenting—emanated much more strongly than the other message—about family violence and child safety. As the discussion of the findings of the Evaluation pertinent to the intermediate aspect of the legislation's operation indicates, the impact of the shadow of the amendments has been informed by a crude and simplistic understanding of what they 'meant'. Significant diversity is evident in this area, with the Evaluation and Fehlberg et al.'s research suggesting variations in behaviour concerning 'agreeing', 'bargaining', 'negotiating' and 'compromising' among parents. As Dewar observes, on the basis of the Evaluation and other recent studies, '[t]he picture is of a system polarised by pathways, by the disposition of parties to agreement, by associated disparities of bargaining power and disparities in access to legal advice and processes ... [the system produces] more diverse results—positively in some cases, but negatively in others'.

Bearing in mind the complexity adverted to by Dewar, the analysis presented here supports some conclusions about the theoretical functions of the law, and their impact. An overarching point emerges particularly strongly: the difficulty inherent in attempting to implement a legislative framework predicated on differential messages for differently situated users. As the data on family violence demonstrate, the frequency and complexity of the experience of family violence belies the logic of establishing family violence as the feature that differentiates one group of family system clients from other groups. In relation to the normative function of the law, the evidence examined here suggests that

despite radiating messages consistent with social attitudes, only incremental changes in the voluntary uptake of shared parenting arrangements is evident, and these may well be the result, at least in part, of a pre-existing social trend.

The analysis presented here suggests, not surprisingly, that the regulatory operation of law is the most powerful in light of the increase in court orders for shared parental responsibility and shared time, pre and post reform. However, it also seems that regulation has occurred in a way that means that the nuances in the legislation—primarily those concerning family violence—have had very limited impact, as indicated by the lack of evidence of any differentiation in the extent to which parents expressed safety concerns between shared-care parents and parents whose child was in primary mother care. On the basis of the analysis presented here, clarity in the regulatory messages to be conveyed by legislation, together with caution in relation to complex and differentiated messages, are necessary elements in effective legal frameworks. Social change is perhaps best achieved by other mechanisms.

1.2.4 COMPLEX INTERESTS

Writing just before the 2006 amendments came into effect, Hunter draws our attention to key shifts in the development of Australian family law since the enactment of the *FLA*.

Rosemary Hunter, ‘Decades of Panic’

(2005) 10 *Griffith Review* (pages not numbered)

Family law is hot. If it isn't the subject of the latest television current affairs program, newspaper editorial, opinion piece or *Quarterly Essay*, it's being reviewed by yet another committee, or re-engineered by yet another government policy initiative. This essay attempts to explain why family law continues to be a burning issue. Why, in the 21st century, does family law remain such contested terrain? And what is the prognosis for family law in the future? In order to consider these questions, anecdotal, short-term, and localised views are not particularly helpful. It's necessary, rather, to place Australian family law within the bigger picture of historical and structural forces since the Second World War, and in a comparative frame. As Helen Rhoades and Susan Boyd point out in a recent article in the *International Journal of Law, Policy and the Family*: 'The past two decades have witnessed significant debates about child custody law reform in various jurisdictions including Australia, Canada, England, France, Denmark, Portugal, Hong Kong and the United States.' Australia is by no means alone in the trajectory, or in the vehemence, of these debates.

The standard account of the continuing heat surrounding family law is that social change since the 1970s, especially feminism, has eroded traditional male roles in the workforce, the family and the community, and this has engendered a backlash against feminism, or a crisis of masculinity, which is manifested, among other things, in ongoing debates about the shape and purposes of family law. There are two difficulties with this account in the Australian context, however. First, traditional male roles in the workforce and the family haven't eroded as much as some of us hoped for. As we have learned from periodic time-use surveys, the father-primary breadwinner, mother-primary homemaker and carer model still prevails to a large extent. The major difference now is that in addition to doing most of the domestic and child-care work, mothers are also likely to be working part-time. What has eroded in the consumer society is the ability to raise a family on a single income. Secondly, the standard account is too broad brush. It doesn't help us to understand how and why the contested issues in family law have shifted during the course of the past 30 years.

It appears, in fact, that the three decades since the enactment of the *Family Law Act 1975* can be very roughly divided up as follows. The first decade was the decade of the divorce panic. The second decade was the decade of the property panic. And the third decade has been the decade of panic about children.

