Children, families and the law
A view of the past with an eye to the future
Helen Rhoades

Over the years a great deal of scholarship has been devoted to scrutinising the interaction between family law reform and social change. As John Dewar has noted, family law is peculiarly sensitive to its social environment, due in no small part to the constantly changing nature of its subject matter: family relationships (Dewar, 1998). This observation is particularly pertinent to Part VII of Australia’s Family Law Act 1975 (“the Act”), which provides the legal framework for resolving disputes about children’s care arrangements. However, despite the many amendments to Part VII over its 38-year history, recent reports suggest that it has failed to keep pace with the growing diversity of families in Australia, and that its original concern for children’s developmental wellbeing is in need of restoration.

This chapter explores the current challenges for family law in relation to children, and how they might be met, by examining the background to the introduction of the Family Law Act in the 1970s and its modern resonances in Australia today. The first part of the chapter uses material gathered for a legal history project about the early operation of the Family Court of Australia to describe the ground-breaking changes to the law that were realised by the Act’s passage, and the problems with the existing laws at that time that prompted these reforms. The second section draws on the Australian Institute of Family Studies Evaluation of the 2006 Family Law Reforms (“the AIFS Evaluation”; Kaspiew et al., 2009) and the author’s current research on decision-making about children’s care arrangements (“the Children’s Needs study”; Rhoades, Sheehan, & Dewar, 2013) to evaluate the present state of the law and the possibilities for change.

The introduction of the Family Law Act
A new approach to marriage breakdown
The Family Law Act was passed by the Australian parliament in May 1975 and came into operation on the 5th of January 1976, two months after the fall of the Whitlam
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Government that was responsible for its development. It is best known for two significant reforms that changed the approach to marriage breakdown in Australia: the introduction of no-fault divorce and the establishment of a specialist multidisciplinary court for the resolution of family disputes, the Family Court of Australia.

The first of these reforms was the centrepiece of the Act. Its passage replaced the long list of “matrimonial offences” (such as adultery and desertion) that had characterised the Matrimonial Causes Act 1959 with a single ground for divorce based on evidence of 12 months’ separation. As a consequence of this change, spouses wanting to end their marriage no longer needed to engage in litigated contests to prove or defend allegations of matrimonial misconduct. Instead, they simply had to wait out the 12 months and apply for their divorce decree, which most couples secured without ever setting foot inside a courtroom (Swain & Thornton, 2011). Apart from the cost savings associated with this reform, it also generated a significant cultural shift, effectively recasting divorce, which had previously carried shameful connotations, into little more than an administrative process in the transition from marriage to single life. It is not difficult to imagine the benefits of this development for the unhappily married—including deserted wives and women trapped in abusive marriages—many of whom saw this transformation as a “godsend” (Rhoades, Frew, & Swain, 2010).

The second important change wrought by the Family Law Act was the creation of a dedicated family court with an inhouse counselling section. Staffed by psychologists and social workers with child welfare expertise, the role of the counselling section was twofold: to conciliate parental disputes about children and to prepare reports that would assist the court’s judges to make decisions about the children’s care arrangements (Marshall, 1977). Although the main legal principle governing (what were then called) custody disputes remained the “welfare of the child”, just as it had been under the under the previous legislation, the way in which decisions were made by the courts shifted dramatically with the passage of the Family Law Act. Under the fault-based system, decisions made about children tended to be influenced by the judge’s findings on the divorce petition. Hence, a wife who had committed adultery or deserted her marriage was likely to be regarded as unfit to have custody of the children. In contrast to this approach, the Family Law Act cast a “positive duty on the Court to investigate the circumstances of children”, and to shape arrangements for the children’s care around the evidence of their needs (Asche, 1975, p. 387). In doing so, judges relied heavily on the expertise of the court’s counsellors, who drew on their knowledge of children’s development and their observations of the family’s interactions to provide an expert assessment of the child’s attachments, relationships and needs (Marshall, 1977). In this way, the Family Law Act created for the first time in Australia a genuinely child-focused model of decision-making.

What prompted these changes?

Underlying the passage of the Family Law Act was a complex mix of forces. Perhaps the most significant factor, as Swain (2012) noted, was the widening gap between the fault-based approach to divorce and the changing social mores of Australian society. At the heart of this disjunction were the significant evidentiary hurdles that couples were subjected to in order to secure a divorce under the Matrimonial Causes Act. As well as a thoroughgoing examination of their married life, petitioners faced the very real possibility that the judge might excuse their spouse’s behaviour and refuse to grant the divorce. For example, a woman who sought to dissolve her marriage on the grounds of
her husband's adultery might see her petition fail if the judge regarded her “nagging” or lack of interest in sex as justification for her husband's conduct (Rhoades et al., 2010). Adding insult to injury, divorce trials were closely followed by the tabloid press, who made a “public sport of marital breakdown” (Swain, 2012, p. 11).

