Proceedings of the
International Forum on Family
Relationships in Transition

Legislative, practical and policy responses

1–2 December 2005

Edited by Bruce Smyth, Nicholas Richardson and Grace Soriano
Director’s foreword

Last year marked the twenty-fifth anniversary of the Australian Institute of Family Studies. The Institute was established in 1980 under the Family Law Act 1975, with the broad goal of improving understanding of factors affecting marriage and family stability. Family law itself represents one of those factors and also serves as a foundation of many policies and programs that have an impact on families.

While numerous amendments to the Family Law Act have been introduced over the past three decades, the latest round of reforms proposed by the Australian Government represents its most extensive changes in thirty years. Among other things, these reforms seek to enhance parents’ involvement in their children’s lives, and to help parents establish positive co-parental relationships in which the best interests of their children become the focus.

At this pivotal period of change in the family law system, it seemed timely for the Institute to bring together leading family law experts and key stakeholders in Australia and elsewhere to discuss issues and exchange ideas around cutting-edge strategies and programs for supporting families through family transitions—particularly relationship change.

In this light, the Institute was a partner in the hosting of an international Forum on ‘Family Relationships in Transition: Legislative, Practical and Policy Responses’, which was held at Parliament House in Canberra on 1–2 December 2005. Our partners in this Forum were the two Australian Government agencies that are responsible for family law policy issues: the Attorney-General’s Department, and the Department of Families, Community Services and Indigenous Affairs.

In essence, the Forum sought to draw out best practice and lessons learned in different countries, and to promote opportunities for an ongoing exchange of ideas of mutual interest in the areas of research, policy and practice. It involved a series of plenary sessions and panel discussions, involving senior policy makers, practitioners and scholars who have expertise in family law and family relationship support, from both Australia and overseas. The countries that participated were Australia, Canada, the People’s Republic of China, the Republic of Indonesia, Malaysia, New Zealand, the Republic of Singapore, the United Kingdom, the United States of America, and the Socialist Republic of Vietnam.

The program sought to set out the various key elements of the reform package, allow government and the judiciary to talk to the package, and then allow Australian and overseas speakers the chance to reflect on various aspects of the reforms. In many ways, the reforms act as an organising framework for tackling some of the perennial challenges to family law—sharing the care of children after separation, post-separation finances, family violence and abuse, mental health issues, parenting disputes, and accessing the family law system. Not surprisingly, the Forum raised more questions than answers.

I am delighted to be able to communicate the Forum presentations more broadly through this set of proceedings. This collection of papers provides an interesting mix of arguments, data, commentary and reflection on where research, policy and practice has been—and, more importantly, is heading—in relation to supporting families through relationship change.
There is great richness in this selection of papers. They cover all three major limbs of the reform package (the Family Law Amendment (Shared Parental Responsibility) Bill 2005; the establishment of Family Relationship Centres; and Child Support Scheme reforms), but also touch on the broad gamut of issues we call ‘family law’. In speaking to these many issues, some opted for formal presentations, while others preferred more conversational styles. Irrespective of these styles of presentation, the audience was always fully engaged, and discussion and debate proved lively. I am confident that much of this liveliness is captured in these printed proceedings.

I would like to take this opportunity to thank everyone who attended the Forum; the many Australian Institute of Family Studies staff who contributed to its realisation and smooth running; and the Department of Families, Community Services and Indigenous Affairs and the Attorney-General’s Department for their generous financial and practical support. The Forum is likely to remain one of the landmark policy events in recent years, and is a fitting conclusion to the twenty-fifth anniversary of the Institute in 2005.

Professor Alan Hayes
Director
Australian Institute of Family Studies
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About the editors

**Bruce Smyth** is a Senior Research Fellow at the Australian Institute of Family Studies, and has published widely in the area of family law—particularly in the area of post-separation parenting and child support. He is currently involved in several large collaborative projects, including research into allegations of family violence in the context of family law proceedings, the psycho-dynamics of parenting disputes, and the experiences of parents and children after the making of relocation orders.

**Nicholas Richardson** is a Senior Research Officer at the Australian Institute of Family Studies. He joined the Institute in 2003 after completing his BA/BSc with honours in psychology at the University of Melbourne. He recently moved to the Institute’s family law research program and is currently involved in several projects, including research into the psycho-dynamics of parenting disputes, and post-separation patterns of parenting.

**Grace Soriano** is a Senior Research Officer at the Australian Institute of Family Studies. She has conducted research into families in the Asia–Pacific region, forming partnerships, and teenage motherhood. She is currently involved in the Stronger Families in Australia project, Trends in Family Transitions, and a survey of help-seeking and service utilisation for relationship issues. Ms Soriano has published a number of journal articles, book chapters, and reports, including a report on the *Changing Role of the Family as a Social Institute in Development in the Asia–Pacific Region*, published by the ESCAP branch of the United Nations, New York.

Acknowledgements

First and foremost, we would like to thank all of the dignitaries, presenters, session chairs, delegates, and observers for supporting the Forum. The Forum would not have been possible without such generous support.

We would also like to thank the Honourable Phillip Ruddock, MP, Attorney-General, Senator the Honourable Kay Patterson, the then Minister for Family and Community Services, and His Excellancy Major General Michael Jeffery, Governor-General of the Commonwealth of Australia, for their support and contribution.

We are also deeply indebted to the organising committee. The Department of Families, Community Services and Indigenous Affairs (FaCSIA) was represented by Greg Chalker and Annette May; the Attorney-General’s Department (AGD) was represented by Jacqueline Aumann, Ruth Treyde and Peter Arnaudo; and the Australian Institute of Family Studies (AIFS) by Alan Hayes, Matthew Gray, Denise Swift, Grace Soriano, Bruce Smyth, Ruth Weston and Catherine Rosenbrock. Lixia Qu and Robyn Parker also deserve thanks for helping at the Forum.

Annabelle Cassells (from FaCSIA) and Leon Trainer played a pivotal role in liaising with delegates from East Asia; Leon also helped to edit some of the papers from non-English speaking countries. Jenny Franklin’s efforts in transcribing some of the sessions were much appreciated.

Alan Hayes deserves a special mention as Master of Ceremony for the two-day event, as does Matthew Gray as timekeeper for each session.
Message from the Prime Minister

MESSAGE: INTERNATIONAL FORUM ON FAMILY RELATIONSHIPS IN TRANSITION

I am delighted to send greetings to everyone attending the International Forum on Family Relationships in Transition from 1-2 December 2005, particularly to those who have travelled from overseas to participate in the forum.

Strong families are central to a healthy society. To this end, the government provides considerable financial assistance to Australian families. However, this is only part of the story. Family relationships can be fluid and we need to recognise that providing support for families in transition can make a significant difference to people’s lives.

The Australian Government has recently announced comprehensive reforms to family law and to the way family relationships are supported. The aim of the reforms is to bring about a cultural change in the way family breakdowns are handled. When implemented, they will represent the most significant changes to the family law system since the passage of the Family Law Act in 1975. These changes will be supported by the biggest ever investment in the family law system, with the Australian Government providing $397 million over four years. The centrepiece of this investment is the establishment of 65 Family Relationship Centres, providing relationship education for intact families and practical, early intervention assistance to separating families.

Knowledge sharing is critical to doing this well. The government is keen to engage with the sector on the best ways to support families. This forum provides a valuable and very timely opportunity to discuss these important issues. I wish you every success over the next two days of the forum.

(John Howard)
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Professor Nicholas Bala, Queen’s University, Ontario, Canada |
| 9:45  | **Panel: Practical resources for separating families**  
Chair: Dr Bruce Smyth, Australian Institute of Family Studies; Dr Joan Kelly, Psychologist, California, United States of America; Dr Paul Murphy, Family Court of Western Australia; Mr Trevor Sutton, Child Support Agency |
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| 1:30  | **Panel: Safety issues, mental health issues and the family law system**  
Chair: Associate Professor Judy Cashmore, University of Sydney; Dr Juliet Behrens, Australian National University; Principal Registrar David Monaghan, Family Court of Western Australia; Professor Bryan Rodgers, Australian National University; Dr Peter Mertin, Legal Services Commission of South Australia; Dr Rajen Prasad, Chief Commissioner, Families Commission, New Zealand |
| 3:00  | **Panel: Accessing the family law system**  
Chair: Associate Professor Tom Altobelli, University of Western Sydney; Ms Nicola Atwool, University of Otago; Ms Josephine Akee, Family Court of Australia |
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| 4:10  | **Summary and key learnings**  
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Professor Alan Hayes, Director, Australian Institute of Family Studies |
| 4:45  | **Close** |
A new family law system

The Honourable Philip Ruddock, MP, Attorney-General

Philip Ruddock was sworn in as Australian Attorney-General on 7 October 2003 in a ceremony at Government House in Canberra. Philip Ruddock was first elected to the House of Representatives as Member for Parramatta at a by-election on 22 September 1973. He was re-elected in 1974 and 1975. Following the 1977 electoral redistribution, Mr Ruddock was elected for the newly created seat of Dundas, NSW, in 1977, and again in 1980, 1983, 1984, 1987 and 1990. In 1992, Dundas was abolished as a result of changes to electoral boundaries. Mr Ruddock succeeded the retiring Member for Berowra, Dr Harry Edwards, on 13 March 1993 and was re-elected in March 1996, and appointed Minister for Immigration and Multicultural Affairs in the first Howard Ministry. Following the October 1998 election, Mr Ruddock was appointed the Minister for Immigration and Multicultural Affairs, and Minister Assisting the Prime Minister for Reconciliation, in the second Howard Ministry. In January 2001, he became Minister for Immigration and Multicultural Affairs, and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs. He was again re-elected in November 2001, and on 26 November 2001 became the Minister for Immigration and Multicultural and Indigenous Affairs in the third Howard Ministry. Mr Ruddock graduated from Sydney University (BA LLB). Before entering Parliament, he was a partner in the boutique commercial and general law firm Berne Murray and Tout in the city of Sydney. Philip is married to Heather and they have two daughters, Kirsty and Caitlin.

Acknowledgements

Firstly, may I acknowledge the traditional owners of the land we meet on—the Ngunnawal people—and pay my respects to their elders, both past and present.

Other acknowledgements

Senator the Honourable Kay Patterson—Minister for Family and Community Services
Professor Alan Hayes—Director, Australian Institute of Family Studies
The Honourable Chief Justice Diana Bryant—Family Court of Australia
Chief Federal Magistrate John Pascoe, AO—Federal Magistrates Court of Australia

Introduction

It’s a pleasure to speak to you today in conjunction with my colleague, the Minister for Family and Community Services, Kay Patterson, and acknowledge the twenty-fifth anniversary of the founding of the Australian Institute of Family Studies.
For twenty-five years the Institute has been producing important work on Australian families and, while there are some ‘institutions’ that have been around in the public sphere longer (but we are not here to talk about me!), their role in tracking the many changes to families over the past twenty-five years must be commended.

Our society has changed greatly in the past three decades since the Family Law Act 1975 was passed and no-fault divorce and the Family Court was offered for the first time in Australia.

This was a seismic change at the time, but with the benefit of hindsight, it was just the start of trying to close the gap between the operation of the family law system and the evolving social environment and community attitudes.

This is a reminder to all of us who seek to reform our family law system—we have to be realistic.

Changing human behaviour is difficult and takes time.

But this is not a reason for not trying.

Some say, in response to the government’s new family law system, you can’t change human nature—separating couples will keep fighting in the courts.

I do not accept this.

I believe we can help more parents to avoid ending up in the courts. I know programs such as the Contact Orders Program which we established have been very successful in achieving this outcome.

I believe we can do more for children growing up in conflict or more to ensure children grow up with the love and support of both of their parents.

And that is why the Australian Government is investing almost $400 million and making the most significant changes to the family law system in thirty years.

I suspect that the family law reforms we are undertaking, including the sixty-five new Family Relationship Centres, would also be considered to be significant and innovative in an international context.

I know there are many international delegates here who would be better placed to comment on whether Australia is a ‘social laboratory’.

I also know that over the past thirty years nearly every developed country has undergone similar changes and faces the same challenges in relation to family breakdown.

We have much to learn from our international counterparts about how we can make our family law systems produce the best outcomes for their clients.

At the same time, I hope our international friends can learn from us.

This Forum is a valuable opportunity to exchange ideas and learn from our experiences and so I am pleased to welcome our overseas guests, who will present their unique but very relevant perspectives.

**Family law reforms**

I want to say a little bit more about the principles underpinning our family law changes, and provide the skeleton of how these changes will work.
Let me start by stating my belief that there is no issue of more importance in our lives than the personal relationships we have.

We often hear about relationships in terms of the adults and parents involved. Historically, our court-centred family law system has emphasised the rights of separating adults.

But it’s time to put children centre-stage. After all, children are among the most vulnerable—and certainly the most innocent—members of our society.

I believe that, all things being equal, children have a right to know both their parents; where this does not put children in a harmful situation.

We all know an adult who has been denied the opportunity to have a relationship with a parent for one reason or another. This can be traumatic and the effect can last a lifetime.

We should never forget that more than one million Australian children have a parent living elsewhere. One in four children never see that parent or only see them once a year.

By empowering parents to sit down with each other and agree on what is best for their children, we are providing an opportunity for the next generation of children to grow up with the love and support of both their mum and their dad.

**Family Relationship Centres**

In the next three years, a network of sixty-five Family Relationship Centres will be set up around the country.

It’s clear that with the previous system, many people didn’t know where to go for information or advice. The new Centres will be somewhere people can feel comfortable discussing their relationships.

We want to strengthen families at all stages of their relationships, including helping families stay together where possible. My colleague, Senator Patterson, will have more to say on this shortly.

When families are going through separation, the Centres will be there to help parents remain focused on the needs of their kids at this very difficult and painful time.

Highly trained, professional staff will use innovative, child-focused dispute resolution techniques to encourage parents to put aside their own differences to agree on what is best for their children.

**Changes to the Family Law Act**

The changes to the Family Law Act have five key aims:

- encouraging parents to reach agreements outside court
- protecting children from harm or violence
- supporting shared parental responsibility
- ensuring children have an opportunity to have a meaningful relationship with both parents
- making court processes less adversarial.
But changing the law is not enough. The government is intent on changing the culture of dealing with family separation.

We are increasing the number of services in the community that will help families work through issues they may encounter after separation.

For example, we are quadrupling the number of services under the successful Contact Orders Program that I mentioned earlier. This will mean more families in high conflict over contact arrangements for their children will be able to reach agreement.

Thirty new Children’s Contact Services will also be funded. This almost doubles the existing number and will give more families access to a neutral place to hand over children or to have supervised contact.

The Family Court and Federal Magistrates Court are also reforming the way separated families interact with the courts. This includes having a combined registry for both courts, with a shared national toll-free telephone number and common forms. If families do end up in the court system, we want to ensure the administrative procedures will be easier to navigate and less stressful for all concerned.

**Family violence**

The Australian Institute of Family Studies has done a commendable job conducting independent research on family issues in its twenty-five-year history.

The importance of quality research cannot be overstated—particularly in contentious areas such as family law.

As you know, cases that involve allegations of violence are some of the most difficult and contentious to deal with in family law.

I am aware of some of the research that has been conducted in this area. It can be hard to get useful data on how allegations of violence are dealt with, and some research to date has varied, depending on which interest group has sponsored it.

This is why I intend to commission—as part of a broader Family Law Violence Strategy—independent research about how the courts currently deal with allegations of violence.

We can then use this research to assist in developing better ways to deal with family violence.

There are some people who are concerned the government’s new family law reforms will expose more women and children to violence.

I dispute that. The government has listened very carefully to the concerns raised and has amended the new laws to ensure they do not expose people to more violence.

If allegations of abuse or harm are not properly dealt with or investigated, cases can drag on, people can be exposed to harm and allegations are never tested.

I am also concerned about false allegations of violence and I am equally concerned about false denials. As part of these reforms, we are looking at practical ways to help deal with family violence.
Having independent research that highlights the strengths and weaknesses of how our system deals with cases involving violence will be an important stepping stone. It will help us in developing measures to improve the way in which cases involving violence are dealt with.

As part of a new family law violence strategy, I am also developing measures such as:

- working with state governments to improve investigation and reporting of family violence
- re-working provisions in the Family Law Act to ensure state court apprehended violence orders work effectively and consistently with Family Court orders
- improving court processes for cases involving violence, similar to how we deal with child abuse in Project Magellan
- asking the Family Law Council to review how we could do better in dealing with cases involving violence.

Addressing family violence is not an easy task and cannot occur overnight. But the government is determined in its resolve to ensure we all do better.

Conclusion

I have appreciated the opportunity to set out for you our reforms to the family law system.

These are significant reforms. But if the great social changes in the past thirty years since the Family Law Act was enacted show us anything, it is that we must remain flexible and responsive to those changes.

We must also remain open to innovation and better practices in dealing with family separation, and so this Forum is an important opportunity to share research findings and discuss better practices.

It has been a pleasure to speak to you today and I wish everyone a successful and productive forum.
Family support services and program responses

Senator The Honourable Kay Patterson, Minister for Family and Community Services

Transcribed address

Kay Patterson was elected to the Senate in 1987. Prior to entering the Senate, she commenced her working life as a secretary and then manager of a small business. Returning to school when she was 20, she completed matriculation, a degree at the University of Sydney and completed a PhD in psychology at Monash University.

She taught at Sydney and Monash universities and was Principal Lecturer and Chairman of the School of Behavioural Sciences at the Lincoln Institute of Health Sciences (now part of La Trobe University). While at Lincoln, she taught psychology, human development and research methods.

Senator Patterson was a Kellogg Fellow and Visiting Scholar at the University of Michigan (1983), and in 1985 spent four months as a Visiting Fellow at Pennsylvania State University. On both of these trips she studied gerontology (the study of ageing). She was also instrumental in the development of the first Diploma of Gerontology to be offered in Victoria.

In Opposition, Senator Patterson held a number of shadow portfolio responsibilities and was a member of and/or chaired a range of Senate committees. In government, she has represented Australia at international events and was a delegate to the UN General Assembly in New York in 1997. She was appointed Parliamentary Secretary to the Minister for Immigration in 1998 and, in addition, Parliamentary Secretary to the Minister for Foreign Affairs. After the 2001 election, she was appointed to Cabinet as the Minister for Health and Ageing, and at the end of 2003 Minister for Family and Community Services and Minister Assisting the Prime Minister for Women’s Issues. Although she retired from Cabinet in January 2006, Senator Patterson will remain in the Senate until her current term of service expires in June 2008.

She was a member of the Monash Council for twenty years and has been a member of Guides Australia since she was ten years old. In 2002, she was honoured to be appointed an Honorary Life Member of Guides Victoria.

Thank you very much Professor Alan Hayes, Chief Justice Diana Bryant, Chief Federal Magistrate John Pascoe, and international and Australian delegates. I welcome all of you to Parliament House.

I want to join with the Attorney-General in speaking to you about the reforms that we have undertaken and the way in which the Attorney-General and I have worked in conjunction to look at the needs of families in transition. I want to address not only the legal issues, but also the issues in terms of the social aspects of families that are changing, particularly families in which parental separation has occurred.

As the Minister for Family and Community Services, the driving force and the driving responsibility in my portfolio is strengthening families and communities. That’s one of the main goals, and each year we pay—when I say this figure it sort of staggers me—$19 billion in family payments. On top of this, we will spend a record $9.6 billion on child care over the next four years. It’s huge part of the budget going to family assistance. We also fund a myriad of locally based family and children support services in hundreds of communities across Australia. I think we have something like 80 programs in my department underpinning our approach to supporting families.
This approach has a very firm focus on intervention and prevention, which means providing services and support early to help families through transitions in their lives, and as much as possible preventing family problems turning into crises.