The 1950s and early 1960s, in Australia and elsewhere, was a period of unprecedented social stability, characterised by both high male employment rates and high marriage rates. The later 1960s and 1970s, by contrast, saw the post-war baby boomers begin to reach adulthood, the rise of new social movements, including feminism, a substantial increase in married women's workforce participation, greater control over fertility, greater individualism and, accompanying these changes, a general re-evaluation of marriage and relationships. Between 1961 and 1981, major divorce reforms occurred in 22 countries, Australia among them. Against the backdrop of the unusual social stability and marriage rates of the post-war years, however, it was not surprising that the early years of the *Family Law Act* saw concerns expressed about the rising divorce rate in Australia and an inquiry by a Joint Select Committee on the *Family Law Act*, which reported in 1980. But empirically, after the initial peak following the enactment of the *Family Law Act*, the divorce rate fell and plateaued at a level that has changed little since 1980. That is, for more than 20 years, the divorce rate has sat between 2.5 and 2.9 divorces per 1000 population—around the same rate as Canada and the United Kingdom, and lower than the US—hardly a figure about which a panic could be sustained. The average number of children per divorce has also remained constant at around 1.9 since the early 1980s.

Despite some resurgent recent concern about the level of divorce from conservative commentators and politico-religious groups, it appears that divorce is unlikely to re-emerge as a major issue in family law. The contested issues around marriage these days are not to do with divorce, but low marriage rates (although that trend now also appears to be in reverse in Australia), low fertility rates and attempts by gay men and lesbians to gain access to the institution of marriage.

From a policy perspective, in an era in which the welfare state is being wound back and there is renewed emphasis on individual responsibility rather than state provision, divorce *per se* is unproblematic so long as it does not result in the consumption of major public resources. One way in which it might do this is by increasing the welfare dependency of mothers and children after divorce, but this has been tackled by means of the child support scheme, introduced in 1988 and the subject of a recent major review and report published in May [2005], *In the Best Interests of Children—Reforming the Child Support Scheme*, which is discussed further below. Another way in which divorce might consume significant public resources is through parties resorting to the courts to resolve disputes over 'ancillary' matters—such as maintenance, property division and arrangements for children post-separation. This risk has been addressed in a number of ways, including making child support a matter of administrative assessment by the Child Support Agency (CSA), and the increasingly coercive 'encouragement' for parties to use dispute-resolution processes such as mediation, conciliation and counselling, and to take responsibility for achieving their own solutions to family-law problems, while cutting the Family Court's funding so that it is beset by chronic problems of delay engendering widespread dissatisfaction. The Attorney-General's recent launch of fifteen Family Dispute Resolution Centres is the latest move in this ongoing procedural saga.

A further factor militating against any renewed divorce panic is the fact that divorce has become increasingly meaningless as a result of the children panic, as set out below. The new mantra of 'shared parenting' after divorce comes as close as possible to preventing couples from actually separating. In the words of Professor Patrick Parkinson, [then] chair of the Family Law Council and of the Ministerial Taskforce on Child Support in evidence to the House of Representatives Standing Committee on Family and Community Affairs in 2003: 'I think that divorce no longer means the end of a marriage where

there are children. It means the restructuring of a marriage into two separate households. And how we deal with that is the fundamental challenge for us all.' Or as Swedish and English feminist academics Eriksson and Hester prefer to put it: 'Fatherhood has replaced marriage as the social institution maintaining men's control of women.'

After the initial divorce panic subsided, attention shifted to the aspects of the *Family Law Act* relating to property division. The concern arose initially around the issue of post-divorce welfare dependency, but there was also interest in overseas regimes that provided for equal sharing of matrimonial property after divorce. Proposed amendments along these lines were referred to the 1980 Joint Select Committee on Family Law and the committee received numerous submissions indicating gendered dissatisfactions with the current law. 'Men gave the impression that the present law operate[d] as an asset-stripping device, while women complained that their contributions as homemaker or parent [were] not recognised.' The committee recommended that the Australian Law Reform Commission (ALRC) undertake a study of the legal implications of the proposed amendments, and that a survey of community attitudes also be undertaken on the proposal. These recommendations resulted in the ALRC's *Report No.39: Matrimonial Property* (1987), detailed empirical work by the Australian Institute of Family Studies on how separating couples actually were dividing property, reported in *Settling Up* (1986) and *Settling Down* (1993), and a further Joint Select Committee report in 1992. The debate turned on whether the rules about property division should pay attention to individual circumstances and future needs (which supposedly favoured women, particularly those who had been full-time homemakers), or whether they should reflect the alluringly simple and straightforward idea of a 50/50 split of matrimonial property (which might, in theory, be more favourable to men, although disguised as equality). At times, this debate was abstracted into a contest between different kinds of legal norms—rules versus discretion—but the substance of what was at stake was never far from view.

