In the past year, the empirical evidence base about the operation of our family law system has grown exponentially. The Australian Institute of Family Studies Evaluation of the 2006 Family Law Reforms (the AIFS Evaluation) (Kaspiew et al., 2009) represents the largest and most detailed examination of any system internationally. A range of other research projects has also come to fruition, collectively providing an evidence base about our system that is the envy of international policy-makers, practitioners and researchers. This edition of *Family Matters* brings together articles from several of the key pieces of research that now inform our understanding of the system.

In exploring the operation of the system from the perspective of families and a diverse range of professionals (family service system professionals, lawyers, judges, family consultants and registrars), the AIFS Evaluation has provided an extensive and multifaceted picture of the system. Findings from key studies based on large-scale, representative samples of parents are supplemented by smaller scale studies, including qualitative studies tapping professionals’ views, and studies based on other sources of information, including administrative records, court data and court files.

As the summary by Kaspiew et al. in this edition indicates, many positive messages emerged from the AIFS Evaluation. The big picture view shows that, as was the case before the 2006 changes, substantial numbers of separated parents are able to reach agreement about post-separation parenting arrangements, with little if any use of formal services. Further, parents expressed high levels of satisfaction with their use of relationship services, and the use of these services is increasing. There was extensive (almost universal) support for a key principle in relation to post-separation parenting arrangements—that both parents should continue to be responsible for their children after separation.

The AIFS Evaluation also highlighted areas where further improvement is necessary, notably the area of family violence (see Kaspiew et al., 2010). Along with other important legal system analyses published in 2009 (e.g., Chisholm, 2009; Family Law Council, 2009), the evidence shows that the family law system has some way to go in ensuring that clients affected by family violence access the most appropriate pathways for their needs, and arrive at post-separation parenting arrangements that optimise outcomes for their children. On 11 November 2010, the federal Attorney-General, The Hon. Robert McLelland, announced the Government’s proposal to amend the legislation in response to the findings and recommendations of these three reports (Attorney-General’s Department, 2010a). Specifically, the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010 seeks to amend the *Family Law Act 1975* (Cth) to strengthen provisions dealing with family violence and child abuse. In addition to a wider definition of family violence, the Bill introduces provisions specifying that where there is conflict between principles concerning meaningful involvement and protection from harm, protection from harm is to be given greater weight. The proposed legislation also seeks to repeal those parts of the legislation that discourage the disclosure of concern about family violence and child safety (*FLA* s60CC(3)(c) and s117AB).

The AIFS Evaluation demonstrated that it is a particularly complex group—families who report being affected by family violence, often accompanied by mental health problems or substance abuse issues—that represents the most intensive users of the system. Many of the needs of these families are not the same as the needs of families not affected by these issues, and it is clear that responses in the legislation, the service system and the courts need to recognise this. Another article in this edition, by Bagshaw and colleagues, specifically examines the experiences of purposive samples of self-selected system users, and provides further detail on experiences in the family law system of those affected by family violence.

While it has become commonplace to refer to Tolstoy’s famous observation in *Anna Karenina* (Tolstoy, 1901) that “all happy families are alike; each unhappy family is unhappy in its own way”, in the family law context, the evocation of this sentiment is irresistible in light of the material in this edition. The themes of diversity and complexity, manifest in various ways, are evident in the other articles in this edition, each of which reinforces the central point that policy and legislation will have differential impacts on different groups.

Diversity in the impact of the legislative underpinning of the 2006 family law reforms, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, is highlighted in research by Fehlberg and colleagues, who are undertaking a qualitative, longitudinal study of parents who have negotiated shared parenting and property arrangements in the post-reform era. The AIFS Evaluation’s findings, through the perspectives of lawyers and service system professionals, and to some extent parents, suggested that the legislation had changed to an uncertain degree the “bargaining dynamics” over post-separation arrangements in a range of areas, including over parenting and property (see Kaspiew et al., 2009, section 9.6). The data raised the hypothesis that an “agreeing dynamic” applied to some parents, but the dealings of other parents were susceptible to a “bargaining dynamic” and, for this latter group especially, the legislative amendments had weakened the position of women and favoured “parents over children”. Our understanding of these findings is enlarged significantly by the work of Fehlberg and colleagues, whose sample, although not representative of post-reform separated
parents, included a group of parents whose shared care arrangements were arrived at amicably and proceeded smoothly. It also included a group whose arrangements had been negotiated; at times, it seems, in the shadow of a common misunderstanding of the law as establishing an “entitlement” to shared care. From the mothers’ perspectives, these arrangements were proceeding much less happily and were the source of significant concerns about children’s wellbeing. Conflicted relationships, and sometimes a history of violence, were evident in this latter group.

Two other articles in this edition demonstrate further the diverse nature of parental dealings over post-separation parenting arrangements. In combination, the findings of several recent studies are building an emergent understanding that some parenting arrangements are chosen bilaterally (or even multilaterally, if children are meaningfully consulted) by parents who genuinely have the capacity to cooperate and agree about what is best for their children (Cashmore et al., 2010; Fehlberg, Millward, & Campo, 2009; McIntosh et al., 2010). For other parents, arrangements may come about through negotiation (with “agreement” representing a continuum ranging from compromise to coercion) (Fehlberg et al., 2009), or through judicial determination for those who end up in court.