This moralistic approach was designed to deter divorce applications and preserve the institution of marriage, even if this sometimes posed significant hardship for the partners. The burden in this respect was often borne by women, who tended to shoulder the responsibility for holding the marriage together (James, 2006). By the early 1970s, however, this view of married life was increasingly at odds with the shifting values of Australian society. Alongside rising numbers of married women working outside the home was the advent of the women’s liberation movement (Margarey, 2009), which saw demands for free child care, paid maternity leave and family-friendly workplaces (Sawer, 2008). At the same time, the widespread availability of reliable contraception had created a “sexual revolution”, in which the former stigma attached to unmarried cohabitation and unwed parenthood was beginning to wane (Finlay & Bissett-Johnson, 1972). The 1970s also saw a growing rejection among the post-war generation of their parents’ values and choices, and an increased emphasis on individualism and “personal satisfaction” (Edgar, 1986, p. 9). In this changing social climate, fault-based divorce began to look decidedly out of date.

A second sign that reform was needed were the increasingly liberal interpretations of the fault-based legislation by divorce judges. Conscious of the widening gap between the law and social attitudes, and sensitive to the plight of spouses trapped in “intolerable” marriages by the need to prove a matrimonial offence, a number of progressive judicial officers in the late 1960s began to soften the evidentiary requirements for the most commonly used divorce grounds (Toose, Watson, & Benjafield, 1968). In the case of *Ainsworth v Ainsworth*, for example, Justice Selby held that it was sufficient to make out the ground of cruelty if the husband’s conduct had caused the wife to have a “reasonable apprehension of injury”, effectively overruling the existing obligation to prove the respondent had intended to inflict harm ([1968] 1 NSWLR 68, 72). Similarly, in *Colamaria*, Justice Jenkyn decided that the legal requirement to show physical injury could be satisfied by evidence of a general deterioration in the wife’s mental health ([1968] 3 NSWLR 231). These shifts provided another clear signal that the existing legislation was no longer performing its job.

A third important factor underlying the *Family Law Act* reforms, and particularly the establishment of the Act’s child-centred model of custody decision-making, was a growing recognition of the relevance of social science expertise to the resolution of family disputes (Enderby, 1975). This development was fuelled by the emerging child development research of the time, and by the increasingly prominent role played by marriage counsellors within the divorce system (Swain & Thornton, 2011). Based on their experience and knowledge of the developmental research, which showed that ongoing parental conflict can be destructive of children’s wellbeing (Rutter, 1971), these practitioners began to challenge the view embedded in the existing law that unhappy spouses should stay together for the sake of their children.

Together, these factors—the widening gap between the fault-based law and family practices, the increasing evidence of “creative” decision-making by the courts, and the growing calls by social science professionals for a more child-focused approach to custody decisions—helped to inform the development of the *Family Law Act*’s key reforms. The enduring legacy of these changes is manifest. Although marriage
remains a popular aspiration in Australia, the belief that unhappy spouses should be free to end their marriage has continued to enjoy majority support (de Vaus, 2004), and the modern family law system is still very much a multidisciplinary environment, where social science professionals play a key role in managing the separation process (Rhoades, Astor, & Sanson, 2009). Sustaining a decision-making framework shaped around children’s developmental needs, on the other hand, has proved to be more difficult.

**Forty years on: A new case for family law reform?**

Much has changed since the passage of the *Family Law Act*, both in Australian society and the Act itself. This includes significant amendments to Part VII in the 1980s to extend its coverage to ex-nuptial children, a move that recognised the growing numbers of unmarried parents. Further reforms in the 1990s added provisions dealing with family violence, reflecting a growing awareness of its prevalence and consequences for children (Rhoades, 2007), while shared parenting amendments in 2006 were designed to encourage more “cooperative parenting” between separated parents in the interests of children (Ruddock, 2005).

Given this level of reform activity, it is tempting to think that the present legislation reflects the current state of social practices in Australia when it comes to family life. Yet there is much about Part VII and its approach to children’s care arrangements that looks as though it was drafted some time ago. In this part of the chapter I want to explore two concerns in this regard: the Act’s limited recognition of family diversity and the need (once again) for the law to focus on supporting children’s development.