The empirical studies made it clear, however, that the rules (or discretions) that supposedly benefited women in fact did not do so. The high-profile cases in which the wives of wealthy men walked away from the Family Court with vast and undeserved riches were, in fact, quite rare. More typically, women—and children—experienced impoverishment after divorce and men demonstrated much greater capacity than women to re-establish themselves financially post-divorce. These findings were confirmed by data from the Australian Institute of Family Studies' subsequent Australian Divorce Transitions Project. The empirical studies both in Australia and overseas also made it clear that a move to strict 50/50 property division would leave women worse off. In this context, it was difficult to argue for a change that would have such a blatantly adverse impact on women. A discussion paper put out by the Commonwealth Attorney-General's Department in 1999 represented the last gasp for the idea of formal equality in property division. There was simply not enough support for the 50/50 proposals to counteract the chorus of protest they elicited. Instead, recent reforms to the property provisions of the *Family Law Act* have focused on the more practical issue of incorporating superannuation—an increasingly significant matrimonial asset since the enactment of the superannuation-guarantee legislation as part of the Hawke Labor government's 'social wage' reforms—into the matrimonial property regime.

Part of the reason for the lack of support for more far-reaching matrimonial property reform is that serious property division is a minority issue. The minority for whom this is an issue is probably equally well, if not better, served by another set of recent amendments to the *Family Law Act* relating to pre-nuptial agreements, and it's hard to see this aspect of family law reigniting as a concern. Instead, the focus of family law debates has shifted to children and become dangerously overheated.

Clearly, the distribution of children among their parents after divorce is an issue that has more popular resonance than property division. The fact that children of de facto relationships are also dealt

with under the *Family Law Act* broadens that impact still further. Concerns that the Family Court's distribution of children was biased against men were raised relatively early and resulted in a report by the court in 1983 attempting to refute this claim by reference to the evidence of settlement and litigation outcomes, and a subsequent report by the Family Law Council, *Patterns of Parenting*, in 1992. But the question of post-divorce parenting didn't really come to the boil until the mid-1990s.

Several developments occurred in the late 1980s/early 1990s that, in my view, underpin the development of a full-scale panic about children. First was the economic restructuring introduced by the Hawke government in the late 1980s, which exposed the Australian economy to global competition. Global competitiveness required a smaller public sector, reduced labour costs and greater flexibility of labour utilisation, which were achieved by means of corporatisation and privatisation, the introduction of enterprise-level, productivity-based wage bargaining and the rise of precarious, low-quality employment. For example, between 1988 and 2003, the proportion of the labour force in full-time permanent employment fell from 75 per cent to 61 per cent. In the decade 1989–1999, the proportion of men in full-time work declined from 85 per cent to 75 per cent. Full-time jobs grew by 5.5 per cent in the 1990s, while part-time jobs grew by 61 per cent. Casual employees increased from less than one fifth (19 per cent) of all employees in 1988 to more than a quarter (26 per cent) of all employees in 1996. Australia's current low unemployment rate, therefore, does not signal economic prosperity, but rather the rise of the working poor, and the phenomenon of labour market churning, whereby people move constantly between unemployment and poorly paid, casual and part-time jobs, which they must accept as a condition of continued support when they are again unemployed.

The economic changes of the 1990s also saw a shift from manufacturing and trades employment to services employment and, hence, in Australia's gender-segregated labour market, higher job growth for women than for men, although it is important to note that the great majority of these jobs are part-time. At the same time, casualisation of male employment advanced more rapidly (off a low base) than did casualisation of female employment (off a much higher base). In 1988, only 12 per cent of men were employed on a casual basis, but this had doubled to 24 per cent of men employed casually in 2003. Thus, the former female ghetto area of casual employment became more gender mixed.

The results of these economic changes for family law were twofold. First, a lower proportion of men had full-time, all-consuming jobs; conversely, a higher proportion of men had enforced time to spend with their children (though of course it must be acknowledged that spending time with doesn't necessarily mean actual caring for). Secondly, a lower proportion of men were in a position successfully to re-establish themselves financially after divorce, thereby putting pressure on their capacity to sustain child-support payments and creating incentives for men to obtain the welfare benefits available to carers of young children.