I am very interested to see the way in which families change. For example, in my mother’s family, she was one of two, but suddenly became one of nine when her aunt died and left seven children to my grandmother, who adopted the seven of them (I always thought she needed a Dame-hood for that). But when those children started growing up and marrying, the other children saw their brothers and sisters having children and they learnt about what kids were like. I have a friend with eight children and it’s interesting to watch the dynamics of the three youngest boys in her family interacting incredibly closely with the two new nephews that have come into the family. I used to ask students when I was teaching, ‘How many of you have held a child under five?’ These students were going to be physiotherapists, speech therapists and occupational therapists, but out of forty, you’d most probably get three to five who’d actually held or played with a child under five. With smaller families, many younger people come to their late adolescence and early adulthood with absolutely no experience of children at all and we suddenly send them off from hospital with a bundle of joy and not much else. How can we give those children the best start in life, and parents the best start in actually doing what is most probably the toughest job we ask people to do?

A lot of our programs and initiatives are about helping communities nurture young children and helping children as they enter the first year of school. We are rolling out an index developed from Canada to assess why our children are doing well on physical development and not so well in effective development in one area, and in another they are doing really well on learning readiness but they are not doing so well in physical development. What are the characteristics of those communities, sometimes side-by-side, where children are doing differently?

The whole program is about strengthening communities and strengthening families. Our $490 million Stronger Families and Communities program comprises a range of activities, but the centrepiece of those is our forty-five ‘Communities for Children’. The strategy involves local organisations with a peak body or bodies in partnership, driving local solutions to address the issues in their communities about the needs of their children and the way in which they can strengthen their communities. What we are looking at is a ‘bottom-up’ approach rather than a ‘top-down’ approach, with those communities best knowing what the issues are in their own communities and how they can address them. Those projects are getting between $1.5 and $4 million to bring together over a period of time all those who work with children in their communities, particularly communities that have particular needs.

I have visited a number of these projects and you see different complexions and different solutions in those different areas and very simple things that don’t cost money that are going to have a significant effect. For example, in Lakes Entrance—which for those of you who come from overseas, is a coastal town on the south-east coast of Victoria—when I visited there, early childhood providers had never ever met together in what is a fairly close-knit community that is a four- or five-hour drive from a major city. They have done some very creative things. I give one example. The local child care centre, in cooperation with the local library, has the parents in small groups of four or five pick their children up from the local library instead of picking them up from the child care centre. They go in and see their children being read to, they see the range of books that are available, they get a library card, and
they get introduced to a resource in their community which they most probably didn’t know existed and, if they did, were a bit too shy to go and use it—a very simple thing. The resource is there and it has never been used.

So what you see are programs not only doing those sorts of things, but also running parenting programs for children and parenting programs for parents. One of the things that is very instrumental or a major factor in the breakdown of family relationships is conflict and difficulty over childrearing. These programs reduce some of those issues.

Also, we have a range of programs in our portfolio about financial management, particularly in our Indigenous communities, in cooperation with the business community, because if something else is going to be a cause of crises in families, it’s money.

So what we have to look at is all these causes. Is it about parenting? Is it about managing finances? What are some of the issues that cause families to break down? We also look at the ways in which we can assist families and people before they make the decision to marry and have children. So it’s prevention right through all those stages.

What we are now looking at is a national agenda for early childhood. It’s the first of its kind in our history and it covers four areas. It’s in conjunction with all the states and I hope that early next year we will be able to see the National Early Childhood Agenda being launched. There are four main areas: healthy young families, early learning and care, supporting families, and parents and child-friendly communities. This is an agenda which we have been developing in conjunction with the relevant state ministers, as it covers a whole range of portfolios at a national level and at a state level. It’s fairly ambitious, but really if we don’t invest in the most important resource in our country, then we are failing.

As a developmental psychologist, I started off in early childhood development and, even though I went across to gerontology, I still have my feet in the early childhood development area. I know that the trajectory for life is determined very early on, and more and more evidence shows that. More and more evidence also shows that there are quite significant biological changes and biological markers as a result of those early years. There is a question mark about whether they can ever be changed, whether the door is shut. The jury is still out on that, but there is a suggestion there are some parts and some aspects that are really hard to make up later on, so what better way to do it than invest early on. The main aim of our agenda is to support strong family relationships and to encourage families to stay together if possible and, while of course we can’t legislate to make them do that and make families strong, we can help to equip them with the resilience and skills to help them through the transitions in their lives. Relationships within the family are important and, as I said before, an important influence on childhood development. Children have the best chance when they grow up in a strong loving environment.

We fund a range of family relationship services, with significant investment in family relationship education, but the reality is, as the Attorney-General said, that we have a significant number of children living in single-parent families because almost half of first marriages in Australia end in divorce, and the rate of breakdown for second marriages and de facto relationships is even higher. As we all know, family breakdown can have an enormous impact not just on parents but on children, on communities.
as a whole, and also the extended family. And as the Attorney-General’s emphasised very clearly, our emphasis in the reforms is on putting children first.

Part of the reforms are about focusing on conflict resolution, avoiding litigation and trying to find solutions that help people move further forward in their lives. So, apart from the introduction of sixty-five Family Relationship Centres—which the Prime Minister and the Attorney-General referred to—in that $400 million is an expansion of Early Intervention and Prevention Services, including a threefold increase in funding for our longstanding Family Relationship Services Program. This is designed to build resilience across the family relationship cycle, from early formation through to assisting families in conflict or those at risk of relationship breakdown, through services such as education counselling, family relationship skills training, adolescent mediation and family therapy services. As part of the package, specialised services for men, mediation services, children’s contact services and family violence services have also received substantial extra funding.

These services are about supporting families through those transitions. However, some families do break down, and for many families child support becomes an issue. We had a House of Representatives report, called Every Picture Tells a Story, which highlighted community concerns regarding the Child Support Scheme. A recent Australian Institute of Family Studies study found that almost two-thirds of separated fathers and half of separated mothers felt the current scheme was not working well—not a good vote for the Child Support Scheme. Similar proportions of separated mothers and fathers also felt the system was unfair. In response to this, the government established a Ministerial Taskforce chaired by Professor Parkinson to examine the child support formula. He delivered a detailed set of recommendations based on a comprehensive evaluation of the cost of children, benchmarked against international studies. That report was released recently and received broad public support. For those of you from overseas, it is a very interesting report, particularly the new costs of children’s research and the way in which families spend money on children as their income increases (spending does not rise proportionally with income). It looks at all those things and it’s a very good guide for any of you who are looking at any such system.

The report received broad public support and the government is currently considering its very complex and inter-related recommendations, because recommendations have effects across a range of portfolios. Our guiding principle in looking at the recommendations is that any changes in the child support system must be in the interests of children. With our reforms, the government is helping separating families to ensure the best possible outcomes can be achieved for each family. We are disposed to support the recommendations in the report, but the complex details of policy and implementation are still being considered because it’s quite complex to move from one system to another. Given your own experiences and knowledge, I am sure over the next two days you will inspire us with many ideas and suggestions. We have officers of the Department here, and I am sure they will be listening closely to everything you are saying, which will help us meet the challenges of setting up the new system so that it’s truly responsive to the needs of families.

One of the questions I am sure you will consider is how we build on our research and evidence base. Coming from a research background, I am a minister who is very keen on making sure that what we do is based on evidence. And as part of our commitment to continuous service improvement, we want to know what works well and what doesn’t work in the Australian context. In the past decade, we have
drawn extensively on Australian and international research into best practice in family support service models and interventions. Governments and bureaucracies, despite what we think of ourselves, don’t have all the answers and we continue to rely on and value expert input and advice from others throughout the social policy development and implementation process.

The broad range of research in the area of family transitions and family law and the clearinghouses managed by the Australian Institute of Family Studies have contributed significantly to our knowledge base since the Institute’s establishment twenty-five years ago. Ongoing research in the areas of the impact of family law, family transitions and supporting families will be as important as the Family Relationship Services Program and, as the program expands by approximately 300 per cent by 2008/2009, the development of practice, policy and research in relation to family relationships, separation and family law typically moves at a rapid pace, reflecting the changing makeup and complexity of families in today’s Australia.

The large variety of information sources makes it difficult to assess all of the up-to-date and relevant material available. So, to increase access to relevant information I’d like to announce that the government will be setting up a Family Relationships Clearinghouse, at a cost of $800,000 over two years, in conjunction with Australian Institute of Family Studies. This is a substantial investment in policy and program development. The Clearinghouse will contribute to the sector by focusing on:

- promoting resilience and strong positive family relationships through prevention, early intervention and post-separation strategies
- disseminating and synthesising relevant research, legal developments, policy directions, educational resources, best practice initiatives, and other relevant information
- facilitating information exchange between the Department of Families, Community Services and Indigenous Affairs, the Attorney-General’s Department, the Family Relationship Services sector and, indirectly, families
- providing an opportunity for shared learning and networking for family relationship practitioners
- increasing the showcase of innovative and best practice across the family relationship services sector.

This initiative will complement the existing clearinghouse functions that the Australian Institute of Family Studies currently manages, and generally enhance the understanding of family relationships in the Australian context. I am sure that it will be very welcome to those of you who will find getting access to information much easier as a result of this clearinghouse.

We have reached a watershed in our family law system, with family support services and program responses taking on a new life and new directions. Our new approach to family law requires a move away from an adversarial system towards one that focuses on early intervention. Getting the best outcome for families and especially for children, in the end comes back to government support for services that build and strengthen family and community capacities to help themselves before problems arise or before they escalate. It is also about providing appropriate support for families under relationship stress, and working with separated parents to provide stable environments for themselves and their children. As the Attorney-General said, an adversarial separation, where a child ends up losing contact with one parent, does affect children for the rest of their lives in the way they will parent and engage in relationships themselves. As a result, the most important thing we can do is ensure,
as far as possible, that people can deal with conflict within a relationship and, if they
can’t manage it and a family breaks down, then the very best thing we can do for
those children is to ensure, as far as possible, all things being equal, that they have
access to both parents, because throughout their lives that will have an impact.

The most important thing is to invest in our children. It’s a challenge for all of us.
It’s exciting times for anyone with an interest in strengthening family relationships.
There are going to be some things we have to modify and some things we will learn.
I hope those of you who are in the field will tell us very clearly what we need to do,
and why we need to change. But we shouldn’t be afraid of change. We should move
forward and take this as a real opportunity to focus on children, to make sure that
children in separating families in particular have the best possible outcome for them
and the best possible outcome for the rest of their lives.

Can I thank you for participating in the Forum and for giving up your precious
time to be here? I am sure you will gain as much as you give. I hope you have a very
productive time, but also some opportunities to network and to share and to build
some relationships that most probably weren’t there before, particularly across the
shores. I wish you all the best for a very productive conference.
The Honourable Chief Justice Diana Bryant, Family Court of Australia

Diana Bryant was appointed as Chief Justice of the Family Court of Australia on 5 July 2004. Prior to that, she was the inaugural Chief Federal Magistrate of the Federal Magistrates Court, and held that office from May 2000 to July 2004. Prior to her appointment to the bench, Chief Justice Bryant practised at the Victorian Bar from 1990 until 2000, where she specialised in family law and de facto property disputes, particularly at appellate level.

Through her family law practice, Chief Justice Bryant also dealt with bankruptcy and human rights and equal opportunity matters. She was appointed a Queen’s Counsel in 1997. Between 1977 and 1990, Chief Justice Bryant was a partner with the firm of Phillips Fox in Perth, where she practised as a solicitor and counsel specialising in family law. She was a director of Australian Airlines from 1984 to 1989.

Chief Justice Bryant holds a Bachelor of Laws and Master of Laws degrees. She was admitted as a legal practitioner in Victoria in 1970.
areas, such as the division of matrimonial property, child support, and children’s post-separation relationships.

More recent work, particularly in the area of parent–child contact, and particularly that by Bruce Smyth, is equally important, and should continue to inform legislative practice.

Through bodies like the Institute, we have continued to refine our understanding of how families are affected by relationship breakdown and how the legal system, where it intersects, can contribute to building a sustainable future for those families.

The key theme to me out of the conference today seems to be the use of the word ‘transition’—that is, the process of passing from one formal stage to another. It is a very apt term to use in the context of family law, because it focuses on the experience of change rather than the outcome. The process of separating and arriving at new family relationships after separation is complex and multi-faceted. It is usually a highly emotional and often fraught experience for those involved, particularly for children.

Where children are involved, constructive and sustained dialogue between parents about their children’s development and their needs and wishes is essential. Supporting children to reach milestones, such as birthdays, graduations and weddings, requires an ongoing relationship between parents. The way in which we design our processes and procedures affects the likelihood of whether or not that sort of relationship can be built and sustained into the future.

In the Family Court, we have attempted to bring children’s interests to the fore—of course having the guiding principle in the Act as the ‘best interests of the child’ to inform our decisions through the appointment of separate child representatives and the preparation of expert family reports. Child representatives and family reports have continued to be of enormous assistance to the Court. Necessarily, however, we need to strive for better ways of trying to focus parents on their children’s best interests, and reducing the often damaging impact of adversarial litigation. In this, the Court and the government are in strong agreement.

As you would know, the government is intending to legislate to enable children’s cases to be conducted on a less adversarial basis. Since March 2004, the Family Court has been trialling the Children’s Cases Program, which is a program initially based largely on the way children’s cases were conducted in Germany, and which takes a less adversarial approach to the conduct of disputes involving children. Recently, we also began piloting a program in Melbourne entitled the ‘child responsive model’, which involves a more child-inclusive approach to dispute resolution within the Court.

Given the new initiatives that the Family Court has already developed, we are well positioned to give effect to the government’s reform proposals in the area of less adversarial proceedings. The Court has also undertaken considerable activity in conjunction with the Federal Magistrates Court in moving towards a shared Family Law Courts Registry, and I will speak briefly about this work and the Children’s Cases Program shortly.

The issue that remains is how the Family Court is likely to be affected by other parts of the reform package, particularly by the network of Family Relationship Centres in compulsory pre-trial dispute resolution procedures, and I will attempt to answer that question also in the time remaining to me.
First I’d like to mention the key activities that the Court has been engaged in since the proposed reforms to the family law system were announced last year. The two areas that are most directly affecting the Court at present are, as I say, the combined Family Law Registry and less adversarial proceedings in children’s cases. The legislation itself, of course, will make changes, and the Court will obviously implement that legislation when it’s in a final form and enacted.

The Children’s Cases Program pre-dates the reforms by a couple of years, and this is acknowledged in an explanatory memorandum accompanying the Exposure Draft of the Bill. It would take me hours, rather than the few minutes I have, to explain the aims and objectives and features of the program in detail—suffice to say that the primary aim is to provide significant benefits to children and their families by the judge ensuring that the parties remain focused on the child’s needs and interests, and that the evidence meets that end. The program achieves these objectives through less adversarial court processes, more child-focused court processes, and either directly or indirectly providing assistance to the parties that enable them to parent more cooperatively in the long term. In one of the registries at least, there have been arrangements made with local community-based organisations running parenting programs to which the Court can actually refer people where a need is identified, and I see the likelihood of that sort of relationship continuing.

A crucial part of the program is the degree of control the judge exercises over the proceedings. He or she plays a leading role in the conduct of the hearing. The judge determines the issues to be decided, the evidence to be called, the way the evidence is given and the manner in which the hearing is conducted. Importantly, the parties have an opportunity at the outset to speak directly to the judge, whether or not they are legally represented. This is a significant departure from the traditional adversarial model of conducting litigation in Australian courts.

Two evaluations of the Children’s Cases Program pilot are currently being undertaken and the results of the evaluations will be available in mid-2006. The Court’s internal assessment, the judges’ perceptions of the program and feedback received from participants all pointed to the need to expand the program in the short term. The National Steering Committee has recommended to me that the program be rolled out in all registries on a consensual basis prior to the legislation taking effect, which we expect to be in the middle of next year.

The Children’s Cases Program commenced in Melbourne in October, with other registries to follow. In Melbourne, however, there is a feature of the pilot that distinguishes it from what’s happening in Sydney and Parramatta—and that is the incorporation of the ‘child-inclusive model’. When the Family Court was established in 1975, the creation of a dedicated counselling service within the Court was both novel and ground-breaking. For many years, the Court’s counselling service provided privileged counselling and mediation to couples at the pre-filing stage of proceedings as well as after court proceedings had been initiated.

There have been many changes to mediation services and practice since 1975, but one of the most significant, from the Court’s perspective, has been the professionalisation of community-based mediation services. In recognition of this, the government has provided funding to community sector agencies through the Family Relationships Services Program to provide pre-filing mediation, counselling and education services, rather than them being provided by the Court. Of course,
the new Family Relationship Centres will also be a major new player in the provision of privileged pre-filing mediation services.

In light of these developments, the Court undertook a review of its primary dispute resolution services. Some of the findings of the review included that there was duplication between the Family Court and community-based service providers. Most of this occurred in the area of privileged services, and children were not being seen in the early resolution stage of proceedings in the Court. In light of these findings, we decided the Court needed to focus its mediation service towards litigating families at an early stage in the proceedings on a non-privileged, reportable basis. This approach recognises that although there are multiple opportunities for settlement in the dispute resolution pathway, once parties are in the court system they are moving towards a hearing, and this should be recognised in mediation services provided by the Court. I am aware that the Court’s Principal Mediator, Dianne Gibson, will be speaking on a panel this afternoon and will probably have the opportunity to give you some more detail about the model, so I won’t go into further detail. Suffice to say, again like the Children’s Cases Program, the Child Responsive Pilot Program will be evaluated and will explore how the two programs integrate with each other and with services in the community.

We do know that the government is proposing to provide legislative support for the Children’s Cases Program, and this will be helpful because at the moment it can only be entered with the consent of the parties. Once the government’s proposed amendments come into effect, all proceedings conducted in relation to children’s matters will necessarily use a less adversarial approach, and the Court proposes to use the approach which is being adopted in Children’s Cases Program.

The other area where there has been considerable activity has been the establishment of a combined Family Law Courts Registry. Currently, the Family Court of Australia provides registry services to the Federal Magistrates Court, but the two courts maintain different forms, files and fees, individual Internet sites, telephone numbers and signage. Each court has its own Rules of Court and correspondingly different case management systems. A number of reports released in the last few years, including the Out of the Maze report and Every Picture Tells a Story, found that clients find this system confusing and difficult to navigate. Our own internal research tells us that family law clients want a process that is as streamlined as possible, and creating a combined registry is a way of achieving this objective.

Moving towards a shared registry environment has been a priority project for both courts. About 80 consultations were undertaken across the country in the past twelve months to discuss the combined registry process and model. The model for streaming of cases has largely been settled. Participants were strongly supportive of a system whereby the Federal Magistrates Court acts as the point of entry into the system, with clients being transferred to the Family Court as deemed necessary or appropriate. The Family Court would retain its own jurisdiction in special jurisdictions such as adoption, Hague Convention applications, international relocation and matters where the Federal Magistrates Court doesn’t have jurisdiction. However, implementation of this aspect of the combined registry is something that will need to occur over time. The resources are not available to appoint the number of new family law federal magistrates that would be necessary to make the model work in the short term. Currently, both courts are working on a mechanism that will enable them to transfer the less complex work to the Federal Magistrates Court over a period of time.
We are, however, in the interim, working on providing for one manner of entry through the use of one form and harmonised rules.

What does the future hold? The Family Court has made significant progress in implementing part of the government’s reform package but the question that remains is, how will the Family Court be affected by the proposed amendments to the Family Law Act? The overall thrust of changes to the family law system is to encourage parties to reach agreement outside the court system, an entirely laudable aim with which I doubt anyone would have any objection at all. The Family Court indeed introduced new pre-action procedures in March 2004 which require parties to make a genuine effort to resolve a dispute before issuing proceedings. We found there was a reduction in filings after the introduction of these procedures, which was encouraging and, I think, is encouraging for the Family Relationship Centres.

We have also been focused on encouraging parties, where appropriate, to reach agreement between the time proceedings are initiated and the final hearing. The Family Court has always placed strong emphasis on the ability of parties to settle matters right up until they go to a hearing. At present, around 7 per cent of applications for final orders actually go to trial; whilst that percentage has increased a little bit, it’s been largely around the 5 to 7 per cent for many years.