**Family diversity**

While the traditional family (where children are raised by two biological parents in a nuclear family arrangement) remains dominant in Australia, around 27% of families with resident children do not fit this description (Hunter & Price-Robertson, 2012). Along with increasing numbers of step-families, blended families, sole-parent families and same-sex families (Qu & Weston, 2012), kinship care arrangements are a fast-growing family form in Australia (Boetto, 2010), a phenomenon that is increasingly visible in the family courts (see, for example, *Maxwell v Finney* [2013] FMCAfam 131). Recent reports also highlight the considerable cultural diversity of families who use the family law system. Although there is a wide variation of practices within Indigenous communities, it is not uncommon for Aboriginal children to have multiple caregivers drawn from the wider family, while Torres Strait Islanders practise a form of customary adoption, in which children are “grown up” by relatives within kinship networks (Family Law Council, 2012a). Along similar lines, the Family Law Council has noted the increasing number of new and emerging communities in Australia, including families from Africa and the Middle East, many of whom take a collectivist approach to child rearing (Family Law Council, 2012b).

In addition to these changes, the past decade has seen a growing use of assisted reproductive technologies (Victorian Assisted Reproductive Treatment Authority, 2013) and surrogacy arrangements (Millbank, 2013) to form families, increasing the number of potential parents a child may have. These various reviews indicate that for a large number of Australian children, their family includes carers who are not their biological or legal parents. Moreover, a considerable body of research evidence shows that children’s
understandings of family do not always mirror the assumptions embodied in the law. As Pryor and Rodgers (2001) noted, “we cannot make assumptions about who belongs to an individual child’s family in his or her eyes” (p. 130). Yet despite the many amendments to the Family Law Act over the past decade, this social reality is not currently reflected in Part VII of the Act.

The most recent policy review of Part VII took place in 2003. It resulted in a suite of amendments to Part VII, including a number of new legal principles and a new framework for deciding children’s care arrangements (Goode v Goode [2006] FamCA 1346). Although the changes require the courts to consider the relevant customary practices where Aboriginal and Torres Strait Islander children are concerned (s 61F), the current definition of “parent” for the purposes of Part VII is limited to the child’s biological or adoptive parents (Tobin v Tobin FLC 92–848, [45]), and the Act assumes that children have two of these. This approach to what we might call “legal parents” is reflected in particular in the first object of Part VII, which is to ensure children have the benefit of “both of their parents” having a meaningful involvement in their lives (s 60B(1)(a)), and in the first primary best interests consideration, which requires the courts to consider the benefit to the child of having a meaningful relationship with “both of the child’s parents” (s 60CC(2)(a)).

As this might suggest, the current provisions of Part VII have created something of a problem for the courts when a child’s family does not conform to the model envisaged by the Act, a circumstance that is increasingly commonplace. According to the Act, even though an applicant may be someone on whom the child has depended for their care, the court is not required to consider “the benefit to the child of having a meaningful relationship” with that person. Given the evidence of family diversity described above, this narrow understanding of family life brings to mind the kinds of problems with the law that signalled the need for reform in the 1970s, and suggests that, once again, the legislation has not kept pace with social reality. A question that arises is how are the courts dealing with this limitation in practice?

One of the consequences of the present limitations of the Act is that the judges of the family courts, much like their counterparts in the early 1970s, have had to engage in some creative decision-making in order to meet the needs of children living in non-traditional families. In a series of recent cases involving applications by grandmothers, step-fathers, lesbian co-parents, and sisters and aunts, judges have carefully manoeuvred their way around the current legislative framework in an attempt to consider the substance of the provisions that apply to parents, if not their form, so that the children in question are not disadvantaged (Chisholm, 2010). As the judicial officer in one such case explained:

To exclude [the step-father] from those considerations that specifically relate to parents would in the circumstances be artificial and may have the potential to distort the decision-making process leading to a decision that may not be in the child’s best interests. (Vaughan & Vaughan & Scott [2010] FMCAfam 863, 139)

However, some judicial officers have gone further, actively criticising the Act’s narrow understanding of family (Knightley & Brandon [2013] FMCAFam 148) and, reflecting the Full Court’s view that “it is not parenthood which is crucial to the best interests of the child, but parenting” (Yamada & Cain [2013] FamCAFC 64, [27]), suggested that it is time for reform.
Children’s needs
A second area of recent critique suggests that the Act’s historical focus on supporting children’s development has been compromised by the complexity of the decision-making framework introduced in 2006.