In the other article drawing on evaluation-related research in this edition, Weston et al. describe different care arrangements and the characteristics of the families that have them. The 10,000 parents in this study had separated post-reform and most of the children were less than 5 years old. The data show that shared care arrangements (35–65% night split) applied to about 16% of the children, and while the picture for many families with these arrangements was a positive one—reflected in parents’ high satisfaction and views that the arrangements were working well—a sub-group of parents with shared care told a much less happy tale. Members of this sub-group, who were more likely to have relied on the formal family law system for assistance, had experienced a history of violence and/or held ongoing safety concerns arising from their child(ren)’s contact with the other parent. While such experiences were linked with diminished child wellbeing across all care-time arrangements, according to mothers’ reports, this was particularly the case where there were safety concerns and the children had a shared care-time arrangement.

The article by McIntosh and colleagues in this edition also evidences the heterogeneous nature of families who have shared care arrangements, and highlights the varying needs of children at different developmental stages. In focusing on the impact of different care arrangements on children of different ages, this research underlines the importance of implementing policies that ensure that those who apply them—parents and practitioners—recognise the importance of adopting practices that meet the needs of those who are affected by them; in this context, children. The studies suggest that shared care arrangements may pose a particular risk for children aged less than four, for reasons related to developmental needs, particularly the development of attachment. More broadly, for children in all age groups, the appropriateness of care arrangements depends on the parents’ abilities to implement and sustain them in a way that is child-focused and maintains and enhances the wellbeing of children through minimising exposure to conflict and acrimony, and making the arrangements sufficiently flexible to allow children to pursue other activities.

Yet another complex aspect of the legal system’s interaction with separated families is evident in the research on disputes over post-separation relocation, discussed by Kaspiew, Behrens and Smyth in their article in this edition. Family violence is a highly relevant theme in this research as well, with the study demonstrating the prevalence of a history of family violence among pre-reform samples of parents who have litigated relocation disputes and in judgments handed down in such cases. The study indicates that rather than being a source of conflict, many relocation disputes are a manifestation of conflict, with the qualitative data indicating that the majority of relationships among parents in the sample were conflicted before, during and after the dispute. Again, the empirical evidence in this study establishes the need for legislative and policy responses that can accommodate a diversity of needs. The authors conclude that “extreme caution [is needed] in making assumptions about the types of relocation cases to which the law is applied, and consequently [there is] a need for caution in framing such law should any changes in legislative policy be contemplated”.

The other article based on the project being undertaken by Fehlberg and her colleagues arises from the 2006 shared parenting changes, combined with changes to the child support scheme from 2006–08, which were partly rationalised on the basis of women’s increasing participation in the workforce. Millward et al. explore what is probably a growing, but little examined, group: women who have a child support liability. The article highlights significant diversity in their circumstances, attitudes and behaviour and suggests some insights into how these differ from those of fathers.

The article by Losoncz, which is the only article in this edition that does not focus specifically on family law, examines mothers’ increasing involvement in the workforce. The impetus for Losoncz’s focus on persistent work–family strain among working mothers arises from their increasing workforce involvement, without much, if any, consequent decrease in their domestic responsibilities, including child care. Losoncz finds that working mothers fall into six “clusters” on the spectrum of persistent tension between work and family responsibilities, with factors such as the nature of work, numbers of hours worked and the age of their children being influential factors in terms of cluster status. Other important factors determining cluster status are personal characteristics, including attitudes to being a working mother. Mothers experiencing separation, as well as those whose youngest children are between the ages of 6 and 11, were found to be particularly vulnerable to such strain.

Although our evidence base about the family law system is significantly broader and deeper than it was prior to the 2006 reforms (as the material in this edition of Family Matters shows), there is little justification for thinking that there is not much more to learn. There are fewer big gaps in our empirical evidence base but the coverage is by no means comprehensive. For example, the evidence on the experience of children as participants in the family law...
system, and their experience of different types of post-separation arrangements, remains sparse. An Australian Institute of Family Studies project associated with the AIFS Evaluation, which is close to completion, addresses this issue in relation to adolescents; however, evidence on the experience of 5–11 year olds, the group most likely to have shared parenting arrangements, is lacking.

Additionally, the large-scale survey of parents who separated after the reforms associated with the AIFS Evaluation (reported by Weston et al. in this edition) was conducted some 15 months after separation. Snapshots taken at any one time are simply that—snapshots. The study was designed to identify the experiences of families who separated soon after the reforms were introduced. A different picture may have emerged had the study been conducted five years after separation. Respondents were contacted again another 12 months after the initial survey, and a report on this study is in preparation. But an understanding of the extent to which the diverse experiences so far examined, changes in family structure (e.g., through parents re-partnering) and other future events combine to shape different longer term trajectories for these families would require further survey waves.

The evidence also raises other questions for investigation. The AIFS Evaluation, and the work by Fehlberg and colleagues, both refer to the complex dynamics surrounding post-separation property and financial arrangements, and the links between negotiations over these issues and shared care. This is an area that warrants further, broad-scale investigation, particularly in the context of recent legislative changes that mean de facto property arrangements are now dealt with under the Family Law Act 1975 (Cth) (rather than through state-based legal regimes),3 the gendered shifts in labour market participation referred to earlier, and the possibility of the extension of the requirement to attend family dispute resolution prior to filing a court application that was mooted by the Attorney-General in May 2010 (Attorney-General’s Department, 2010a).

To further investigate the long-term trajectories of children whose parents had been separated for an average of 15 months when interviewed, yet there is little data on experiences so far examined, changes in family structure, and other future events combine to shape different longer term trajectories for these families would require further survey waves.

The conclusions of policy-makers (and by extension practitioners in the application of policy) may be in vain and uncertain if not founded upon the observations of researchers.

Endnotes


3 Family Law Amendment (De facto financial matters and other measures) Act 2008 (Cth).

References


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