It is a reality, however, that with the best will and encouragement in the world, some disputes are simply not amenable to settlement and require determination by a court. Although the government’s proposal to introduce compulsory dispute resolution procedures and expand community-based mediation services may result in more matters being settled outside the court system, they are less likely to have effect in disputes involving allegations of violence or abuse, or those where there is entrenched conflict. These are the most difficult cases, and these are the cases that currently comprise the Court’s workload.

The Court has developed a specialised list and dedicated case management approach in cases involving serious allegations of physical or sexual abuse of children. This is known as the Magellan Project, which the Attorney-General touched upon, and has now been introduced in the Court on a national basis. One of the major features of the project is a strong team-based and cooperative state–federal approach. The Family Court is not an investigatory body and it cannot investigate allegations of abuse as such. There is no federal body to investigate allegations of abuse, and that responsibility lies with the state and territory child welfare departments, where notifications are made to them. Part of the Magellan approach is directed towards ensuring that such investigations occur in a timely fashion, and the report detailing the findings of the investigation is available to the Court at the earliest opportunity.

There is an added complexity when issues of violence are raised, as this is an area where state and territory courts, primarily at local court level have jurisdiction. Injunctive relief for personal protection is available through the Family Law Act, but not often applied for. In the overwhelming majority of cases where legal protection is sought, it is done through state and territory courts by way of application for an apprehended violence order, intervention order or protection order, depending on the terminology used in the specific jurisdiction. Of course, significant child safety issues may arise in families where there is a history of violence, which may also then involve the state welfare authorities and proceedings in children’s courts. Thus two different systems, the state and the federal, each exercising different jurisdictions,
will often be required to look at the issue of violence separately. The interaction between these two systems is often problematic. This was recognised by the Family Law Council in its report into ‘Family Law and Child Protection’, when it called on the federal government to establish a national protection service to investigate child protection concerns and provide information to family law clients.

The problem of violence and allegations of violence made in family law proceedings, as far as the Court is concerned, is unlikely to recede. Under the proposed reforms to the Family Law Act, abuse or violence, or the risk of abuse or violence, is an explicit basis on which parties can be exempted from participation in compulsory dispute resolution procedures and come directly to court. In addition, the Exposure Draft of the Shared Parental Responsibility Bill currently contains a presumption in favour of an order for joint shared parental responsibility of a child. The presumption does not apply where there are reasonable grounds to believe that a parent is engaged in abuse or family violence. In cases where the application of the presumption is resisted by a party, violence may be alleged as a reason why that presumption should not apply. It will then be for the Court to assess whether or not there are reasonable grounds upon which to believe that family violence has occurred. These new provisions raise the question as to what processes of enquiry should be developed when allegations of violence are raised in family law proceedings.

I was interested to hear the Attorney-General’s comments this morning about what he proposes to do about the issue of violence which, I think it’s fair to say from his comments, he recognises is a difficult issue. Having heard his comments, I am tempted to just close my paper and stop, but I think because what he is proposing is entirely sensible, I will continue. I look forward to seeing that working. Nevertheless, I think it is important for me to detail some of the problems, because the solutions may be easy to articulate, but I suspect that in practice they will be hard to apply.

One possibility which the Attorney-General touched on was a case management model similar to that used in the Magellan Project. There are obvious advantages to the Magellan Project, including earlier resolution, lower cost and less trauma to children than occurs with a traditional approach, primarily because the state authorities and legal aid commissions provide assistance at an earlier stage. Other jurisdictions, albeit in the context of applications for personal protection, have also adopted a more coordinated approach to cases involving domestic violence, with the ACT’s Family Violence Intervention Program being one example. In Victoria, they are setting up separate courts within the Magistrates’ Court to deal with family violence.

So I pose the question: could the Magellan model or some kind of coordinated inter-agency case management approach be extended to disputes where allegations of family violence have been made? I think the answer is yes, and clearly the Attorney-General thought so as well, but probably at a considerable cost and with some degree of difficulty. There is no state government department that would be in a position to undertake an investigation into cases involving allegations of violence in every matter, as there is in child abuse cases, unless there has been significant and serious harm caused to the child as a result.

If state police are investigating those issues, they may have already investigated a complaint in the context of intervention order or apprehended violence order, and would be called upon to investigate afresh in the context of family law proceedings. As the Family Law Council has observed, state-based investigatory agencies, like
child welfare authorities, do not have general investigatory powers. Their powers
are tied to specific legislation and there is a lack of consistency between the terms of
state legislation and the Family Law Act, which in turn impacts upon the capacity
of those agencies to be able to do their work.

Expense is a highly significant issue, as the Family Law Council also found. A
tightly controlled team-based approach, such as that used in Magellan, is extremely
resource-intensive in terms of both judicial and non-judicial resources. The Court
would be unable to bring the Magellan approach to cases involving allegations of
family violence without a considerable increase in its existing judicial resources.

Another possible approach is that of a preliminary hearing in family law proceedings.
The New Zealand Care of Children Act 2004 provides that, where allegations of violence
are made in proceedings relating to parenting orders, the Court must consider
whether or not, on the evidence before it, the allegation of violence is proved. If so,
the Court must make certain orders concerning the care of the child and contact
with the child, unless certain exemptions apply. The process, as I understand it,
occurs at a preliminary hearing and is supposed to occur within defined timelines. I
understand that that’s not always possible and that can’t always be met.

The Family Court could conceivably conduct preliminary hearings to determine
allegations of violence at an early stage, but again this would require a significant
increase in judicial resources to avoid undue delays in finalising cases. We already
know that the longer parties are in the court system, the less happy they are with the
result, and any increase in delays would undermine the purpose of the government’s
reform agenda.

The foregoing discussion illustrates that there are no easy answers when it comes to
how the Court should respond to the government’s legislative reforms, particularly
in this area.

Our trial statistics tell us that, although there has been a reduction in filings in the
Family Court since the Federal Magistrates Court was established five years ago,
the most complex cases are being filed in or transferred to the Family Court. The
reduction in filings is therefore being offset by a reduced settlement rate—meaning
there has been no significant reduction in the defended hearing case load of family
law cases. The number of cases still being heard by the Court is the same, although
the filings have decreased. This suggests, in my view, that the Court is now doing the
core workload of the difficult cases and that it will continue to do. I think this trend
will continue after the reforms are introduced, as it will be the most complex and
difficult of cases that enter the court system. In addition, I think we may anticipate
an increase in litigation as parties test the meaning of the new provisions, such as
the concept of equal shared parental responsibility, and seek to vary existing orders
on the basis of the new legislation.

I share the Attorney-General’s optimism about the possibility of changing behaviour,
and especially of keeping people out of the court system, but I think we must also
face the reality that there are a group of people who will need to come to court to
have their matters determined, and the funding of the court system as well as the
funding of organisations to provide means of keeping people out of court is, in my
view, equally vital.

Although I don’t believe the Court’s core business would be particularly affected
by the forthcoming changes to the family law system, in the sense of the number
of cases that require a final hearing, it will nevertheless be a time of transition for
us. The legal landscape in which we operate will have altered in many significant respects. We are moving towards a combined Family Court Law Registry, with all that entails, and we will be developing new relationships and protocols with the Family Relationship Centres and ensuring that we are in a position to hear children’s cases in an entirely different way.

As I said earlier, the concept of transition connotes moving from one place to another. That begs the question: how will we know when we have arrived and whether the journey’s been a success? Success is not an easy concept to measure. Firstly, there needs to be an agreement on what ‘success’ is. I am conscious that there are some disparate views on this issue. It is, however, vital that this issue be thoroughly ventilated and agreement reached on what outcomes are being sought. I suspect I am preaching to the converted in emphasising the importance of evaluation. Nevertheless, I must reiterate how essential it is, particularly when dealing with changes of this magnitude. The Attorney-General has referred to the reforms as the ‘most significant since the Family Law Act was passed’, which makes it even more imperative in my view that the effect of the reforms be properly examined at all stages.

For my part, success is not just about quantitative measures, although statistical measures like a reduction in filings and in contravention applications may be useful indicators of whether or not the reforms, or part of them, are achieving their objective. I believe success also lies in qualitative outcomes, and one of the most important of these is changing attitudes towards parenting, whereby parents focus on their children's needs and wishes in a post-separation environment, rather than exclusively on their own.

We require for this, in my view, a sophisticated and ongoing research program such as that which has been carried out in the past by the Australian Institute of Family Studies. It needs to be remembered also that encouraging parents to engage in cooperative parenting and to have a meaningful involvement in their children’s lives where appropriate will require a major shift in community attitudes. Part of that will be asking parents to take responsibility for this themselves rather than seeking to have a judge or a federal magistrate determine it for them. But real change takes time. It took a decade for people to come to accept no-fault divorce, and I believe that a similar amount of time should be permitted to measure whether attitudes in parenting have really been changed. I hope that the government, before it implements any more changes, will allow sufficient time for us to really evaluate properly whether we have been effective or not.
John Pascoe was appointed as Chief Federal Magistrate on 14 July 2004. Mr Pascoe is a graduate of the Australian National University and, after admission as a solicitor, became a partner in the legal firm, Stephen Jaques & Stephen in 1977. Prior to his appointment, Mr Pascoe was Managing Director in the national law firm Phillips Fox and has been a solicitor whose practice has been in insurance law, risk management and government regulation. He has broad commercial experience, including a period as CEO of a public company and has been chairman of a number of listed companies and statutory authorities. He is a member of the Council of the University of New South Wales and the Deputy Chair of the Institute of Early Childhood Foundation. He is also a member of the Board of Trustees of the Duke of Edinburgh’s Award International Foundation (UK). He was appointed a member in the General Division of the Order of Australia in 1994 and an Officer in the General Division of the Order of Australia in 2002. He was awarded a Centenary Medal in 2003.

The Federal Magistrates Court is a ‘can do’ court which seeks to bring about expeditious, practical and just solutions without undue legalism and formality.

Family law is an important part of its overall workload; currently about 50 per cent overall filings continue to rise by up to 40 per cent in some registries. It is the area where the courts interface with Australian families is most direct and visible.

The Court does not operate in isolation. It is part of a much wider network that includes non-government organisations such as those represented here today; all working to assist Australian families at a time of transition and often significant distress.

The Court’s role is, of necessity, limited to judicial determination. We see it as important to involve litigants, especially litigants in person, in finding workable solutions. However, if there is no compromise, the Court will make a decision that sees people out of the Court as soon as possible and linked to appropriate support networks.

The Honourable Philip Ruddock, Attorney-General; the Honourable Kay Patterson, Minister for Family and Community Services; Professor Alan Hayes, Director, Australian Institute of Family Studies; Chief Justice Bryant Diana Bryant; distinguished guests.

I acknowledge the traditional owners of the land.

It is a great privilege to be part of the proceedings today, especially given the wide range of organisations represented.
The House of Representatives Standing Committee chaired by Mrs Kay Hull, MP, heard harrowing—and sadly repetitive—tales all around Australia of how the system had failed Australian families.

Certain themes emerged:
- a perception by fathers that they were disadvantaged in relation to shared parenting responsibilities
- an inability on the part of the system to protect women and children from violent partners
- feelings of hopelessness and despair at being trapped for long periods of time in a system which did not deliver outcomes that allowed the parties in a failed marriage—and more importantly their children—to move on.

No one can doubt there was a problem that government needed to address.

Earlier this year, Prime Minister Howard issued a discussion paper entitled *A New Approach to the Family Law System*, and formally tabled the government’s response to the House of Representatives Standing Committee on Family and Community Affairs 2003 report, *Every Picture Tells a Story*.

The proposed reforms we are discussing today are, for the Federal Magistrates Court, merely a further step on a long and arduous journey towards stronger and more resilient families—of which the courts are only a part. I hope that in time, the courts will be an increasingly minor part.

I do not intend to discuss the changes in detail. Rather, for an audience such as today, I felt it better to concentrate on a few aspects which reflect the experience of the Federal Magistrates Court and may be of interest to the wider family support networks.

Spend one day with me at the Federal Magistrates Court, or work at the coalface of family welfare and support like many of you here today, and you know that one of the biggest challenges facing our nation is to develop emotionally resilient adults, who in turn will build stronger families which endure.

Let me give you a sample of the sort of crises the Court must make orders to try to resolve:
- A parenting order for a teenage man whose one-night stand has resulted in the pregnancy of a married woman more than twice his age. He does not wish to see the child, but must now support it.
- Orders for a DNA test to try to identify the father of a baby after a woman’s wild night of partying with multiple partners. DNA testing did not identify the father.
- Residence orders for a father whose access to his children has been thrown into disarray due to his ex-wife’s sudden relocation, without warning, from the city to a country town many miles away, and to which he will find it very difficult to travel.
- Orders to give residence to a mother and prevent access to her two daughters by their father, who has been charged with incest in relation to another of his children.
- Orders to change the full-time care arrangements for a 14-year-old boy from the mother to the father, where there is serious conflict between mother and son, and the teenager has become suicidal.
I do not believe the new legislation will, at least in the short term, greatly change the way in which the Federal Magistrates Court does its work. I do, however, want to highlight a number of issues.

A general initiative is the move to a single registry for both the Family Court and the Federal Magistrates Court in family law. This is but another step in the journey, whereby the courts have to become more integrated in order to provide the best and quickest service to family law litigants.

Eventually, it is intended that all family matters will be streamed through the Federal Magistrates Court, although this may take some time as there are currently insufficient judicial and other resources within the Court to enable this to happen immediately.

In this regard, I note that the Federal Magistrates Court has a very heavy workload. It is not unusual for duty lists to have 40 or more matters in a single day. Federal Magistrates often sit well beyond normal court hours to assist those who appear before the Court and save costs to the parties.

Ultimately, when resources are available, streaming should result in quicker resolution of family law disputes and more specialisation between the courts. However, it is not just judicial resources that are required. The need for additional non-judicial resources is nowhere better illustrated than the issue of family reports. To make constructive and informed decisions, the Court needs to be kept informed of the latest research on how to achieve optimum outcomes for children from separated families, including, in particular cases, professional reports on family dynamics. Without such reports in appropriate cases, the chances of reaching the right conclusion are diminished, to the detriment of the children involved. Such reports are, however, expensive.

I note that, in some instances, children need separate legal representation. This must also be funded, as so many of the most difficult cases involve families with limited means. If the family law courts are not properly funded, both in relation to family reports and more generally, a single registry will not work and the courts will be left to squabble over inadequate resources.

The Chief Justice has mentioned some specific initiatives on the part of the Family Court, including the Children's Cases Program. The Federal Magistrates Court will monitor that program closely. However, at the present time, many of the elements of the Children's Cases Program are already applied in the Federal Magistrates Court and the legislation provides sufficient flexibility for this to continue.

I note that the reforms do nothing to tackle the disconnection between the state courts and the Commonwealth courts. This is a matter of great concern and it is most heartening to hear that the Attorney-General is seeking to remedy this situation. Often, where there is criminal behaviour being dealt with in the state courts and a related family law matter being addressed in the Federal Magistrates Court, each court acts without regard to what is happening in the other.

For example, in the matter to which I previously referred, where the father was charged with incest, he was released by the state courts on bail. It is alleged that he immediately made threats against the mother and her daughters because of her efforts to stop his contact. Although this was probably a breach of his bail conditions, it was not possible for the Federal Magistrates Court to do anything about it. The
only (unsatisfactory) option was to write the orders in a way in which the father could be arrested if he were to attempt to breach the prohibition on contact.

Experience in the Court indicates that, to be effective, long-term family law reforms must tackle the issues of poverty, education, community support and financial aid to give all Australians the best possible chance to be part of the family they deserve. We need to help our families before they get to crisis point and end up in the courts, and have adequate facilities and services in place for immediate access to a safety net when things go wrong. Without this, the vicious cycle that we sometimes see in the courts will continue and repeat from generation to generation.

In this regard, I strongly support the establishment of the Family Relationship Centres and their focus on shared parenting. However, many questions remain about their operation. For example:

- Will the proposed Family Relationship Centres be staffed and adequately funded to handle the heated and complex issues of problem-solving, family guidance, child residence and contact arrangements?
- What will be the connection between our Court and the Family Relationship Centres? It is a terrible waste if each was to exist in isolation from the other, especially as the Federal Magistrates Court, given the nature of its work, is so closely engaged with a very wide range of people and problems.

In short, all elements of the family law system must work together to benefit both the parents and the children locked in the midst of an often bitter, emotional, physical and even violent parental tug-of-war.

We must all be accountable.

In the legislation, the Government has proposed the establishment of sixty-five Family Relationship Centres. I support the Centres, not as a single entry point into the family law system but, more importantly, as a part of an effort to build stronger and more resilient families. It is in this endeavour that their success should be judged.

The theory is that by establishing these Centres and proposing various amendments to court processes, the government will encourage parties to come to an agreement about parenting rather than resorting to litigation. We must provide adequate training and resources if this is to happen.

I am interested in the issue of who will run the Centres, what will their training and expertise be, and what is the availability of their support services to the broader community. There has been no guarantee of uniform training for people staffing the sixty-five Centres.

However, although there may be difficulties to start with, I believe that one benefit from the Family Relationship Centres will be to create over time a strong pool of well-trained professionals. There need to be strict quality control measures in place to protect all those using the Family Relationship Centres and access to the best-trained mediators. It may be useful if guidelines were to stipulate that all mediators be trained in recognising domestic violence in a relationship.

Funding for these Centres should not be based only on the number of cases the Family Relationship Centres each deal with, and allowances should be made in their budgets for follow up consultation. I note in this regard that Relationships Australia...
alone supports more than 90 000 families each year. It also runs intensive, well-regarded training programs. It is but one of many effective organisations.

Already, our family support and welfare services are overstretched—something perhaps best illustrated by the fact that in Sydney alone there are only two contact centres for non-resident parents to spend supervised time with their children. The waiting list at one of these centres is eight months long.

Family Relationship Centres alone will not solve the problems. At the Federal Magistrates Court, we remain seriously concerned about the lack of contact centres. Can the Family Relationship Centres also provide these services? If not, it is important that the centres do not come to be regarded as the only answer, with less money available for other organisations active in this area.

Government, community groups supporting our families and the courts have a major stake in all the issues confronting families. The services that NGOs provide in terms of education, promoting and aiding parenting and communication skills is also vital for the long-term wellbeing of all Australian families. We need to ensure that there is open and regular dialogue between all stakeholders.

Family law is heated, and even after the legislative changes, will remain controversial, emotional and often confrontational. There is nothing glamorous, nothing nice, about a failed marriage, particularly where violence towards one partner or children is apparent. Abuse, anger and fury often go hand-in-hand with divorce, and while on paper the Family Relationship Centres have been touted to mediate marriage break-ups, this mediation presumes both parties can, and want to, speak freely as equals. It is often difficult and dangerous for a victim of violence to mediate because of the power imbalance between the victim and the perpetrator. Further, experience shows that many victims of violence identify with the perpetrator and do not tell the truth, even under oath.

In the matters that come to the Federal Magistrates Court, around half have some allegations of abuse or violence. That is not expected to change as a result of the reforms. This is a long-term problem. A report released by the World Health Organization just last week states that one in six women worldwide suffers from domestic violence. Security is paramount in these situations and, much like our courts, the Family Relationship Centres must be able to provide adequate protection and counselling for people at risk during any mediation process.

One of the government’s stated aims is to make the law more responsive to children’s needs and their right to know and relate to both parents. It does so through the proposal to give both parents equal rights in relation to key decisions concerning their children.

Lobbying from men’s groups may have been one of the factors which influenced the government’s focus on shared parenting, with a push for fifty–fifty direct shared time between the mother and father. Certainly there was much evidence given to the House of Representatives committee by fathers who felt shut out of their children’s lives. Again, this is not generally in the interest of the child. Whilst I support the government’s changes in relation to shared parenting, one has to be realistic when addressing this issue in a court context.

1 Relationships Australia Federal Budget Submission 2005.
As mentioned by the Attorney-General, in Australia today, there are 1.1 million children under the age of 18 living away from one parent due to separation or divorce, and each of these cases needs to be judged on its own merits. Put simply, one has to have regard to all the factors:

- What effect does equal time with each parent have on the child?
- Can feuding parents develop a workable family plan?
- Is it reasonable to expect parents who have previously developed an eighty-twenty share, due to work and home commitments, to suddenly revert to fifty-fifty?
- What aspects of a child’s life should be open to mutual consent? Schooling, religion and social restrictions come to mind.
- Is equally shared residence logistically possible?
- And importantly, we must consider how this assumed role of shared parenting affects those children and partners who are trying to escape domestic violence.