The AIFS Evaluation of the 2006 amendments (Kaspiew et al., 2009) revealed complaints by legal advisers that this framework had impeded their ability to work with parents in a child-focused way, and suggested that it “did not facilitate the making of arrangements that were developmentally appropriate for children” (p. 229). Similar criticisms were made by family relationship sector professionals, who voiced their frustration with the law’s narrow understanding of children’s needs (Rhoades et al., 2009; Wright, 2008). These concerns suggest that despite the similarity of issues that families present within each sector, and that many clients use more than one service (Kaspiew et al., 2009), they may be receiving quite different messages about their children’s care needs in different parts of the system (Kaspiew, Gray, Qu, & Weston, 2011), and that the law has played a role in creating this disparity.

In light of the concerns raised by practitioners, a recent research project has been exploring the possibility of developing a new decision-making framework, one that is structurally simple, supportive of children’s developmental needs and capable of application by the range of practitioners across the system’s different dispute resolution sites. The methodology for this project, which is described in detail elsewhere (Rhoades et al., 2013), sought in the first instance to gain insights into the ways in which professionals from the family relationships sector use their practice experience and knowledge of child development in working with parents, and how this approach differs from the decision-making process mandated by Part VII of the Act. Stage 1 of the project employed a series of dispute vignettes (case studies based on published judgments of the family courts) and recorded interviews with 39 experienced practitioners to elicit information about their approach to deciding developmentally sound arrangements for the children in those scenarios. The analysis of their responses was then compared to the decision-making process in the judgments from which the vignettes were drawn, to identify the areas of commonality and divergence between the two (the “comparative analysis”).

The comparative analysis revealed a number of similarities of practice. In particular, it showed that many of the factors in Part VII that judges are required to consider—such as the child’s views, age and cultural background, and the likely effect on the child of being separated from a parent or sibling—are likewise important considerations for family relationship professionals. However, the analysis also revealed some important differences that suggest the need to re-think certain elements of the current legislative framework. Three issues in particular are worthy of note.

One issue concerns the process of decision-making itself. The central difference here was the absence from the responses of the family relationships sector practitioners of anything that resembled the provisions in Part VII that require decision-makers to consider particular forms of care arrangement. Not surprisingly, it also involved a more organic and iterative method than the highly structured pathway contained in the legislation. Instead of testing presumptions about children’s best interests, the process used by participants centred on the performance of three assessment tasks: identification of the children’s needs, an assessment of the risks and protective factors affecting the children’s safety and wellbeing, and an assessment of each person’s capacity to support the children’s development and protect them from harm.
A second notable distinction involves the way in which the decision-making exercise was framed. Like the legislation, family relationships sector practitioners were concerned to ensure the child’s safety. Part VII currently couples this objective with a requirement to consider the benefit to the child of having a meaningful relationship with both parents (s 60CC(2)(a)). In contrast, the main concern for family relationship professionals (alongside their focus on safety) was to ensure the child’s healthy development would be supported, a principle that is not currently found in Part VII of the Act.

The third important feature of the comparative analysis involved different understandings of harm to children. The present protective provision in Part VII is concerned with safeguarding children from harm caused by “being subjected to or exposed to abuse, neglect or family violence” (s 60CC(2)(b)). According to Richard Chisholm (2009), this formulation of harm has the potential to see decision-makers overlook the effects on children of other damaging behaviours, such as parental conflict and parental indifference. This concern was supported by the responses of family relationship professionals in our study, whose assessments of risk were more broadly concerned with harm to the child’s future development. This included concern for children’s moral development and identity formation, as well as their needs for security and stability. In light of this broader focus, practitioners identified a wider range of potential sources of harm to children, including exposure to destructive parental conflict, a factor that is missing from Part VII.

**Conclusion**

In 1975, the Whitlam Government responded to the growing evidence that the law governing divorce was out of step with changing social practices and the emerging child development research by enacting the *Family Law Act*. Almost four decades later, Part VII of this Act continues to provide the relevant legal framework for deciding children’s care arrangements when their carers are in conflict. But once again there are indications that the law has failed to keep pace with shifts in Australian society, and that the courts have had to engage in some liberal interpretative practices to circumvent the legislative limitations and ensure just outcomes for children. And there is also evidence of a renewed need to harmonise the law with the practices and understandings of family relationship professionals. The challenge for current policy-makers is for them to be brave enough to accommodate these changes.

**References**


Family Law Council. (2012a). *Improving the family law system for clients from Aboriginal and Torres Strait Islander backgrounds*. Canberra: Attorney-General’s Department.