As suggested earlier, feminism might be said to have achieved psychic but not economic independence for Australian women. Women have been empowered to leave bad marriages but not sufficiently empowered to financially support their children after they do so. Under the *Family Law Act*, as originally enacted, the amount of child support ordered was discretionary and judges used their discretion largely to shift women's and children's economic dependence from former husbands to the state, thereby providing sufficient means for both the custodial and non-custodial parents to live on. Ironically (or not), the change in child-support policy and the move to standardised assessment and collection through the Child Support Agency occurred in 1988–89, at the very moment when economic restructuring was beginning to undermine the continuity and value of men's jobs. In a context in which contact fathers could no longer make arguments to a court about affordability, and had much less capacity to avoid payments, it's hardly surprising that they started demanding something more in return—that is, more of a role in their children's lives—and exploiting incentives in the legislation that

enable them to pay less if they undertake more care. Resident mothers are also worse off as a result of these changes. Unless they have sufficient income not to need to rely on parenting payments, they are locked into the CSA system but still bear the risk of non-payment by the father, a risk that has been reduced compared with the old system, but by no means eliminated.

The recent proposals of the Ministerial Taskforce on Child Support, [since enacted] ... have the capacity to take some of the heat out of debates over the operation of the child-support scheme, by basing assessments on objectively determined costs of supporting children of different ages, and on the income of both parents, rather than on a fixed proportion of only the non-resident parent's income. But they will not assist in the large proportion of cases in which there is simply not enough combined parental income adequately to meet the costs of the children, and they will continue to provide strong incentives for men to reduce financial transfers to their ex-partners and increase their access to welfare and tax benefits by entering into 'shared care' arrangements. While the taskforce acknowledged that 'shared care' actually costs more, 'because of the duplicated infrastructure costs of running two households ... and the costs involved in exercising contact, especially transportation', it did not factor this into any of its formulae for calculating child-support payments. The possible moral hazard that resident mothers might be encouraged to minimise their private incomes in order to retain full welfare benefits and maximise their child-support payments has been obviated by the 'welfare to work' reforms that ... require mothers receiving parenting payments to seek paid employment (however poor quality and poorly paid) once their children reach school age.

While the economic shifts in Australia since the late 1980s/early 1990s have created increased pressures for the family law system, those pressures have been simultaneously heightened by a broader cultural shift in attitudes to children and parenting. Lower fertility rates and smaller household sizes have seen changes in the construction of childhood, with more time and effort invested in the education and socialisation of children, changed authority relations between children and adults, and the rise of 'children's rights'. 'Parent-child relations [have become] more emotionally laden', and in an age of freely available divorce, children have become 'the source of the last remaining, irrevocable, unexchangeable primary relationship'.

These notions have given rise across the Western world to the concepts of ongoing parental responsibility and the right of children to have continuing, regular contact with both parents after separation, and a preference for joint physical custody arrangements or 'shared care'. These concepts and preferences have been embraced internationally—for example, in the United Kingdom and France, as well as Australia, and across the political spectrum in Australia, ranging from the Catholic Right of the ALP to the Coalition backbench, from the Family Law Council to the fathers' rights movement. The various motives for embracing these ideas appear to encompass a genuine concern for children's welfare (despite a lack of evidence that shared parenting actually does improve outcomes for children), a pragmatic understanding that shared parenting avoids the need to choose which parent the children will live with and, hence, has the potential to eliminate many family-law disputes, and the self-interested pursuit of property rights in children and/or continuing control over one's ex-spouse.

In turn, this range of motives demonstrates that shared parenting can never be a legislative panacea for family-law disputes. Rather, it has become the very thing contested. On the one hand, it articulates well with contemporary arguments—advocated by the men's movement among others—about the social problem of fatherlessness. (By contrast, up until the end of the Second World War, fatherlessness caused by war, industrial accidents and disease was not seen as a major social problem.) This ideology of fatherhood is attractive because it transforms men's sense of economic disempowerment and resentment into something noble and good and worth valuing. It is ideological precisely because it shores up a particular set of power relations rather than bearing any necessary resemblance to reality.

On the other hand, women's advocates point to the reality that mothers continue to be primary care givers prior to separation and that few separating couples possess the high levels of co-operation, co-ordination, economic resources and workplace flexibility required to sustain successful shared parenting. Moreover, where there has been violence in the relationship, any requirement of regular contact with the violent partner exposes the child and his or her other parent to ongoing abuse and control, and to the risk of serious harm.