Joint parental responsibility or equal shared parenting time should depend on the abilities and capacity of individual families, with the best interests of the child always paramount. It must be judged on a case-by-case basis and it is commendable that the legislation allows this.

For an unemployed Melbourne-based father—divorced from his wife in Sydney since his son was born—wanting to have fifty-fifty access to his two-year-old without the financial and social network to support his request—although desirable—may be unrealistic. This is not to say that the Court and the wider community network should not help him find solutions so that he can play a major role in his child’s life. This is in the best interest of the child.

On the other hand an eight-year-old girl who wants to maximise the time she spends with each parent by having a one-week-on, one-week-off arrangement with parents who live in close proximity, will be among those who may benefit from the proposed legislation.

For many Australian families, fifty-fifty shared parenting will, quite properly, become the starting point for discussion or negotiation. Flexible parenting is often essential for older children, who prefer a single home—their own space—but equal access to each of their parents for emotional support when required.

The greatest danger of any legislation about shared parenting would be if it encouraged anything other than to weigh the individual facts and judge each case on its merits. In the Federal Magistrates Court we will continue to do so.

As part of this, we must also ensure that orders are understandable, current and workable. They must also be capable of being enforced. There is no point in any court-making orders if they are not able to be enforced and one party is able to manipulate the system in order to deny the other—often, but by no means always, the father—access to children in accordance with the decision of the Court. The availability of contact centres to ensure safe and appropriate handovers can be important for compliance. The Family Relationship Centres may also play a role here.

Ladies and Gentleman, we stand on the cusp of great opportunity.

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The Australian Government has indicated strongly its desire to build stronger families and to do this in a variety of ways. This commitment is important to all of us. Over time, I hope that by addressing the issues which cause stress to families, from poverty to violence, drug abuse, generational cycles of bad parenting and psychological illness, we will, by working together, reduce the stress on families.

In doing so, we will ensure that only the most difficult and intractable cases come to the courts, and that, once there, they can be dealt with quickly and effectively within an overall community framework of support for both parents and children.

The Court by itself can not—now or in the future—fix broken hearts. Working together, all of us can. More importantly, we can not only fix broken hearts, we can, over time, as the Attorney-General said in his opening address, change behaviours and thereby help prevent broken hearts.
Panel: The Australian family law reform package

Chair
Professor Patrick Parkinson, University of Sydney

Patrick Parkinson is a professor at the Faculty of Law, University of Sydney, and a specialist in family law, child protection and the law of equity and trusts. He has written and edited a number of books on these areas. He is Chairperson of the Family Law Council, and also chaired the Ministerial Taskforce on Child Support in 2004–05.

Presenters
Session A: Legislative change

Mr Kym Duggan, Attorney-General’s Department

Kym Duggan has been the Assistant Secretary of the Family Law Branch in the Civil Justice Division of the Attorney-General’s Department since February 2001. He has been a member of the Family Law Council since 2002, and Member of the Senior Executive Service since 1995. He previously worked for the Department of Aboriginal Affairs, ATSIC and Department of Prime Minister and Cabinet.

Professor John Dewar, Griffith University

John Dewar is the Deputy Vice-Chancellor (Teaching and Learning) and Deputy President at Griffith University. He has Bachelor of Civil Laws and Master of Arts degrees, both from the University of Oxford, and obtained his Doctor of Philosophy at Griffith University. Professor Dewar commenced at Griffith in 1995 and was Dean and Head of School of Law from September 1999 and the Pro-Vice-Chancellor (Business and Law) from November 2002 until taking up his current appointment in January 2005. He is an internationally renowned family law specialist. He was a member of the Commonwealth Attorney-General’s Family Law Pathways Advisory Group from 2000–2001, a member of the Family Law Council from 1998–2001 and Chair of the Council from 2001–4. He is currently a Vice-President of the International Society of Family Law and Director of Studies for the World Congress on Family Law and Children’s Rights. Before coming to Griffith, he taught at the universities of Lancaster and Warwick, and was Fellow and Tutor in Law at Hertford College, Oxford. He also worked for law firms in London.
Session B: Family services and the Family Relationship Centres

Ms Sue Pidgeon, Attorney-General’s Department

Sue Pidgeon is the Assistant Secretary of the Family Pathways Branch in the Civil Justice Division of the Attorney-General’s Department. She is responsible for policy and funding by the Australian Government of a range of support services for separating and separated families under the Family Relationships Services Program. As part of this role, she is responsible for much of the implementation of the government’s response to the parliamentary report *Every Picture Tells a Story*. This includes the establishment of Family Relationship Centres around the country, new dispute resolution services, new children’s contact services and new services under the Contact Orders Program. Prior to this, Ms Pidgeon’s main focus in the Attorney-General’s Department was the establishment of the Federal Magistrates Court. She has also held senior positions in other Australian Government agencies, including as Senior Assistant Ombudsman in the Commonwealth Ombudsman’s Office. Ms Pidgeon has a Master of Public Law from the Australian National University.

Ms Deborah Winkler, Department of Families, Community Services and Indigenous Affairs

Deborah Winkler is the Deputy Branch Manager of the Family Relationship Services and Child Support Policy Branch. She commenced work with the Department of Families, Community Services and Indigenous Affairs (FaCSIA) in September 2003. Before joining FaCSIA, she was a Senior Manager in the Department of Education, Youth and Family Services, ACT, and has extensive senior management experience in statutory child and family welfare in Queensland and in national working groups. Ms Winkler’s qualifications include Bachelor and Master degrees in Social Work and a Graduate Certificate in Management. Her recent work has involved significant policy input to the new family law system and program development for the Family Relationship Services Program.
Session C: Child support

Dr Matthew Gray, Australian Institute of Family Studies

Matthew Gray is the Deputy Director, Research, at the Australian Institute of Family Studies. Dr Gray has published widely on economic and social policy issues and was a member of the Ministerial Taskforce on Child Support.

Mr Wayne Jackson, Department of Families, Community Services and Indigenous Affairs

Wayne Jackson is a Deputy Secretary in the Australian Government Department of Families, Community Services and Indigenous Affairs, a position he has held since July 1998. In his time with FaCSIA, he has had responsibility for broader social policy, welfare reform, family and children, women, youth, service delivery and social security governance and accountability. He has represented the Department on a number of broadly based policy review bodies, including the Welfare Reform Reference Group (as Deputy Chair), the Youth Pathways Action Plan Taskforce, the Family Law Pathways Advisory Group and, most recently, the Ministerial Taskforce on Child Support. Prior to this, he was the Deputy Secretary in the Department of Prime Minister and Cabinet (PM&C), where he was responsible for the Social Policy Group, which included oversight of health and community services; employment, education and training; income support; immigration; women’s issues; and Indigenous issues.

Federal Magistrate Grant Riethmuller, Federal Magistrates Court of Australia

Grant Riethmuller holds a Bachelor of Laws degree from the Queensland Institute of Technology and practised as a barrister in Townsville from 1989. He had a wide-ranging general practice, which included appearance in Queensland’s Court of Appeal and its Supreme Court, and in the Family Court. Mr Riethmuller’s areas of practice included family law and child support, human rights and anti-discrimination, bankruptcy, industrial law and administrative appeals to the Administrative Appeals Tribunal (AAT). In addition to a number of journal publications, Mr Riethmuller is the consultant editor of the CCH Child Support Handbook and the CCH Federal Magistrates Court Practice.
Opening remarks

Professor Patrick Parkinson, University of Sydney

This session is in three parts. The first focuses on the Family Law Amendment (Shared Parental Responsibility) Bill 2005, the second on the new Family Relationship Centres, and the third on the child support reforms.

There can be little doubt that the family law reform package represents the biggest change to the system in thirty years. It is a time both of enormous challenge and rich opportunity. What is most interesting about the agenda for change in Australia is that by far the most significant changes are likely to be to the processes involved in dealing with disputes about post-separation parenting, rather than the changes to the substantive rules of law.

Of course, those changes to the substantive law in the Family Law Amendment (Shared Parental Responsibility) Bill 2005 are significant. Yet if no amendments were made at all to the law that judges have to apply in determining parenting disputes, the reform package could still be described as heralding a new epoch in Australian family law.

The focus on processes rather than substantive rules of law represents a fundamental change in orientation in family law reform. For years, parliaments have dealt with the pressure for reform by amending legislation. The Family Law Act 1975 must compete with the tax legislation as the most amended legislation in Australian history.

In contrast, the 2006 reform package is much more concerned with services and processes of adjudicating parenting disputes than with changing the substantive rules of family law. The budget of nearly $400 million for family law reform is almost entirely for work outside of the courts. That is a very important message about the priorities of the Australian Government for the future. These reforms are complemented by major changes to the child support formula (which is applied administratively) and the operation of the Child Support Agency, again requiring a substantial financial commitment from the government. The government is making a huge investment in changes to what may broadly be called ‘the family law system’, but its investment is not in legal processes.

The goal of these reforms, taken as a whole, is major cultural change in relation to parenting after separation. The success of these reforms, or otherwise, cannot be judged in a five-year time frame. A twenty-year time frame is more realistic.

The origins of the package are to be found in the parliamentary inquiry held in 2003, where the focus was on whether there should be a presumption in favour of an equal time arrangement if both parents want to be primary caregivers. The terms of reference of the committee also encompassed child support and the position of grandparents in parenting disputes. Towards the end of that inquiry, there was a shift towards process, with the committee recommending a tribunal and a ‘shop front’ gateway to the family law system. Although those recommendations were not accepted in the form in which they were put, the recommendations did influence virtually every subsequent development, and the Family Relationship Centres are based on the ‘shop front’ concept that the committee proposed. The committee
started a debate about the processes of family law which has led us to the point which we have now reached.

The key themes of the reform package are, first of all, support for family relationships at all stages. Family Relationship Centres are not ‘divorce centres’. The name is deliberate and the intent is clear. The Centres are for all aspects of family life. Certainly, the major part of their work will be in relation to post-separation parenting. The work of supporting intact families will be mostly through information, advice and assisted referrals. Nonetheless, it is an important aspect of the vision for these Centres that they establish themselves in the community consciousness as frontline resources to assist families and those considering entering into committed relationships, whatever people's needs may be at that time.

A second key theme is that of the indissolubility of parenthood. We have accepted for many years since 1975 that marriage is fully dissoluble by the decision of one party against (or with) the wishes of the other; but parenthood is not dissoluble. The problem that family law systems all over the world are grappling with is to work out the implications of what it means for parenthood to be indissoluble. In the absence of violence, abuse or intractable and continuing conflict, it is best for children to maintain close relationships with both parents. To this overriding goal of maximising the wellbeing of children in the circumstances of family breakdown, where it is in their best interests to maintain a close relationship with both parents, all competing considerations such as parental autonomy must bow.

However, sadly, there are some families where it is in the best interests of the children for the parenting to be done mainly by one parent; in some circumstances it may be necessary for the other parent’s contact to be supervised or even terminated. Family law systems must grapple with these competing tensions—on the one hand to sustain parent-child relationships in most families in the face of the breakdown of the parents’ own relationship and, on the other, to protect children, and their parents, from violence and abuse.

The new legislation on shared parental responsibility makes these competing considerations the primary ones in determining parenting disputes. This does not represent a relegation of other considerations, such as children's views and attachments, but rather a promotion to the centre of the Court’s attention of the goals to which their decision-making should be directed in determining where the best interests of an individual child lie.

These considerations must be in tension with one another, for both are of central importance, and one should not be emphasised at the expense of the other. The problem that policy makers must deal with is that family law legislation is directed to multiple audiences. One audience is the great many people who ‘bargain in the shadow of the law’ or are otherwise affected by the norms which the family law system provides. Another (albeit much smaller) audience is those who go through to trial. In many such cases, there are issues of serious violence, (or at least allegations thereof), as well as other issues such as drug and alcohol abuse and mental illness. How we address those different audiences in legislation, which is normally written to tell courts how to decide cases, is one of the biggest challenges in drafting laws for families.

The third theme is joint parental responsibility. One aspect of this is the need for shared decision-making on major issues. In the child support reforms, a central tenet is joint financial responsibility for children, based upon on an ‘income shares’
approach. In the current law, the formula is applied to one parent’s income alone in the great majority of cases.

The fourth theme is the importance of a holistic response to the needs of families, rather than focusing systems just on resolving parenting arrangements. Families after separation often have a range of problems and needs, not just those issues that are actually, or potentially, the subject of a legal dispute in the family law system. The Family Relationship Centres in particular, are intended as a gateway not only to services aimed at resolving parenting disputes, but also to a range of other services that can meet the needs of families at this difficult time in their lives.

A final theme is the better integration of child support with the social welfare system and tax transfers. One of the biggest challenges in the Child Support Review was to integrate the Child Support Scheme with social welfare policy through examining the interrelationship with parenting payments, unemployment benefits, and family tax benefit. The problem was that these different areas of government policy have been developed largely in silos, by different departments and at different times. These systems had to be made to work together within a coherent overall policy framework. The Ministerial Taskforce’s work on a new Child Support Scheme was guided not only by our research on the costs of children, but also by consideration of workforce disincentives, the best interests of children after parental separation, and other such major policy issues.

This session reviews the package of reform proposals.

Kym Duggan, who has had the major carriage of the Shared Parental Responsibility Bill for the Attorney-General’s Department, presents an overview of its major features. Professor John Dewar, who is a Deputy Vice-Chancellor at Griffith University, a former Chair of the Family Law Council and a distinguished family law scholar, takes a critical approach to the draft legislation.

The next segment is on Family Relationship Centres and the expansion of the network of services supporting families, particularly those where a separation has occurred. Sue Pidgeon has had the major carriage of this for the Attorney-General’s Department, and Deborah Winkler has had a significant responsibility for this program within the Department of Families, Community Services and Indigenous Affairs. These two departments are working in partnership to implement the new initiatives across Australia.

The final segment is on the child support reforms. Wayne Jackson, who had the major responsibility for the reform process within the Department of Families, Community Services and Indigenous Affairs, explains the process that led to the recommendations of the Ministerial Taskforce, of which he was a member, and some of the issues for government in dealing with child support reform. Dr Matthew Gray, of the Australian Institute of Family Studies, who was also a member of the Ministerial Taskforce, explains how the costs of children were assessed for the purposes of the Taskforce’s work. Grant Riethmuller, a Federal Magistrate in Melbourne, has written widely on child support issues, and offers his own evaluation of the reform proposals made by the Ministerial Taskforce.
Session A: Legislative change

Mr Kym Duggan, Attorney-General’s Department

Transcribed address

Today I would like to focus on aspects of the Shared Parental Responsibility Bill.

In the Attorney-General’s mind, and certainly in the view of the Department, the changes to the Family Law Act 1975 which we are discussing today in fact comprise a very small part of what we are doing in the overall reforms to the family law system. Indeed, arguably the two most important initiatives are the Family Relationship Centres and, in tandem with other services that we’re rolling out, changes to the Child Support Scheme.

The changes to the Family Law Act we hope will, in fact, become less and less important over time. That’s the intention and the focus of the new reforms. The changes themselves are designed to ensure that children have a right to know both parents, ensure that parents take shared responsibility for their children after separation, and encourage people to take responsibility for resolving disputes themselves, in a non-adversarial manner. And we hope, even outside the shadow of the court, the changes will empower separating parents to make their own decisions, not necessarily based upon a decision a court might make.

The Bill which was drafted has now had a report by the House of Representatives Standing Committee. That report was tabled on 18 August and there were fifty-nine recommendations for change. Professor John Dewar has actually spoken a bit about the provisions in Schedule 1, which talk about shared parental responsibility, and I don’t necessarily endorse any of those comments, but I’d be fascinated to consider them further.

I’ll just outline briefly what’s in Schedule 1. It contains the new Objects and Principles of Part VII. There’s compulsory attendance at family dispute resolution, which Sue Pidgeon will talk about a bit later. Presumption of joint parental responsibility: we’ve revised the way the best interests of the child are going be dealt with; there is now a two-tiered approach and we’ve strengthened the effect of parenting plans—quite a major change.

What I wanted to do, however, was to talk briefly about the reasons why we’re here. The main drivers of why, in fact, these reforms are taking place are twofold; and to a very large extent they relate to the dissatisfaction of an enormous sector of our stakeholders with two issues in the system. One is what they perceive as a lack of enforcement of contact orders, and secondly is something we’ve already talked about, and that’s the Child Support Scheme.

We need to reflect on why that’s the case, because in many cases it stems from, first of all, a fundamental misunderstanding of the way contact orders are made and the difficulties of making such orders, and secondly, the principles upon which the Child Support Scheme is based. Wayne Jackson will talk about that shortly. But there is a huge dissatisfaction with the system out there. The House of Representatives Committee which looked at this received, in the end, over 2000 submissions. And they weren’t just form letters—people took a lot of time and trouble to make those proposals and the result was that the government felt it had to move. The government believed the system was ‘broken’ and it fundamentally needed to be changed; and
that is why we’re talking about this breadth of reform. Whether you necessarily agree with all of the reforms or not, it is clearly based upon this perception.

What I want to do is look at some of the other provisions in the legislation. Firstly, in relation to the compliance regime, this is providing the Court with greater options to deal with enforcing parenting orders. Firstly, we’ve dealt with the clarification of standard of proof that’s in the legislation (I am not going to discuss this today), but in relation to further options for the Court, we provided an opportunity in the Bill for the Court to provide for ‘compensatory time’, so even when there’s a reasonable excuse for not bringing the children along, the Court would have an opportunity nonetheless to award the party who missed out ‘compensatory time’. We’ve provided for compensation orders. What does happen on occasions is that some parties travel a long distance for parent–child contact and, if they can’t get that contact, then they’re out of pocket and the Court would have an opportunity to make such orders. There will be the potential for costs in enforcement proceedings.

The government is quite clear that where there are serious breaches of orders, issues relating to costs should be considered by the Court. And we have also introduced a process of civil bond.

But I’d also like to talk about the impact of parenting plans. The government does not believe that simply because a couple is in the court system that they have to remain there. It is the intention of this legislation that a couple will, in fact, be able to, post-order, enter into their own parenting plan themselves, which will have the effect of changing the order that they originally had, without the need to return to a court. Certainly the Contact Orders Program which the Attorney-General spoke about so highly has shown great results in actually changing the behaviour of high-conflict couples. Sue will talk about the changes in and the expansion of that program, but we are very hopeful that even though a couple has had to go through a court process to start with, that won’t be the end of it for them.

What I’d like to talk about now is the way that these matters are dealt with by the courts. The Chief Justice spoke a lot about the Children’s Cases Program. One of the major recommendations of the Every Picture Tells a Story report was that the government should establish a tribunal, a different way of making determinations in the family law system. The government was not convinced that that was, in fact, the best way of dealing with these issues, but what the government was encouraged by were initiatives by both courts—the Federal Magistrates Court and the Family Court—to move towards a less adversarial process.

There is a real conceptual question for us, I think, as to why we’ve tended to deal with family relationship breakdown in a similar way, from a legal point of view, that we would have dealt with a contract dispute. Similar rules of evidence have applied for a whole lot of reasons; they have applied for a whole length of period. The Family Court has taken a great initiative in this regard and I pay some tribute to Justice O’Ryan for his leadership in making a fundamental change to the way that a superior court now approaches matters concerning the determination of parenting disputes. The change is fundamentally about a judge no longer acting as, effectively, an umpire, which is the way that the judges tend to operate in our courts, but become very much an active case manager—basically telling the parties what he or she wants to hear. The reforms will support this process in both the Family Court and the Federal Magistrates Court.
If I can just indicate to you the sorts of general duties that the Court will have as a result of the legislation. The judge will be determining which issues require full investigation and hearing and which do not. It’s not going to be a matter for the parties to determine that. At the moment, courts in our system spend a lot of time weeding out irrelevant material and trying to keep parties from raising material which is of no relevance to the final determination of their matter and which itself increases the conflict between them. The Court will be determining the benefits of taking a step back to justify the costs. They’ll need to determine, for example, whether the parties need to be present at court, whether we can use appropriate technologies, and there will be the decision on the papers. The Court must determine the impact of the proceedings on the children, and what role the children might play in that regard. There is a much greater role, generally speaking, in these proceedings for court mediators, who are often actually present in the Court for some of the hearing.

Clearly it is a much more informal process. The judge (in terms of the Children’s Cases Program)—and I know the Magistrates have done this sort of thing for a long time—actually questions clients directly; so the Court will actually ask the questions. It is interesting to watch because, generally speaking, they’ll give the client the option of having a question to their barrister or to themselves. Typically what happens is that initially the question will be answered by the lawyer. It is pretty amazing to see how quickly the clients themselves actually want to start answering those questions, so it’s really a much more empathetic and empowering way of dealing with these disputes.

It will be compulsory, effectively, or mandatory to apply the new, less adversarial process when the provisions come in, and most rules of evidence that many of us lawyers have grown up with, will not apply unless the Court determines they have to apply. The Court will also have the power to deal with the way witnesses are questioned, which witnesses actually attend, what subpoenas are issued, and what process generally operates in the case. There are also provisions in the legislation which set out the actions the Court may carry out, and they provide for the giving of direction about cross-examination and those sorts of key issues that often create conflict in these matters.

It is interesting to see how much more comfortable, generally speaking, parties are in engaging in litigation in processes of this sort.

The final thing I thought I would do in this fairly short time is talk briefly about a change of terminology. Symbolism is very important in this area of the law. We have tried to use the law as a tool for changing attitudes for some time. We originally started with the language of ‘custody’ and ‘access’—terms that tended to connote questions of ownership. We moved in 1995 to ‘residence’ and ‘contact’, hoping that this linguistic and philosophical shift would help to foster patterns of cooperative parenting after separation. In hindsight, these changes do not appear to have been enough. This is perhaps not surprising given the enormity of the challenge.

The 1995 changes to a large extent did not lead to the cultural shift that we had hoped for. What we are now going to do is not have legal labels at all. They’ll simply be the parenting orders that relate to with whom a child spends time. So there’ll be no shorthand way of describing these orders (although no doubt one will develop).

I think the fundamental change between now and the 1996 Reform Act, however, is that the government has agreed to put a very significant package into outside court
processes—$400 million for the new family law system is a huge injection of funds. It is in that area that cultural change will come. The law will support that to some extent, but the law will not be a key driver of that. The fundamental changes that we hope will come, in a cultural sense, will come more from the expansion of services and the greater reliance on outside court services than is currently the case. And the government is committed, financially and otherwise, to following through with that major expansion of services which, as we say, will and should lead to significant cultural change. Combined with the major changes that other presenters here will talk about in terms of the Child Support Scheme, which will make that system fairer, the government believes that there will be a cultural shift—particularly in relation to shared parenting and shared parental responsibility.

The Shared Parental Responsibility Bill is one small, but important, part of a concerted multi-pronged reform agenda designed to reduce inter-parental conflict, and encourage the active involvement of both parents in their children’s lives.
I have about twelve minutes and I’m going to try to do two things in that time. The first is to say a little bit about shared parenting and, in particular, reflect on the latest package of legislative reforms that Professor Patrick Parkinson has just been telling us about, and present them as the latest sequence, or latest instalment if you like, of an unfolding sequence to statutory changes that have taken place in the concept of shared parenting over the last twenty or so years. I will briefly describe the trajectory of those changes that have taken place and offer some reflections on what’s now being put forward. I want to suggest, with respectful dissent from Patrick’s proposition, that this is not just about process—actually there is a change of substance here too.

The second thing I want to do is to reflect on the relationship between empirical research and legislative change. This is something I think that should be, and is, of particular interest to the Institute, given the very prestigious role that it played in its early life in uncovering, for example, the financial consequences of divorce. I’m delighted that the Institute is a co-sponsor of this event and that it is signalling its renewal of interest in the importance of this area for its activities.

But what is or should be the relationship between empirical research and legislative change? Well, call me old fashioned, but I think there should be a relationship, and that whenever possible family law legislation and policy and the administration of the family justice system should be based on as good an understanding as we can achieve of what’s likely to work and what’s happening. I’m going to offer one or two queries about whether what’s being proposed in fact measures up to that benchmark.

Let me start with shared parenting. The concept of shared parental responsibility first saw the light of day in the United Kingdom in the late 1980s in the form of the Children Act, which really pioneered this as a legislative strategy. In doing so, it drew inspiration from the United States, which, as we all know, is a wonderful laboratory of family law and practice. Thus, in one sense, the latest package that we’re seeing here in Australia could be presented merely as an evolution in this idea. For example, the idea that shared parenting entails joint decision-making about long-term issues, which are now enshrined in the draft bill, is one that’s been around in case law in Australia for some time—certainly since the Full Court decision in B&B. Similarly, the idea that children should enjoy meaningful relationships with both parents and spend substantial time with them is evident in current case law and practice.

Equal sharing or substantial time arrangements are not currently unknown. But I think it’s instructive to compare what we’re now seeing with the Children Act version of shared parental responsibility. Just in case you don’t recall it immediately, I’ll remind you of two salient features of that piece of legislation. The first was that in that Act, the Children Act 1989, the concept of shared parental responsibility really entailed joint but independent parenting. In other words, each parent was able to act independently of the other in discharging their parental responsibility, provided only that in doing so they didn’t infringe a court order. If parents couldn’t agree about how to discharge their parental responsibility, then the way they would
sort it out would be to apply to court for an order. There was also enshrined in that legislation the principal of legal non-intervention—that is, that a court should make an order only if it was better for the child than making no order at all.

In other words, the focus was very much on the benefits to be derived for the child of legal intervention. Now the effect of this was to leave each parent with a fair degree of autonomy from the other, subject to clearly defined limits as set out in court orders. When this model was transported to Australia in the mid-1990s, it was altered slightly, in that the principle of non-intervention was not enacted here as part of the 1995 reforms, and limits were quickly set to parental autonomy by the judicial ruling that I mentioned earlier that parents must consult each other on major issues.

But my point is that it’s instructive to compare what we’re now seeing emerging from the new bill with the version of parental responsibility when it first came to light in 1989; in particular, the following features of the shared parental responsibility package that we’re now seeing here. Shared responsibility now explicitly includes an obligation to consult the other parent and to make a genuine attempt to reach agreement about significant changes in plans for the child. The list of provisions that can be included in a court order or a parenting plan is now greatly extended in terms of scope and also the detail of what can be ordered or agreed, and the legislation is now much more explicit about the practical embodiment of shared parenting; in particular, that children should spend substantial time with both parents or otherwise enjoy meaningful relationships with them. In other words, one might argue that joint or shared parenting as it’s now understood is a much more highly regulated and prescribed state of affairs than its 1980s equivalent and the chief instrument of that regulatory regime is now law and the legislative framework that this bill will create.

So in place of parental autonomy and scepticism about legal prescription, I would suggest we now have its opposite, and the fact that courts and lawyers are displaced from the dispute settlement process doesn’t alter the fact that the instruments of this regulation are primarily legal ones. One only needs to look at the legal consequences of parenting plans to understand that.

So this new package seems to me to raise the stakes around the issue of shared parenting quite considerably by applying this newly prescriptive and regulated model of shared parenting, unless there is evidence of abuse or family violence. It seems to me that a huge amount turns on this exception, and I was delighted to hear the Attorney-General talk about the importance that he’s attaching to this and the Chief Justice is attaching to it in terms of the processes to be used. But in terms of the legislation, this distinction or this exception around abuse and violence runs through the whole legislation like a golden thread. It’s in the revised Statement of Object at the beginning of the legislation; it’s in the application of the principle of shared parental responsibility; and by extension from that, the principle of consultation and the obligation to consider making an order that a child spends substantial time with each parent; and finally, but I would suggest most significantly, access to the formal court system.

In this context, it’s worth noting the various hoops through which a parent must jump if they wish to invoke the court’s jurisdiction on the basis of abuse or violence. They have to prove that there are reasonable grounds to believe that abuse or violence has taken place, but they can’t rely on interim or ex parte court orders. In
doing so, and they must satisfy this burden of proof before the court is able to hear the case, they must also produce a certificate that they have obtained information about the issue in dispute.

Now one might argue that this sets up many obstacles to accessing a court and one wonders how many parents will attempt the effort. Yet, without being able to prove abuse or violence, they’ll have no option but to submit to the shared parenting regime that I’ve just described, and attempts to protect children could well be perceived negatively by the decision makers in the light of the new ‘friendly parent’ provisions in the child welfare checklist. Some parents are possibly in a ‘Catch 22’ position, in that the more they seek to protect children, the less likely they are to succeed; which leads me to my second point about empirical knowledge and legislative reform.

The new legislation and the debates leading up to it, I think, were premised on a fairly jaundiced view of lawyers and legal process. There is, I think, one further thread running through the bill, which is about the compulsory dispute resolution provisions it contains.

I just want to mention four pieces of research evidence from Australia and overseas. I’ll be very brief. The first is that people with a family dispute are far more likely than people with other kinds of disputes to see that dispute as a legal dispute and perceive themselves as requiring some sort of legal advice. Family law is unique in this respect. At the same time, family law disputes are far less likely than others to be resolved by formal adjudication, and that’s a finding that comes from Hazel Genn’s work on *Paths to Justice*.

Secondly, satisfaction with the family law system depends on the ability to access clear advice about entitlements early in the process. This finding comes from some work that the Institute did for the Family Law Pathways Advisory Group.

Thirdly, lawyers are not as litigious as their popular image suggests. Indeed, lawyers are very settlement-minded and have an important role in constructing rational expectations in their clients. But they do use litigation, or the threat of it, as a device to encourage settlement, which is sometimes seen as litigiousness rather than its opposite.

And finally, compulsory mediation or dispute resolution as a prelude to court proceedings doesn’t work. It’s become compliance-driven. It can become compliance-driven and reutilised. It doesn’t noticeably lead to increased rates of settlement and can add to the cost of the family law system. These were findings that Gwynn Davis and his colleagues made in their evaluation of a pilot conducted in the UK in the 1990s. Now the reason I mentioned these research findings is that I believe, as I said at the outset, that it’s important that legislation is grounded in good information about its likely effects, and I wonder whether that is the case with this package.

To put a positive spin on it, I think one could say that this is a bold experiment. I think what this points to, in turn, is the importance of having a rigorous and systematic research agenda of the sort that the Chief Justice talked about earlier, so that we can evaluate these changes and feed them back into the findings to the legislation. The Institute is very well placed, I would suggest, to provide leadership in this regard and it will find a vibrant and highly talented community of university-based family law researchers very keen to participate in such a research agenda.
Session B: Family services and the Family Relationship Centres

Ms Sue Pidgeon, Attorney-General’s Department

Transcribed address

The history of family law in Australia has been one of innovation, of evolution, of trying to find the right answers as our society changes. We have heard about the change in family law, when the Family Court was introduced, of putting counsellors into the courts. This was very innovative in its time. At the time, we also had services in the community that helped people with their family relationships. It evolved out of marriage guidance in the old days.

Over the last ten years, the importance of services in the community has increased. The resources for services in the community have greatly increased. We’ve had a lot more emphasis on providing services for people to keep them out of court, to keep families away from the court system if we could. This has been a bit of a theme or a mantra for some years in the Attorney-General’s Department. We did not want people going to court unless they had to. However, the problem was that people didn’t necessarily know where to find these services, and there probably has never been enough services. We’ve had people who go through the legal system, who’ll go through the court system, and later on say, ‘If I’d known about this service or that service that might have made a real difference to me’.

One of the real problems has been that there’s an assumption that it is a legal process. There’s no doubt that if people are separating, one of the first things they’re told by their friends and family is, ‘You had better go and see a lawyer’. People contact the court, people contact some sort of legal service, because that’s what they think it’s about; because that’s the way separation has always been treated in Australia. They may not end up going to court—more than half the people in Australia who separate don’t go to court—but many of those still see it as a legal issue and it easily becomes an adversarial issue.

We all know people who do manage to reach agreement with their former partner and do have reasonably amicable arrangements. They are the people that we’re not really worried about today. They are the people who will always be able to do that. But a lot of other people end up becoming more and more adversarial and the fight between them starts being the focus, instead of the children. The fight is about the rights or the wins or the losses of the parents and not about what’s in the best interest of the child. That’s what we want to change—that’s the cultural change.

Family Relationship Centres are central to that change. We are putting sixty-five around the country. It is not quite enough. We would love to have more, but that is a really good start. We want the Centres to be places that people know they can go to if they have relationship difficulties or they’re going through a separation or they have a post-separation problem. So that’s the place they first think of—not going off to a legal service or to the court. They might end up getting legal advice or going to court, but let’s say there’s somewhere that they know they can go first. They do not have to go there. There’s no compulsion. But they’ll know about the Centres and that’s really important.
The Centres will be central to a broader system. We’re not abandoning all those other services we’ve been building up over the years. In fact, we are building them up further. There is a lot more money going into other services. We are putting money into early intervention and prevention services to help keep families together, and Deborah Winkler will be talking to you about that shortly.

We are also talking about more money for the programs that help really high-conflict families. The Contact Orders Program has been mentioned several times today. As many people here would know, this program deals with separated parents at the high-end of inter-parental conflict. A lot of those cases involve allegations of violence and/or child abuse. The program works with families who are at that end, to try to stop them churning through the courts.

We are also expanding Children’s Contact Services. The Chief Federal Magistrate talked about waiting lists for Children’s Contact Services. We are almost doubling the number of those services around the country. Currently the Commonwealth funds thirty-five. We will be funding sixty-five Centres by the end of this rollout of services. And we’re also funding a lot more dispute resolution services, like mediation.

So it’s not all about Family Relationship Centres. However, the Family Relationship Centres are the centrepiece. They are the central focus. They are the place you can go to find out about other services. They are the place you can get information, regardless of whether or not you are separating. You might just want to know about some family relationship education. You might want pre-marriage education. You can go there to find out where to get those services. You’ll be able to get referrals and information about preventing relationship breakdown. If you are separating, you will be able to get individual help. You will be able to sit down with a professional—indeed a highly qualified professional—and talk through options. That professional will help parents to stay focused on their children’s needs. The Centres are for families with children. We are not so interested in arguments over property, although these can be dealt with in the Centres where they are entangled with issues about children. But the focus and the intent is for the children’s interests—children’s outcomes—to be the main game.

The new Centres will offer group sessions for those people who do not want to sit down individually. They will have group information sessions, training sessions on parenting after separation, on how to develop parenting plans and a whole range of other issues. And they will provide joint dispute resolution for parents and extended family members. We are not saying it is only parents involved here. Extended family members (including grandparents) will also be able to go through a dispute resolution process, such as mediation or conciliation. This process will be tailored to suit that particular family.

Some people have got the impression that it will be compulsory to go to the Family Relationship Centres before you can go to court. That’s not quite right. What is intended is that, over the next three years, changes to the law will be phased in making it compulsory to go to some form of dispute resolution with an accredited professional practitioner before you can go to court—unless you meet one of the exceptions. We’ve already heard that violence and child abuse are exceptions. Urgency is another exception. Also where it is just not appropriate to have a dispute resolution process because one or more of the parties can’t participate effectively for whatever reason. So there are exceptions. There are safety issues very much in
mind as well as fairness in terms of the process. But if you do not fit one of those exceptions, you will be required to go through some sort of dispute resolution process, whether it is in a centre, at another service or with a private mediator. There are many options. As long as they meet the professional standards which will be required under the legislation, you will be able to go through that process. Then, if that doesn’t work, you go to the court.

We heard a few minutes ago about a service trialled overseas that sounded similar but didn’t work. However that trial took a quite different approach, providing the same information to all clients rather than adapting the service to the needs of individual families, as we’re doing.

I should also just mention, in terms of the violence issues that we’ve touched on today, that we will be having specific training in screening and assessment for staff of the Centres and for an advice line (which will be an alternative for those who can’t get to a centre or other services). We’re expecting and requiring highly professional staff in these services. But, on top of that, we are going to provide consistent training on a range of things before the Centres open up. These include screening for violence and abuse and other issues. It includes how to deal with cases that may still involve violence that has not been disclosed. We all know that violence does not necessarily get picked up in screening, so we know that we have to set up these Centres in a way that can be very mindful of how to make processes fair and be alert to issues such as those.

I hope that this gives you some taste for what we are trying to do. You can find more information at www.ag.gov.au/family. These are the biggest changes to the family law system in Australia in thirty years and the impact will not be evident overnight. But, over time, we are hoping to make a real difference in outcomes for families in Australia.
Session B: Family services and the Family Relationship Centres

Ms Deborah Winkler, Department of Families, Community Services and Indigenous Affairs

Transcribed address

When Patrick Parkinson referred before to Sue Pidgeon and me being a ‘double act’, the reason is that, quite regularly, Sue and I end up in the same forums talking to people. Part of the reason for that is that we have joint responsibility for the Family Relationship Services Program, which is a Commonwealth-funded program. The Attorney-General’s portfolio provides funding for that program and so does the FaCSIA portfolio. So we are working very closely together in terms of the implementation of a new family law system.

A lot of speakers this morning have touched on the context that we’re operating in. In terms of the implementation of new services and with the existing service system, we need to be very mindful of what the impacts are going to be in terms of any legislative change, and also the complementary proposals that Wayne Jackson will talk about shortly in terms of child support. Within that context, there’s really been a greater focus on who are the people who need to be serviced by these systems, and there was a lot of emphasis this morning on keeping the focus on children.

In a number of the talks, there were words used like being realistic about innovation, sharing research findings, investing early on, resilience and skills and that focus on children within a transitional kind of process of looking at families. I think all those concepts are really important and we have been trying to ensure, in terms of their implementation, that we’re trying to be as realistic as possible about what you can do. With the $400 million recently allocated—which is a lot of money—we also have a large country that we have to service geographically, in terms of where families are located.

We have talked about the need for seeing cultural change. What we’re wanting from this program is for it also to be promoting healthy family relationships, the issues around preventing conflict and separation, agreement rather than litigation, and promoting meaningful relationships with both parents for children. Sue’s outlined the broad directions for the Family Relationship Centres and what I want to emphasise is: Yes, the Family Relationship Centres are like a flagship or a highly identifiable part of the system, but they are not the only part of the system. There is an existing service system out there that, to date, has done an extremely good job. Probably one of the major issues has been the level of demand on that service system and the capacity to be able to respond, so the Family Relationship Centres will be the highly visible and highly accessible gateway into the system. But we are still expecting that the other services that are there will also be available to families.

One of the things that we have been trying to focus on is about trying to help families earlier, and we’ve talked a lot about separation when they get to the court end of the system. But there’s a whole service system response out there that’s also about supporting family formation and keeping families together. Earlier on, there was mention about poverty and the impacts that that might have on families. When you ask who is actually separating and you look at some of the research that is
available, it suggests that separation rates are three times higher among families with low incomes. We know that the large majority of people currently accessing the service system probably fit into that group. The issues around family violence are not only issues for Family Relationship Centres. They are also issues for the broader service system and how we get some consistency in responding to that. I also want to emphasise that there’s a whole range of gender issues in terms of how we respond to our service delivery, and probably a greater recognition now of the need for men to be serviced in particular ways. What I will say is, there were some myths out there that men weren’t accessing the service system to the extent that they might, but when we did a review of the program back in 2003–2004, it was actually identified that almost half of the clients in the program were men. Some part of that could be that we have programs that are specifically targeted to men as part of the Men and Family Relationships Services.

There has also been a range of issues, in terms of the expansion of the new services, about access. This has traditionally been a mainstream program that possibly has not serviced particular groups as well as it could have. With the Family Relationship Centres, there is some outreach and Indigenous funding that’s associated with that, but access to the broader service system is important for Indigenous people and also for culturally and linguistically diverse communities. One of the other things is that there’s been some focus around children. But, over time, there will need to be a greater focus on what processes are in place to engage children in these new services.