The policy debate over family law is stuck between these competing contentions. The *Family Law Reform Act 1995*, which first asserted that parents share responsibility for the care and welfare of their children and that children have a right to ongoing contact with both parents, has given rise to a pro-contact culture in family-law decision making, which in too many cases leaves women and children with unsafe and unworkable contact orders that have a high rate of breakdown. At the same time, the *Family Law Reform Act* failed to deliver the 50/50 post-separation parenting arrangements and the ability to enforce contact orders that fathers' rights groups consider desirable, and they have consequently continued to lobby for further changes.

The family-law system was subsequently reviewed by the Pathways Committee, whose very sensible report, *Out of the Maze* (2001), recognised that different families needed different kinds of dispute-resolution processes, depending on their circumstances. The recommendations of the Pathways Committee were sidelined, however, in favour of a new inquiry into parenting arrangements after separation by the House of Representatives Standing Committee on Family and Community Affairs, which resulted in the report *Every Picture Tells a Story* in 2003. In response to this report, the Commonwealth Attorney-General's Department has drafted the Family Law Amendment (Shared Parental Responsibility) Bill, to be introduced in the spring 2005 session of parliament [and since enacted]. The Bill will amend the *Family Law Act* to strengthen its shared-parenting provisions while, at the same time, providing greater acknowledgment of the need for protection from family violence, thus giving something to both sides. It is unlikely to satisfy either.

The amendments also propose the introduction of a quicker and less adversarial method of dealing with children's matters coming before the Family Court. As noted earlier, one way to minimise the costs of divorce to the state has been to channel family dispute resolution away from the courts. Another strategy to achieve a similar end, widely adopted in the United States, the United Kingdom, and other Australian jurisdictions, is the introduction of so-called 'technocratic justice'—the informalisation, streamlining, rationalisation and active management of cases, which enables courts to handle increasing caseloads more rapidly, efficiently and effectively with fewer resources. The establishment of the Federal Magistrates Court was one step down this road in family law, and the mandating of less adversarial procedures in children's matters is arguably another. A pilot of the less adversarial method is being conducted in the court, but since the results of the evaluation of the pilot are not yet available, its actual efficiency and effectiveness are unknown [see now Hunter's article on the evaluation 'Child-Related Proceedings under Part VII Div 12A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227]]. As Rhoades and Boyd have observed, however, child-custody law reform in the current conjuncture inevitably consists of political compromises between competing 'consumer' groups, at the expense of either internal coherence or systematically evidence-based policy development.

Family law in Australia operates in an economic context in which there are not enough good-quality jobs to go around ... in a policy context in which the state refuses to share responsibility for children's economic wellbeing except at the most minimal level or to invest in adjudication, and in a social context in which thinking about gender and parenting roles may have changed, but the actual gender division of labour in the family has not changed a great deal over the past 30 years. The different economic,

social and ideological positions of men and women come to a head in disputes over post-separation parenting arrangements, and fester when decisions fall to be made either by a bureaucracy which lacks the capacity to take circumstances into account, or by a court which lacks the resources to deliver justice in a timely manner.

The fact that the family has, on the whole, failed to become an institution practising internal equality, and that gendered social and economic inequalities prevail outside it, render arguments for or presumptions of formal equality between partners at the point of separation—first in relation to property, and now in relation to children—highly problematic. One way out of this impasse would be to use the *Family Law Act* to create an incentive to alter the gender division of labour within intact families. If children automatically have a right of contact with both parents after separation, fathers need make no effort to play an active caring role prior to separation. By comparison, if the *Family Law Act* created a presumption that post-separation parenting arrangements should, as closely as possible, reflect each party's relationship with the children prior to separation, that might more effectively invigorate fatherhood and shared care both before and after separation, and reduce the demand for third party dispute resolution. Meanwhile, in considering its response to the recent child support review [the recommendations of which have now been largely enacted] the Government could consider one recommendation omitted by the Ministerial Taskforce—that stable, reliable, family-friendly, decently-paid employment opportunities for both men and women would go further to solving the problems of child support (and other problems besides) than any other conceivable reform.

Two other articles providing an overview of the history of family law in Australia since the enactment of the *FLA* are: Jennifer Boland, 'Family Law: Changing Law for a Changing Society' (2007) 81 *ALJ* 554–76 and Margaret Harrison, 'Australia's *Family Law Act*: The First Twenty-Five Years' (2002) 16 *International Journal of Law, Policy and the Family* 1–21.

QUESTIONS TO CONSIDER:

- 1 What specific topics or issues would you expect to learn about in a Family Law subject? Why?
- 2 Is it helpful to identify central themes and issues in the area at this early stage of the subject? Why/why not?
- 3 What should the key goals of a family law system be?
- 4 What factors might influence the achievement of those goals, and the development of our family law system?