With the Family Relationship Services Program, we’ve talked about the *Family Law Act 1975*. I wanted to quickly also mention that the *Marriage Act 1961* applies to the education end of the spectrum, and that currently out there are about 100 community organisations providing services through the program in 350 outlets. And they have links with a whole range of other parts of the service system—the Child Support Agency, Centrelink, the Family Court, legal services, etc.—so that part of the system will need to continue to be built on.

As Chief Federal Magistrate John Pascoe mentioned, the issue of the interface of services will be critical in terms of enhanced integration. We know that this program is built on a number of highly successful service types. I mentioned services specifically for men before. Sue Pidgeon talked about the Contact Orders Program, as did Kym Duggan earlier. So we see the Family Relationship Centres as being the next phase of the service innovation. Seventy-four million dollars of that package is being invested in early intervention and prevention services that will focus on education, counselling and skills training. There will be additional men’s services and some specialised family violence responses. There is also a substantial amount of money going to support Mensline Australia, which provides counselling to men across the country.

What we are wanting to see, and I think Kym emphasised this earlier and a number of the other speakers, is ‘whole-of-family’ approaches that focus on both the strengths of the families and on the child. Those services need to be integrated more broadly. So you will see other services going in similar locations to Family Relationship Centres so that there is a complementary range of service outcomes.

One of the things we are talking about as part of this process is looking at research and evaluation and making sure that if we’re putting new service responses into place, that they are actually meeting the needs of the families that they’re meant to
service. We are starting to talk much more openly about focusing on outcomes for families and children and the communities that they’re part of.

We are really pleased that we’re also forming a partnership with Australian Institute of Family Studies in terms of the new Family Relationships Clearinghouse that they’re going to develop, coordinate and facilitate. This will complement the program, because what we think now in terms of families and how they are being serviced will be different to how we thought about them last week, or how we might think about them into the future. We do need a greater focus on evidence and research as part of that, and to be able to support the service system to showcase their good practice and build from an evidence base.

There were a couple of key issues that I wanted to highlight with this significant growth in the service system. Firstly, there are a range of issues that we will need to work on in collaboration with the sector, including workforce planning and ensuring that we have enough skilled workers out there to be able to provide the service responses. I think we’ll look a lot more at partnership development and the networking capacity and the integration of the service system to be able to respond to some of those issues.

The last thing I would like to say is that we know that families are dynamic, that the shape and size of a person’s family changes over their lifetime, so transitions are very important. Children grow older and living arrangements change, so we need to really focus on the impacts of family transitions on children’s outcomes.

Thank you.
Session C: Child support

Dr Matthew Gray, Australian Institute of Family Studies

To give any child support scheme the best chances of being seen as being fair, it is important that it be based on the best available evidence and that this evidence base be clearly communicated. The Ministerial Taskforce on Child Support sought to base its recommendations on the best available evidence. In this paper, I describe the evidence base developed by the Taskforce. I also provide a summary of how the Taskforce determined the costs of children. This research had to be completed in a very short time frame to contribute to the development of the Taskforce recommendations and the subsequent policy processes. The Taskforce was established in August 2004 and reported in June 2005.

The Taskforce identified a number of gaps in the evidence base. To fill these gaps the following pieces of research were commissioned:

- a snapshot of contemporary attitudes to child support (Smyth & Weston, 2005)
- updated estimates of costs of children in Australia:
  - updated costs of children using Australian Budget standards (Henman, 2005)
  - costs of children and equivalence scales (Gray, 2005)
- a comparison of selected overseas child support schemes (Taskforce Secretariat, 2005)
- a micro-simulation model of existing and proposed child support schemes (National Centre for Social and Economic Modelling—NATSEM).

Other research and analysis was also undertaken on the characteristics of the child support population, the operation of the scheme and changes in the characteristics of families over time.

This research is publicly available from the Department of Families, Communities Services and Indigenous Affairs website (www.FaCSIA.gov.au).

One of the earliest pieces of research to be commissioned was a snapshot of attitudes to child support (conducted by Bruce Smyth and Ruth Weston from the Australian Institute of Family Studies). This work provided evidence on public attitudes to child support and raised many fundamental issues about social values and ‘fairness’. The attitudes of those who had direct experience of the child support system (either as payers or payees) as well as the general population was measured. Information was gained through questions about how the current scheme was considered to be working, as well as through threshold questions about other possible schemes. For example, there were questions on the level of support there would be for making the amount of child support being paid dependent on the age of the children—a majority of the population agreed with that suggestion. Another example of the information provided by the work of Smyth and Weston related to whether the amount of child support a non-resident father has to pay should depend upon the number of nights the children stay with him—again the majority of the population supported this.
The child support percentages have been identified as problematic by successive committees that have examined the Child Support Scheme (for example, Australian Parliament Joint Select Committee on Certain Family Law Issues, 1994; Australian Parliament House of Representatives Standing Committee on Family and Community Affairs, 2003).

The Terms of Reference required the Taskforce, inter alia, to evaluate the child support formula percentages in the light of research on the costs of children in separated households. The Taskforce came to the view that in order to determine estimates of the costs of children, further work needed to be undertaken on identifying the costs of children in Australia. This was considered vital, given the view of the Taskforce that:

The child support formula should provide a transparently fair basis for calculating child support. This requirement cannot be met if the Scheme aims to fulfil objectives other than sharing the costs of children equitably between the parents. For that reason, it is proper that child support obligations be based on the best available evidence of how much children cost to parents with different levels of combined household income (Australian Ministerial Taskforce on Child Support, 2005, p. 4).

The Taskforce commissioned three pieces of new research that provided new and updated estimates of the costs of children in Australia. Each piece of research used a different method.

Richard Percival and Ann Harding from NATSEM at the University of Canberra updated previous estimates of the cost of children using expenditure data (that is data on what people actually spend). Paul Henman from the University of Queensland updated existing Budget standards estimates of the costs of children. Finally, I conducted a review of all the previous Australian estimates of the costs and benchmarked them against the international evidence.

A comparison of selected overseas child support schemes was also undertaken, so we were fully aware of what was being done elsewhere in the world and could learn the lessons, both positive and negative.

The final piece of research involved the development of a sophisticated micro-simulation model. This model enabled the impact of the Child Support Scheme on families in a whole range of circumstances to be assessed and options for change to be developed.

Costs of children

Using the accumulated evidence base, the Taskforce came to ‘Taskforce-agreed’ estimates of costs of children (expressed as the percentage of gross family income spent by intact couples at a middle-income level, with different numbers of children).

Table 1 shows the costs of children as a percentage of gross income for a middle-income couple. The costs for families with one, two, three, and four plus children are shown. The first panel (‘Detailed age ranges’) shows how the Taskforce-agreed costs of children vary for four age ranges (0–4 years, 5–12 years, 13–15 years and 16–17 years). The costs of having one child aged 0–4 years is 10 per cent of gross income for a ‘couple family’ with an income of $50 000–$60 000 per annum.
A number of aspects of the agreed gross costs of children are worth emphasising:
- older children cost more than younger children
- each additional child costs less than the previous child (because of economies of scale and budget constraints)
- the cost of children as a percentage of income falls as family income increases.

The Taskforce came to the view that it would recommend that the child support formulas should use only two age ranges: 0–12 years and 13 years and over. Estimates were prepared of the costs of children in four age ranges (0–4, 5–12, 13–15, and 16 years and over), but the Taskforce decided to recommend that only two age ranges be used in any revised Child Support Scheme. The Taskforce decided that the differences in cost between older and younger children were sufficiently great that some differentiation should be introduced into the system. The Taskforce decided that children under five should be grouped with those aged six to 12 and the percentages applied should be those of the older group, which are higher. This was to take account of the costs of child care and for administrative simplicity. Given the small differences in costs for those 13–15 and those over 16, and for administrative simplicity, a single band was recommended for those aged 13 and over.

The far right column shows the percentage costs of children under the pre-reform Child Support Scheme. It is important to note that the percentages in use in the current Child Support Scheme do not take account of the free area, which reduces the percentage of gross income required to be paid in child support.

Table 1  Taskforce-agreed gross costs of children as a percentage of gross income for middle-income couples

<table>
<thead>
<tr>
<th>Number of children</th>
<th>0–4 years</th>
<th>5–12 years</th>
<th>13–15 years</th>
<th>16–17 years</th>
<th>All aged 0–12 years</th>
<th>All aged 13+ years</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
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<td>16</td>
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<td>3</td>
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<td>28</td>
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<td>37</td>
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<tr>
<td>4+</td>
<td>24</td>
<td>33</td>
<td>42</td>
<td>43</td>
<td>33</td>
<td>42</td>
</tr>
</tbody>
</table>

Note: ‘Middle-income’ means intact couple families with gross incomes around $50 000–$60 000 per annum.

Figure 1 shows the gross costs of children for family incomes over the range $28 000–$128 000 per annum for a couple family with two children aged 0–12 years. The left-hand axis shows the costs of children as percentage of gross income (the solid line) and the right-hand axis shows the costs of children in dollars per week (dotted line). There are two main points to be taken from this figure:
- the dollar cost of children continues to increase as family income increases
- but the cost of children as a percentage of income falls as family income increases.
The basis of the costs of children and the Taskforce formula is that the cost of children should not be based on the gross costs, but rather the costs net of government child-related benefits and family tax benefits. Figure 2 shows the gross and net costs of children for a couple family with two children aged 0–12 years, in which one parent is not in the labour force and cares for the children. In Figure 2, the dotted line is the agreed gross costs. The solid line shows the net costs after subtracting Family Tax Benefit Part A (FTB A).

* All gross incomes have been rounded to the nearest $1000.

Source: Harding and Gray (2005)
This figure clearly illustrates that once FTB A is deducted, the net costs of the children to the family is below the Taskforce-agreed costs up to a private income of around $90 000 per annum. Beyond this income, the family would no longer receive the Family Tax Benefit. It is clear from Figure 2 that at lower private incomes, the net costs of children are quite low.

When interpreting the Taskforce-agreed costs of children, it is worth noting the Taskforce’s conclusion that:

... there is no ‘true cost’ of a child and that, in the end, it is a matter for judgment—but that this judgment needs to be informed by the existing empirical estimates and be evidence based. Many other reviewers have come to the same view, including the National Academy of Sciences Panel on Poverty and Family Assistance in the United States of America, which undertook a major study on how to measure poverty and equivalence scales (Citro & Michael, 1995).

A significant piece of research commissioned as part of the work of the Taskforce was the development of a micro-simulation model. This model incorporated information on the income support and tax systems, the existing Child Support Scheme, and the Taskforce-proposed Child Support Scheme. It allowed the Taskforce to explore a wide variety of possible designs of the Child Support Scheme and to incorporate estimated costs of children into the income shares calculation for the child support liability. The model also allowed distributional analysis to be conducted. The development of this model was no easy task.

The model was developed by the National Centre for Social and Economic Modelling, led by Professor Ann Harding as a member of the Taskforce, and was a very valuable part of enabling different permutations to be tested. This modelling will prove to be a valuable tool for future policy analysis and development.

The Taskforce recommended that the Department of Families, Community Services and Indigenous Affairs undertake or commission periodic updates to research on costs of children and other aspects of the available evidence base (see Recommendation 29) to ensure the Child Support formulas would continue to reflect the up-to-date costs of children, the circumstances of payers and payees and the current government tax and benefit framework.

References


Session C: Child support

Mr Wayne Jackson, Department of Families, Community Services and Indigenous Affairs

Transcribed address

As you have heard from other speakers, an impressive evidence base underpins the proposals put forward for changes to the Child Support Scheme. It is unusual for government to be presented with such a detailed blueprint for changing the architecture and operation of a system as complex and sensitive as child support.

As you may be aware, the government is still considering its detailed response, so as a public service policy adviser, I am constrained in providing any policy commentary. However, I can safely share with you some of the considerations that the government must make in deliberating on the proposals contained in such a detailed, thought-through report.

The government established a steering group of ten relevant departments and agencies, which I chair, to consider the report and provide advice. It is of interest, I think, to briefly describe the make-up of the group, because it highlights the breadth and complexity of the issues that the child support area raises for government.

Family and Community Services, representing the following areas:
- child support policy
- Family Tax Benefit (the government’s payments to families for each child that is reduced according to how much child support is received according to a formula—the so-called ‘maintenance income test’ that helps defray the cost of separation to taxpayers)
- family relationship services
- Office for Women.

Human Services, the new service delivery department, which includes:
- Child Support Agency
- Centrelink (the agency which pays family benefits and income support).

Attorney-General’s Department:
- family law, including family relationship services
- review mechanisms
- other legal/legislative issues.

Department of Employment and Workplace Relations:
- workforce incentives
- working-age income support (some 60 per cent of payees are on benefits and 25 per cent of payers)
- including recent welfare-to-work initiatives.

Department of Finance and Administration:
- financial considerations (both short- and long-term), including behavioural assumptions.
Department the Treasury:

- workforce incentives
- taxation policy
- Australian Taxation Office.

Department of Prime Minister and Cabinet:

- policy coherence and linkages across other policy initiatives.

In analysing the Taskforce report, the steering group had to consider a number of the balances and trade-offs that were proposed or implied by its recommendations. For example, the balance between public and private responsibility, including: the balance between ‘fairness’ to the children, each of the parents, and to the taxpayer; and the administrative intensity that is reasonable and affordable. There are two particular aspects of this, which I will briefly comment on.

**Compliance**

The report recommends strengthening efforts to ensure people pay what they should be paying, in the interests of children receiving what they are entitled to receive, and to strengthen community support for the Scheme. But how much more compliance activity is the ‘right amount’?

What are the returns (i) to the children from increased flows of child support; and (ii) to the taxpayer who would fund this increased activity from different forms and levels of investment in compliance activity; and what should the balance be between prevention, detection and deterrence activity?

**Agreements**

The best arrangements are those that parents negotiate themselves, without unnecessary government intrusion, provided that the interests of vulnerable parties, including the children, are protected. But as the Taskforce report acknowledges, there are also the interests of taxpayers to consider. Currently, for parents entering agreements, these are only accepted if the amount of child support is at least the amount the formula would produce at the time they enter into the agreement. The report proposes that, in the interests of giving parents more flexibility, agreements could be for lesser amounts, provided there are appropriate legal protections for the vulnerable; and that the interests of taxpayers would be protected by the amount the formula would produce when using the maintenance income test. How often should agreed amounts, which often run for many years, be benchmarked against the formula amount as people’s circumstances change, given the administrative costs and intrusion that would be involved?

These examples give just a flavour of the balancing of micro-policy and budgetary considerations that governments must work through to implement the report’s recommendations.

Then there are the logistics of implementation to consider: systems redesign; expanded data exchanges; collecting additional information from people not required under the current Scheme; advising parents and confirming new amounts; and training of staff.
And, finally, how can we manage the inevitable gap between announcement by government of any changes to the formula and implementation of those changes, recognising that people must continue to comply with existing arrangements in the interim?

Postscript: On 28 February 2006, the government announced its response to the Taskforce report. This will involve a major overhaul of the Child Support Scheme. The reforms will be introduced in three stages, commencing from 1 July 2006. Further information can be found on the FaCSIA website: www.FaCSIA.gov.au
Ripples on the millpond—Reflections of social change from the Child Support Scheme

Federal Magistrate Grant Riethmuller, Federal Magistrates Court of Australia*

1 Changing places

Prior to the introduction of the Child Support Scheme in Australia, child maintenance was governed by the provisions of the Family Law Act 1975. The child maintenance system was a traditional common law system, which required carers to apply to a court for a maintenance order. This commonly occurred in the Family Court and the state Magistrates Courts.

The orders made by both courts were generally for relatively low amounts, which did not adequately reflect the true costs of caring for children. In addition, the carer was generally left with the difficulties of enforcing the child maintenance order against the payer (in some states, the carer was able to register the maintenance order with the local clerk of the Court, who would take some relatively simple enforcement steps, such as imposing garnishees).

The enforcement rates remained low and the process expensive for all those who generally were without significant income and had the burden of children to financially support.

Estimates published at the time of the introduction of the Child Support Scheme indicated that around 30 per cent of child maintenance orders were actually met by full payment, demonstrating an extremely low compliance rate.

Whilst non-compliance with child maintenance orders was frowned upon by the law and polite society, little was done to systematically enforce the obligations imposed by the orders until the introduction of the Child Support Scheme.

The first significant step in the Child Support Scheme was the introduction of the Child Support Act 1988, which later became the Child Support (Registration and Collection) Act 1988 (‘the Registration and Collection Act’). This was the first step in a radical change to the child maintenance and child support system in Australia and involved a significant systemic change. The effect of the Registration and Collection Act was to create the Child Support Agency, so that the beneficiary of a child maintenance order could register the order with the Child Support Agency for collection. The effect of registration was for the debt to become a debt to the Commonwealth of Australia, to be enforced by the Child Support Agency. Other provisions of the legislation provide for the monies received by the Child Support Agency to be paid to the beneficiary of the orders.

The Child Support Agency was established within the Australian Tax Office to enable it to have access to the significant information databases of the Tax Office and the wealth of experience in administrative enforcement and collection methods held by the staff of the office.

* Views expressed in this paper are the personal views of the author and should not be taken to be views of the Court.
The second phase of the Child Support Scheme was the introduction of the *Child Support (Assessment) Act 1989* (‘the Assessment Act’), which provided for the administrative assessment of child support. In many ways, the actual impact of this legislation has been greater than the Registration and Collection Act. The Assessment Act allows the carer of dependent children to simply complete the administrative form in order to seek administrative assessment of the amount of child support that ought to be paid. The child support is then calculated using a formula set out in the Assessment Act, based upon the number of children involved and the taxable incomes of the parties and the amount of time their children spend with them. This information is made readily available to the Child Support Agency by the Australian Tax Office.

The most significant changes brought about by the introduction of the assessment process are that:

- the payer now has the onus of applying to the Court for reductions if unsatisfied with the formula assessment (as altered by an administrative process available under the Act), rather than the expensive litigation-based process being required at the outset by the carer of the children (the process for applying for child support is now so simple that it is rare for a person with dependent children to not seek an assessment)
- the effect of the formula has been to significantly increase the average child support weekly payment for a dependent child
- carers of dependent children are required to make application for child support if they are to receive social security payments (unless an exemption is obtained with respect to matters such as domestic violence).

The administrative assessment is then registered with the Child Support Agency for collection (an internal process if collection is requested by the payee), and enforced in the same way as the Agency enforces court orders for child maintenance.

Put simply, the carer of dependent children need only complete a form to have an assessment made and collection commenced. The rate of child support has generally been greater than rates of child maintenance orders and the enforcement system has resulted in enforcement rates of over 70 per cent, compared with previous enforcement rates of only 30 per cent of child maintenance. Significantly, the costs of enforcement now fall upon government rather than the individual carers of children, thus ensuring the benefit of enforcement of child support goes to the children.

Carers now receive financial support without the need for a court order, while payers must apply to the Court to resist providing child support. In a practical sense, carers and payers have changed places with respect to the need for litigation.

2 The effect of changing places

There have been a number of subtle effects of the Child Support Scheme. It has, in a socio-legal sense, resulted in a changing of places between the payers and payees with respect to the expenses and difficulties involved in generating and disputing child support arrangements.

Most significantly, on a social level, there has been a dramatic shift in the power of participants in the Child Support Scheme. The economic bargaining lever that payers of child maintenance and child support had in the past has largely been removed. Payers are now arguably disempowered economically (in the child maintenance
negotiations), in the sense that significant financial contributions for the benefit of their children are required of them and are enforced by the Child Support Agency. In some cases, this amount is as much as half of their disposable income. However, it should be noted that, on a broader level, the financial crisis of carers is generally worse than payers.

The assessment process, in substance, is not able to be resisted by the payer of child support. There is no effective legal defence to a child support assessment, save for issues relating to non-paternity. The only real issue now relates to the amount of child support to be paid. Whilst in legal theory the grounds for defending a child maintenance application are largely non-existent, the resistance of such applications in the court process would cause significant delay and expense to the payer. Such systemic problems have been removed by the administrative assessment process, which proceeds in a largely computerised fashion.

A further change in position of the parties with respect to the bargaining and negotiations is the inability of payers to effectively withhold payment. Whilst some payers of child support do refuse to make payment and cause enormous expense and difficulty to the Child Support Agency, its effect upon the payee is limited to the simple financial withholding. The payer then suffers the accumulation of penalties and, if the Child Support Agency pursues the payer in court, legal expenses. For payers who are in receipt of wages or salary, withholding payment is simply not an option, as the Child Support Agency puts an ‘auto withholding’ process in place (the administrative equivalent of garnishee orders), without the need to first access the court. The result is that withholding of payment is no longer as effective a tool for payers wishing to use their economic position to bargain with carers of children.

A further interesting side effect of the change is that the ability of parties to bargain or haggle about the amount of child maintenance has been significantly reduced. There is no cost involved in obtaining an administrative assessment, or in participating in the administrative departure process. As the Child Support Agency sets the rate, the carer of the children is no longer in the position of having to bargain for whatever financial contribution they can achieve, but is in the position of having received an administrative assessment and deciding whether or not to agree to alterations to that assessment. In the vast majority of cases, the payee is effectively unable to agree to any reduction in child support, as the payee is required to take ‘reasonable action’ to recover child support as a condition of payment of social security. That is, income-tested pensions and benefits will not be paid unless those in receipt of them are taking reasonable action to recover child support which, on a practical level, requires an application for child support assessment and enforcement by the Child Support Agency.

In cases of high conflict, the Child Support Agency effectively reduces the opportunity for disgruntled spouses to engage with their former spouse. This is because the Child Support Agency issues the assessment and pursues the enforcement of it, rather than the former spouse.

3 Context of changing places

Having briefly considered the effects of the Child Support Scheme, it is appropriate to consider the context of this ‘changing places’.

The social issues of the times leading up to the introduction of the Child Support Scheme included the following significant matters:
The government realised that the cost of social security payments in respect of supporting children were growing rapidly as the rate of marriage breakdown increased. Whilst the rate of marriage breakdown in Australia is not outside the range commonly seen in first world countries, it is, nonetheless, a spiralling economic cost to the community. If contributions to the care of children by former spouses remain low, the cost is effectively shifted to the state. The effect of the Scheme was to increase the amount of child support paid, which had a direct effect upon social security in Australia. Above a relatively low weekly threshold, 50 cents is deducted from the social security payment for every dollar in child support that is paid to the carer. This provides the carers with a significant incentive to obtain child support and encourages payers of child support, with the knowledge that their support does have a significant impact upon the child, even if it does reduce the total amount of social security paid. This is a critical distinction from the scheme operating in the United Kingdom, where the social security payments were reduced pound for pound for every pound of maintenance payment, completely removing the incentive of both parents to engage in any arrangements that provided for the non-resident parent to provide financial support to the child (and created an incentive for agreements that potentially undermined parts of the social security system).

There was significant community angst with respect to the costs of separation and single parents, and increasing focus upon the feminisation of poverty and the poverty that those who were the primary carers of children often found themselves in following separation.

The problem of social security expense followed a period of relatively easy access to social security payments. This was particularly clear in the context of the ability of parties to arrange matrimonial property settlements and maintenance settlements in such a way as to maximise access to social security benefits.

4 Political results

The political impact of the Child Support Scheme has seen the most significant sustained pressure by constituents upon members of parliament in the federal arena in the last half century. It is considered by many to be an issue that forms the basis of the greatest number of complaints to electorate offices and members of parliament. The impact of the Scheme has seen the mobilisation of a number of groups seeking reform to the Child Support Scheme, largely father’s groups.

Interestingly, however, the general outcome of the Scheme has been that there is now a general acceptance of an obligation to pay reasonable financial support for children and it is rare, even in the context of day-to-day hearings and departure applications, to hear a person who is a non-resident parent suggesting that they should not have to make reasonable provision for the financial support of their children.

The effect of the Scheme has been that arguments with respect to financial support for children now relate almost entirely to:

- the amount or rate of the financial support
- complaints (whether justifiable of not) about the conduct of the Child Support Agency or officers thereof
- the need for reform of parenting issues, in particular the enforcement of contact orders and the amount of time non-resident parents have with their children.
The rate of private collection of child support has also increased over the years of operation of the Scheme, confirming the acceptance of the obligation to meet child support and the reality that it will be enforced if not met voluntarily. The following tables demonstrate the subtle changes over time.

### Table 1  Acceptance of obligation

<table>
<thead>
<tr>
<th>Year</th>
<th>CSA Collect Number</th>
<th>CSA Collect %</th>
<th>Private Collect Number</th>
<th>Private Collect %</th>
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<td>2005</td>
<td>348,833</td>
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<td>179,241</td>
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<td>1996</td>
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<td>209,477</td>
<td>63.3</td>
<td>121,514</td>
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<tr>
<td>1994</td>
<td>180,581</td>
<td>66.4</td>
<td>91,468</td>
<td>33.6</td>
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</tbody>
</table>


### Figure 1  Child support by collection method

Notes:

1. The CSA Collect figures include amounts for Interim Disbursement, Final Disbursement, Emergency Disbursement and Non-Agency Payments (NAPs).
2. Private Collect totals assume 100 per cent of privately paid child support is transferred. Where this is not so, the payee is entitled to ask the CSA to collect the liability.

Table 2  Child support at or under $260 per year

<table>
<thead>
<tr>
<th></th>
<th>CSA Collect</th>
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<td></td>
<td>Number</td>
<td>%</td>
<td>Number</td>
<td>%</td>
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<tr>
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<td>164 811</td>
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<td>130 076</td>
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</table>


As set out in Table 2, the figures from the Child Support Agency also indicate that a large number of child support assessments are less than or at the minimum rate of $260 per annum.

A disconcerting aspect of the Scheme is that the unemployment levels of those assessed to pay child support, as a percentage of that group, are greater than the percentage of unemployed in the general population.

5  Father involvement

A further social change that has impacted greatly upon family law in Australia, and consequently the child support system, has been the increase in the extent of fathers’ involvement in their children’s lives. It appears that this involvement, generally, has increased dramatically in the last thirty years.

The result of this increase in involvement, and great increase in the desire on the part of fathers to be involved in their children’s lives, has highlighted the need for additional resources with respect to the problems of contact and residence. There are relatively few contact centres throughout Australia to provide for supervised handover, and even fewer resources for supervised contact in cases where there are allegations of child abuse or significant risks to children. (A major expansion of children’s contact services and the Parenting Orders Program was announced in the 2005–2006 budget. These services are being rolled out over the next three years.) The enforcement process for ensuring enforcement of child contact orders remains a cumbersome court-based process that is viewed as a quasi-criminal process akin to contempt proceedings. It is expensive and highly technical. The result is that, whilst there have been significant increases in the enforcement of child support, there have not been corresponding increases in the assurance that contact obligations and rights will be fulfilled.

6  Hard questions

All of the above matters have led to many hard questions being asked about the operation of the Child Support Scheme and maintenance provisions of the family law system within Australia.
Hard questions asked include:

- What is the appropriate method to be used to determine the rate of financial contribution to assist with children?
- What interaction, if any, should there be between the Child Support Scheme and spousal maintenance orders (and, indeed, in what circumstances should those maintenance orders be made having regard to the larger participation rates of women in the workforce and the large number of de facto relationships, where spousal maintenance is not available)?
- Should the impact of a subsequent relationship, and in particular subsequent children, on the ability to provide child support be taken into account?

Administratively, there are also difficult questions to be confronted:

- What are the appropriate review processes for departing from formula assessments in order to balance a timely and just outcome against the costs involved in such processes (both economically and emotionally)?
- How should the growing number of difficult assessments and circumstances, where paying parents’ earning capacity is an issue, be dealt with?

### 7 The method of calculating child support

The earliest assessments of the costs of children were based upon a hypothetical basket of goods. It soon became apparent that such estimates were inaccurate, as a large number of hidden costs (for example, the cost of having a larger household, the extra electricity, the impact upon the ability of carers to participate in the workforce and so on) were not properly accounted for.

What followed from this was an alternative method of calculating the costs of caring for children by comparing households which had similar expenditure on food. Comparison was made between a household with and a household without children and the incomes earned by the adults. It was assumed that the expenditure on food in households reasonably predicted the standard of living in the household, and therefore the standard of living in households (one with children and one without children) was approximately equal if food expenses were equivalent. Thus (it was reasoned) the difference in the incomes of the parents or adults to generate such a standard of living would reasonably represent the costs of the children. The difficulties with such assessment methods (for example, the one undertaken by Lee (1989), which was relied upon by the courts for many years) are apparent.

Much of the work by Professor Parkinson’s committee has focused upon identifying an appropriate method for determining the amount of child support, including considerations of:

- continuity of the standard of living of the child (given that the standard of living of a couple would be less when they separate, as they must then fund two households rather than one)
- the continuity of expense (ensuring that the pre-separation expenses of the child are shared between the couple in appropriate proportions)
- the cost to the carer, which potentially results in lower levels of child support if the carer was on a low income and the payer on a high income, as the child would necessarily be limited to the standard of living in the household of the carer.
8 Do we have reliable data?

Unfortunately, on most of the issues referred to above, we have limited objective data. Much of the data with respect to payment of child support is based upon surveying carers (predominately mothers). Recent surveys which involved interviews of not only mothers and fathers, but also adult children, showed significantly disparate views as to what had actually occurred with respect to child support.

Notably, one study reported (perhaps somewhat counter-intuitively) that the child’s views aligned more closely with those of the father than the mother (Paysley & Braver, 2004). Paysley and Braver found that, when interviewing mothers, fathers and children with respect to parental contributions to college expenses:

- fathers reported their own contributions at nearly double the amount that the mother said the father contributed
- mothers reported that they contributed around one-third more than the father said the mother contributed
- children reported the mother’s contributions at about the same level as the father reported. Children also reported the father’s contribution as being far higher than the mother and nearly at the same level as the father self-reported.

Bruce Smyth and Ruth Weston of the Australian Institute of Family Studies have undertaken a survey on the attitudes of men and women after separation, again demonstrating a wide divergence of opinion, depending upon which group one asks. It is difficult not to conclude that more survey data from young adults reflecting upon their experiences as children of separated households should be sought, particularly in relation to their perceptions of fairness.

Even if one ascertains accurate information as to costs and expenses, there are fundamental difficulties with each of the possible methods of calculating the rate of child support, for example:

- It is generally unrealistic, following separation (in all but the richest of families), for the child to continue to have the same standard of living, as the parents simply cannot fund this when they now maintain two households.
- If the continuity of expense model is followed, that is, that the parents continue to contribute the same proportion of their income that went to the costs of caring for a child whilst they were together, it leaves the carer bearing the difference between the costs of caring for a child by a couple and the costs of a single parent caring for a child. For example, it largely ignores the impact upon income and earning capacity of caring for a child for a single parent.
- The cost-to-carer method does not allow easy access by the child to a standard of living that at least reflects that of the other parent. It may also ignore some of the hidden expenses involved in child caring, such as the impact upon income-earning capacity. In this regard, see, for example, household expenditure surveys from 1998–99 by the Australian Bureau of Statistics (Figures 2 and 3).
9 Opportunity costs

A significant factor in the discussion relates to the impact upon the ability of sole parents to work. This masks a further underlying question as to whether or not the community generally expects sole parents to work or to be supported by the community to stay in the home and care for the children. It is clear that the workforce
participation of sole carers remains lower than that of primary carers and couples, and that workforce participation for women remains remarkably lower than men in Australian society. Similarly, primary care of children by women is remarkably higher than that by men in Australian society. However, workforce participation by men who are sole carers is over 50 per cent for full-time work, whilst for women in a similar position with respect to children, full-time employment is only around 20 per cent. Part-time work accounts for another 33 per cent of women in the group.

10 Stepchildren

As the divorce and separation rates in Australian society continue to increase, the number of serial families (children in households with step-parents) represents around 22 per cent of children of separated parents. The result is that around one-fifth of parents that are paying child support have children of their subsequent spouse living in their household, and receive varying rates of financial support for those children from the non-resident biological parent.

There has been little serious debate or discussion as to the impact of social parenting against biological parenting. In some quarters, it has been suggested that social parenting should be the basis for support of children rather than biological parenting ties. However, this would be likely to result in a significant impact on the social security system and has the potential to impede the re-partnering of primary carers, particularly women who already form a lower proportion of the higher paid workforce. It also has the potential to cause the further feminisation of poverty within society.

Whether biological children should have their financial support reduced because the non-resident parent re-partners with a person with children is a difficult question. Some suggest that a two-year relationship test, coupled with the inability of the biological parent to support the child, is necessary before stepchildren should impact upon child support assessment. There has been little or no public discussion as to whether or not a step-parent obligation should then be seen as an ongoing one, regardless of whether or not the step-parent remains partnered to the biological parent, and whether this should be enforced by administrative assessment.

11 Administration

The administration of the Child Support Scheme continues to be refined. The process for departing from a formula assessment has proved to be an exceedingly effective method of providing a review process that focuses upon the facts and circumstances of individual cases. One of the significant factors involved in the process to date has been use of a number of lawyers experienced in family law to decide the departure applications. Issues continue to arise with respect to whether or not:

- there should be a ‘one-stop shop’ to deal with all issues relating to the assessment and enforcement of child support, rather than the variety of different administrative paths for reviewing different functions of the Agency
- there should be an external process (that is, external to the Child Support Agency) before a court-based process occurs.

If a two-tiered process is required, the parties would be left with an initial departure process, the second-tier process and then an application to the Court. If the second-tier process was conducted by a body such as the Administrative Appeals Tribunal (AAT), Social Security Appeals Tribunal or the like, questions arise as to whether or
not a judge should head the departure or review body in a similar fashion to that which occurs with the AAT.

12 Other administrative issues

As the recent report by Professor Parkinson argues, dual collection rights will be a significant step forward. This will allow a payee to pursue arrears of child support whilst the Child Support Agency continues collecting the child support on a day-to-day basis. If the payee is unsatisfied with the Child Support Agency collection rate or impact, they will not be required to take the risk of having the burden of collection fall entirely upon them, but rather can jointly pursue collection if they so desire.

There is a significant need for tax return lodgement enforcement among the child support population to enable child support assessments to become more accurate. There is also an increasing need for the Child Support Agency to focus upon enforcement at an earlier stage, prior to large child support debts accruing.

Issues relating to privacy continue to cause difficulties, as those paying child support may wish their affairs to remain private and outside of the knowledge of those receiving child support, and vice versa. However, both parents have a significant interest in the circumstances of the other parent, as it impacts directly upon financial support for their children and whether or not a parent ought to seek a departure from or review of the child support assessment. The privacy rules governing the conduct of the Child Support Agency, at present, appear more apt for a government agency dealing with a citizen, such as the Tax Office dealing with a taxpayer, than a government agency left effectively adjudicating difficult questions between two citizens.

The Child Support Agency’s reporting of data has not been consistent since the Agency commenced operation, nor has the reporting been detailed, making it difficult to utilise that data for the purpose of research or measuring its performance.

13 Earning capacity

The issue of whether child support assessments should be based on the earning capacity of the payer, rather than the payer’s actual earnings, continues to be a hotly contested. There has been little community debate with respect to decisions where assessment was based on the payer’s earning capacity. The community’s expectations of the obligations of parents to financially support their children and the extent they should be expected to engage in earning activities remains unclear.

A number of difficult issues regularly arise such as:

- What should be done with cases where a parent says that they have decided that they will have a ‘sea change’ and have left a well-paid job to take up a significantly lesser paying job in an area of employment that is more meaningful to their general life outlook, or less stressful or closer to their home, or the like?
- What should be done when parents cease well-paid employment to start their own business and are financially stretched, at least in the initial business period, yet have not made any provision for the support of their children in the interim?
- What changes would be wrought by the proposed ‘major purpose’ test, compared to the existing ‘opportunity and capacity’ test used by the Court, and
what would these changes actually mean for children? Further difficulties arise with respect to the new phrase suggested in the report by Professor Parkinson of ‘ample opportunity’ to work.

These difficult questions have largely been left to the courts and, as yet, there is no clear guidance. It demonstrates the reluctance of the courts to enter an area that remains politically charged.

14 Reforms

What is abundantly clear is that further monitoring and evaluation of the Child Support Scheme is needed, particularly given the magnitude of the proposed reform agenda and pressures on the Scheme to keep up with rapid social change. Assessing perceptions of fairness—including children’s perceptions—should be an important part of this monitoring.

Of course, any scheme would have great difficulty in meeting all the needs of every participant. Nevertheless, further reforms must continue to focus on the needs of children, as the welfare of children lies at the heart of the Scheme and its ongoing viability.

References


His Excellency Major General Michael Jeffery, AC, CVO, MC, Governor-General of the Commonwealth of Australia

Good afternoon. What a great pleasure it is to be here at this most important international forum. May I also acknowledge the traditional Indigenous owners of the land on which we’re gathered.

Seven years ago, Marlena and I were privileged to attend one of the most beautiful and moving occasions of our lives; the birth of our first grandchild, a lovely boy called Max. As he entered this world in a caring, loving family and hospital environment, and took his first deep breath of air, I had confirmed absolutely, with total certainty, that this special and unique arrival was truly remarkable.

But for him to reach his full potential as a human being, citizen and future parent, would depend to a large degree on what he would see, hear and feel in the years ahead and on the influence of the people about him in developing his sense of values. And the most important nurturing influence of all, particularly in his early life, would be, ideally, his mum and dad happily together, and I emphasise together, to love and look after him and to take a real interest in all that he would do.

Research studies show us that the home environment is the most important influence on a child’s social and intellectual development. We know that it has a most significant effect on the child’s early learning, school attainment and overall wellbeing, and in particular a child’s feelings of self-worth and sense of identity.

A child learns by imitation. This is obvious to anyone who has any regular contact with children. They especially look up to those bigger than themselves, watching with eagle eyes to learn what might be termed ‘acceptable’ behaviour, including trying to imitate their peers. They do this in their efforts to establish some kind of identity and win approval in their interactions with others around them.

Children need to feel a sense of belonging; the most basic need of the human species. To identify, to be part of the group, children develop characteristics of others: facial expressions, movements, attitudes, language and, importantly, behaviours. The ancient African proverb that ‘it takes a village to raise a child’ is the ultimate wisdom. It really does teach an eternal truth; that no man, woman or especially a child can live in individual isolation.

Whilst I appreciate that, these days, there are various forms of family relationships and many of these are successful, I think society still holds to the view that, in the main, the best form of relationship in respect to the long-term wellbeing of parents and their future children comes through a lifelong commitment of a man and a woman to each other, typically through the solemn personal and spiritual commitment made at marriage.
The family can be, of course, an imperfect thing—not without its ups and downs, its joys and strains, its successes and setbacks; yet I hold to the view that the loving family model should be constantly promoted as the best chance of providing the child with the greatest potential for happiness and self-fulfilment.

I would suggest that a caring family—which provides love, guidance, care and discipline, and inculcates ethical and spiritual values—is still the most nourishing of social ‘units’, the core building block of a cohesive society. Children require stability. Children need to have a strong sense that the world in which they find themselves is safe and dependable.

The family is also an environment in which both parents have a very important role to play: both boys and girls need fathers and mothers for the essential masculine and feminine perspectives and balance each provides.

But what is the family situation in Australia today?

Ladies and gentlemen, I don’t want to comment on the reasons for family break-up—that’s another subject in itself—but families are separating at a very high rate. It is estimated that in Australia, 77 per cent of children will spend all of their childhood living with both their natural parents. However, about one-quarter—one million children—have experienced the separation of their parents. Recent estimates from the Australian Bureau of Statistics provide more detailed information. There were 52 747 divorces granted in Australia in 2004—admittedly a small decrease over the previous year—yet this was 9 per cent higher than the number granted ten years ago, and more than 22 per cent on the number granted twenty years ago.

Three out of every ten births are ex-nuptial. For Indigenous women, the rate is eight out of ten. Between 1982 and 2001, total births increased by only 11 000, but births outside marriage increased by 45 000. Eighty-four per cent of the million single-parent children live with their mother. Half of all children with a parent living elsewhere see their non-resident parent (mostly fathers) fairly frequently, 24 per cent have less frequent contact, while 26 per cent appear to have little or no face-to-face contact with their non-resident parent.

Figures produced by the Australian Institute of Family Studies indicated that 26 per cent of non-resident parents live more than 500 kilometres from their children, while another 15 per cent live between 100 and 500 kilometres away. The effect of this on regular contact is obvious. In short, the proportion of married natural parents raising children together as a family is now at the lowest level in our entire history.

What else do we know?

Australians are highly mobile. The result is that many families are becoming increasingly isolated from traditional social supports, both physically and geographically, leaving them potentially vulnerable when hard times hit—as Mission Australia notes.

Many single parents struggle. Often the greatest issues are economic, while the absence of a partner with whom to share problems can be a demanding burden; no-one to share the joys or talk through the normal challenges within any family group, such as schooling, health issues, sport. With single parents very likely working and running a household, there is never enough time to properly deal with all these demands.
And there are families that have the added complications of isolation—living in rural and remote areas (especially Indigenous families)—families perhaps in which either the parent or child has a disability and those from culturally diverse backgrounds. Families today incorporate all sorts of blends, including de factos. To their great credit, many of these dedicated, loving, single parents somehow manage to do it and come out on top.

Of the 25 per cent of children who have experienced the separation of parents, some are doing well, but not all. So what can we do to support children with problems through the difficult years of transition to adulthood?

One concern is the absence of consistently available male role models in the home environment; in particular for boys, but also for girls. As I see it, this situation is compounded by a critical shortage of male school teachers, who are outnumbered by their female counterparts four to one in Australian primary schools.

Thus, I see the long-term value of young Australians belonging to some type of well-led, well-organised youth group or program: cadets, St John Ambulance, the Surf Life Saving Club and so on. There is no doubt that kids participating in these sorts of sporting, cultural, volunteer or adventure activities can improve their own sense of wellbeing, whilst learning vital relationship skills and contributing to social cohesion in general.

They also learn how to participate in a team, to trust one another and to develop mutual respect—in other words, to learn the skills required to build successful relationships. I have noted for some time the effectiveness of mentoring of young school children. As Patron of the National School Volunteer Program, with some 3000 grandparent equivalents involved, I have seen the program elevate academic skills, eliminate low self-esteem, reduce social isolation and open doors to choice, independence and a better life.

Research funded by the United States Department of Education has highlighted the positive effects of mentoring, the most significant and well-documented of which are improvement in young people’s grades, school attendance, family relationships and the prevention of drug and alcohol abuse. Young Australians in their formative years deserve the very best we have to offer. Investment in educational and social opportunities is the key to helping young people who are at risk of ‘slipping through the cracks’, including many of our Indigenous youngsters and also non-Indigenous youth generally, not always from lower socioeconomic backgrounds. In Western Australia, I saw the introduction into schools of a chaplaincy program that made a significant difference to the lives of young people. The experience of the chaplaincy program was overwhelmingly positive—and chaplaincy was not necessarily or exclusively religion-based.

In an economic sense alone, a chaplain on $50 000 per annum had only to save one youngster in a school of 1000 students from going into detention for a year to save the equivalent of over twice that chaplain’s salary. The WA Education Department conducted a survey among high school principals and found that more than 93 per cent indicated the chaplain’s work was irreplaceable in their school’s environment. And it is easy to understand why. Besides traditional instruction, pastoral care and counselling included dealing with personal problems at school, broken family relationships, truancy, leaving home, child and sexual abuse, suicide, illness, hospital visits, births, deaths, drugs, police trouble, community services, alcoholism,
accommodation, financial needs, study skills and relationship problems. Today, we find the chaplain becoming—sometimes by default—a necessary surrogate parent.

Ladies and gentlemen, while the changing nature of family life and patterns of women’s and men’s workforce participation mean that parenting roles, expectations and responsibilities are in a state of flux, one constant remains above all—a child’s need for love, security and support.

In an ideal world, two parents are best placed to provide these things. But families do break up and, in the context of what your conference is discussing, research needs to continue to work towards improving our understanding of post-separation parenting so that parents can be better supported and encouraged in continuing to share their childrearing responsibilities.

We train people to drive cars, to build bridges and to operate computers; yet I don’t think we do enough to train or prepare young people for ultimately the most important role of all—the raising and nurturing of children within a stable, loving family environment.

In terms of adult life relationships, there is a positive development in the Australian Government’s decision to open sixty-five Family Relationship Centres over the next three years. These will provide support to people in all stages of relationships, whether they are thinking about getting married, seeking parenting advice or needing help in the difficult times around separation.

Clearly, the assistance measures provided by churches and other agencies, including pre- and post-marriage counselling—many of which have been in place for years—remain important in better preparing young couples for marriage and in providing support when families are in difficulties. Let me explain one context in which I have seen pre-marriage preparation work.

Even technology, it seems, may have a role to play. Recently, ABC TV’s The new inventors program featured an innovative software package called ‘Family Winner’. It’s designed to help divorcees to rationally negotiate their disputes by advising options for trade-offs of assets between the opposing parties. It sounds like a great idea—making good use of technology in difficult and challenging circumstances to alleviate some of the proven causes of anger and bitterness.

Yet we should ask ourselves why we would seemingly rather pay for the ‘pound of cure’ than the ‘ounce of prevention’?

And I think there is more we can do in the prevention sense, by encouraging generational change in the community in the development of relationships across the board—brother to sister, boyfriend to girlfriend, husband to wife, de facto to a partner’s children and so on. I would define it as the need for relationships preparation to be provided as an important and ongoing educational requirement in the school system, perhaps through a revamping of ethics instruction.

Ladies and gentlemen, I am concerned for many young Australians and their families; that they be given the best opportunities and skills to weather the pressures of a rapidly changing world. Australia has changed. We have traditional family models of mother, father and children together, single-parent families, de facto families, children brought up by grandparents, and separated families brought up in two different households.
I think we all accept that some marriages can be bad, and that it’s better for all concerned that they end in the most civilised and least damaging way possible and the families properly supported thereafter.

But how to reduce that 25 per cent separation rate, if possible, is surely a worthwhile social objective for us all.

As a married father of 39 years, with four great children and almost seven lovely grandchildren, who with my wonderful wife Marlena raised our kids on a single military income for most of our lives, lived in 19 houses in the process, and were frequently separated through military necessity, I’ve often thought on how we did it.

Simply put, we have always worked as a very close team, discussed every issue, shared the domestic work load where possible, sat down with the family at the table for evening meals, shared the chores, and regularly told our kids and grandkids how much we loved them. It seems to have worked.

I wish you well with your Forum.

Thank you.
Keynote address: The United States experience

Dr Joan Kelly, Psychologist, California, United States of America

Transcribed address

Joan Kelly is a clinical psychologist, researcher, teacher and consultant. She received her PhD from Yale University. For thirty-five years, her research, practice and teaching focused on research in children’s adjustment to divorce, custody and access issues, divorce mediation and applications of child development research to custody and access decision-making. She has published more than eighty articles and chapters, and her 1980 book, *Surviving the breakup: How children and parents cope with divorce*, remains a classic resource. Dr Kelly was Executive Director of the Northern California Mediation Center for twenty years, and mediated divorce and family disputes. She developed and provided training programs in mediation and in parenting coordination. She was also a forensic expert, custody evaluator, therapist, consultant, and parenting coordinator in high-conflict custody cases. Now retired from the Mediation Center, Dr Kelly continues to speak and teach seminars in the US and elsewhere and publish articles. She was a member of the recent AFCC Taskforce on Parenting Coordination to develop standards of practice. Dr Kelly has been honoured with many awards, including Fellow of the American Psychological Association, the Distinguished Mediator Award from the Academy of Family Mediators, and the Stanley Cohen Distinguished Research and Meyer Elkin awards from the Association of Family and Conciliation Courts (AFCC). She is Past-President of the boards of the Academy of Family Mediators, the Northern California Mediation Association and the California Dispute Resolution Institute.

Distinguished guests, gentleman and ladies, from both Australia and overseas, I deeply appreciate the invitation to provide this international forum with a perspective from the United States on our experiences with family law policy and programs designed to serve families going through transition. It is, in fact, a challenge to speak with any authority about the United States experience, because our patchwork of fifty states functions independently with respect to family legislation and policies, programs and practices. But thirty-five years of experience in this field do give me a certain vantage point, so I will plunge ahead.

Today I’m going to first highlight just several trends and concerns in the family law policy and program area, consider our problems in providing services that are effective to difficult populations and also describe several innovative and/or well-established programs that support family stability and child wellbeing.

Overview of trends

First, an overview of some trends and concerns. We see continual expansion across the United States of policies and programs promoting alternative ways to resolve family disputes that arise from separation and divorce. California started this trend in 1981 when it mandated custody mediation for parents disputing custody
or access issues following separation or divorce. There is certainly widespread acknowledgement across the United States now that family law adversarial processes are not only costly, but often damaging to co-parental relationships and parent–child relationships, both in the short term as well as in the long term. As a result, policies that mandate education programs for separating parents that promote early custody mediation and that implement judicial settlement conferences are being adopted in many states and in many local jurisdictions.

There’s a growing urgency in the age of the shrinking dollar, crowded court calendars, and hurried justice to utilise more efficient and humane ways of processing family disputes so that we can reserve the resources of the court, which are more expensive, for those families whose disputes and problems properly require the services of both intensive and adversarial intervention and decisions by the court. I’m going to return to several of the interventions that I mentioned later on.

There’s a second trend, and that has been the development and use of self-help guides and materials to enable separating couples to do their own divorce without using lawyers, or at least to file initial papers and settle some issues between themselves and only consult with lawyers as needed. In some jurisdictions, such as California, you actually do not even need to set foot in court, but instead can file all your papers and agreements and complete your entire divorce by mail. Comprehensive materials have been developed and are available online and in publications that contain all the legal forms needed, detailed information about how to file and fill out these forms, and a primer on separation and divorce law. California was one of the first to embrace these self-help procedures and the ‘do-your-own’ divorce movement is particularly successful now in states that have a well-developed and well-articulated body of family law. This makes prediction of outcomes more reliable which, as a policy matter, is beneficial because it reduces uncertainty and the need to litigate and therefore reduces costs to individuals and society.

So, as in Australia, we have no-fault divorce, equal division of community property, formulas for treating separate property that is not community property, and computerised child support guidelines available. All of these developments of statutes and case law support individuals who seek to do much, if not all, of the legal aspects of the divorce work themselves.

Lawyers have contributed to the do-your-own divorce movement by pricing themselves essentially out of the reach of lower- and middle-income families. Increasingly, we see that higher-income families who might afford lawyers are shunning expensive adversarial procedures, which they fear can exacerbate their conflict and/or consume their financial reserves.

Private sector mediation continues to be used across the country and we see now increasing use of private judging, in which high-income or high-profile couples or highly disputing couples hire retired judges to case manage, expedite and settle their conflicts and property and/or custody disputes. We see a very slow growth of collaborative law, which is a four-way negotiation process in which each of the clients is represented by his or her attorney, but where they have agreed in advance that they will not go to court to settle the matters between them.

On the psychological side, the widespread use of traditional visitation guidelines, in particular the visiting schedule that has been in effect either in writing or just, sort of, culturally as part of tradition (of every other weekend to the non-resident parent) is in decline. Empirical separation and divorce research has confirmed
the negative impact of such limited contact (that is, every other weekend type of contact) for the majority of children, as well as the fact that in various studies more than half of children have indicated that they want to have more time with their fathers than they were allowed to have. Instead of traditional guidelines, what we see now is more use of research-based models of parenting plans, which describe for parents multiple examples, multiple ways, in which they can allocate the time-share between mother and father, and which take into account the children’s ages and developmental and psychological needs. These complex parenting plan models, which I’ll give you some examples of tomorrow in a different panel, also appear to be encouraging settlement between parents because they provide so many options, so parents are more likely to be able to move towards agreement about how the time will be shared between them as parents. Accompanying the use of these model parenting plans has been the development of user-friendly workbooks and software to assist parents in identifying the custody and access issues that they must consider at separation/divorce, the different options for things like how to manage holidays and summer vacations, as well as the school year, and tools for reaching agreement on both legal decision-making and minimising conflict.

Overview of concerns

What are some of the major concerns in our country? One of the most troubling trends is the large and rapidly growing number of unrepresented or pro se litigants in family law in court. In the United States, there are no federal funds to provide legal aid to the poor, and both the very poor and the lower- and middle-income parents, who in any event wouldn’t qualify for legal aid, are coming to court unrepresented. In California, approximately 75 per cent of separating or divorcing parents are appearing in court pro se. They are coming unrepresented for every legal aspect of the family’s transition. This raises critical issues for the family law field. What policies, processes and services are needed to assist these men and women to receive fair and just outcomes? What should be the role of the judge? In my conversations with judges, they tell me about experimentation that they are introducing into their courtroom in aspects of informal judicial mediation—Should I do it from the bench? Should I come down to a table and take off my robe?—and also, more frequently, in their use of more formal settlement conferences. They struggle to find a fit between their traditional roles within the legal system and the client’s needs for knowledge of the law and rules as process. Some judges seek out training to learn new skills to manage the parents or their client’s conflict and to communicate clearly and effectively to these parents. They tell me they also learn how to listen.

Many unrepresented litigants have difficulty using the self-help materials that I just described, because of language barriers of limited reading and analytic skills. In one court, for example, in the San Francisco Bay area where I live, we have interpreters available for custody mediation and there are interpreters available in forty-seven different languages in this particular court. That, of course, raises all kinds of issues with respect to providing self-help materials and the accessibility of these materials for parents. In recognition, though, of the challenges of the unrepresented client, California passed legislation implementing the family law representative—a family lawyer who meets separately and for free with separating men and women, provides information about the law, helps them to fill out forms, helps with seeking protection orders, but does not give legal advice. Informational materials have been developed for distribution at all parenting clerk’s offices, which is where you would go to file
a petition. In some states, they’ve implemented family law clinics that offer, for example, night-time hours, a library of pamphlets and information and other self-help materials in an informal atmosphere, and help with forms and procedures.

A second concern is the recognition that family law policy and current court services are failing to deal effectively with the most problematic of family law cases. Services for dealing with parents with continuous high conflict, substance abuse, allegations or a history of domestic violence, allegations of child abuse, and mental illness, are insufficient and frequently fragmented. Research tells us that these parents with serious issues are increasing in number, and research confirms that their children are at high risk. In response, we see the beginnings of specialised services that are specifically designed for parents whose urgent or chronic problems or chronic conflict affects their ability to provide adequate parenting to their children. For high-conflict parents who continue to re-litigate about child-related issues, parenting coordinator programs are being implemented in a number of states, though these are still few in number. More local jurisdictions, and some jurisdictions such as Los Angeles, provide specialised high-conflict group interventions. In Connecticut, a screening and triage model has been developed and implemented, which evaluates families as they first come in the door of the court and assigns them immediately to a service that is expected to be more tailored to their particular needs. I’m going to describe these programs in more detail in a few minutes.

Education programs for separating parents

I want to return to what we call divorce education programs, as well as mediation programs. We call them divorce education programs, but obviously there are a lot of people coming through who have never married, and so they’re really education programs for separating parents. Education programs for separating and divorcing parents in the United States have more than tripled between 1994 and 2002. They exist in either a mandatory or a voluntary format in more than half of the counties in the United States. We’ve known from research that voluntary participation in these education programs is quite low and it’s likely to attract the most well-adjusted parents; therefore the trend has been to mandate these education programs for all parents who seek the assistance of the courts for disputes about their children, or at the very least to provide judges with the authority to order the classes from the bench. There are a few states, such as Utah, that mandate education programs for all separating parents, even those who do not approach the court with their disputes.

Programs are offered in court-connected and community settings. When the education programs are court-connected, these information sessions are most often delivered in one didactic session of one to three hours. Information is provided about the emotional and legal process of separation and divorce for the parent, what alternatives there are to litigation, and the impact of separation on children. At their best, the content of these programs is derived from empirical research focusing on the parents’ behaviour and situations that place children at risk. We’ve learnt a great deal in the last twenty years about what kind of factors promote or increase risk in children and what kinds of factors promote resiliency, and these research findings are making their way into the content of the education programs—which is as it should be. Parents learn about the harmful effects of conflict that places children in the middle of their disputes, and they learn about the impact of violence and violent conflict. They learn about the fact that their needs as adults are actually quite distinct from the needs of their children, particularly in respect to children’s love
and loyalty to both parents at a time, when one, if not both, parents want to put as much distance as possible between themselves and the other partner. They also learn about different ideas for parenting plans. We also know that there’s an effect of these programs, even some of the grief programs. For example, one Canadian project found that parents who were randomly assigned two and a half family information sessions had fewer case conferences and the cases remained active fewer days compared to parents attending the non-family information sessions.

When divorce education or separation education programs are offered in the community, they are more often four to eight sessions, and they use various teaching techniques—videos, didactic talks, written materials, and discussion exercises. They often are offered on a sliding-scale fee basis. The goals are generally more ambitious with these more extended programs, including, for example, skills-based training and exercises to improve parent communication and negotiation about child-related disputes. I should also say that almost all of the programs that I know of have the parents attend separate sessions; that is, they typically don’t come to the same session, which is, of course, also a resources issue. We have to be able to offer those classes to make that happen.

Evaluation of education programs for separating parents have generally found very high levels of satisfaction with the programs among parents, including those who were mandated to attend, and also some modestly encouraging outcomes. Parents tend to report, at follow-up, an overall decrease in their conflict with their ex-partner and being less likely to place their children in the middle of their disputes, compared to those who were assigned to non-intervention groups. Again, a large multi-site Canadian study found that parents reported, at follow-up, significant decreases in several types of parent conflict, including conflictual communication, conflict that puts children in the middle and conflict over time-sharing and financial issues, and increased parental cooperation. They found greater changes in parent anger and cooperation occurred in programs of six or more hours, compared to programs that were less than six hours. They also found that high-conflict parents appeared to benefit the most in terms of reduced parent conflict and increased satisfaction with their custody or access issue. Low- to moderate-conflict parents derived the most benefit in terms of the parenting relationship, that is, their improvements in cooperative parenting. They also reported that skills-based programs, as opposed to didactic lecture programs, were more effective in producing change. Clearly, our experience in both the United States and in Canada has been that divorce education programs should really be considered as one of the alternative dispute resolution (ADR) services, because it is clearly serving as an intervention that helps some people reach agreement and therefore they don’t need to proceed any further with any kind of legal action.

Brief parent education programs have been designed for the average population of separating parents and, while they’re modestly beneficial, they’re a superficial treatment of what can be serious problems for many families. They don’t, for example, focus intensively on the types of parenting behaviours and co-parental interactions that are strongly linked to positive child outcomes following separating and divorce. So we have seen the development of more ambitious research-based prevention programs that have been developed by psychologists in academic settings and subjected to rigorous methodological evaluation and randomised experimental controls. For example, programs may be based on research findings that three different elements of competent parenting following separation and divorce are the
best predictors of good social and psychological adjustment of children. The New Beginnings program in Arizona focuses on the improved parenting of residential parents as an agent of change. The Dads for Life program, also at Arizona State University, focuses on the quality of the father’s contact with their children and also focuses on post-divorce co-parental relations. These two-parent programs for separated parents both demonstrated long-term positive effects on a wide range of mental health, substance use, sexual behaviour and academic outcomes for children and adolescents, and a current objective is to determine whether these programs can be shortened and transported into other settings and still maintain their effectiveness. We also have child programs in the United States, but I don’t have enough time to talk about them.

Policy issues, it seems to me, to get raised around programs for separating parents are: firstly, should they be mandatory? That question was raised ten to fifteen years ago in our country and it’s pretty much being answered ‘yes’, because it’s effective and we want people who need these programs to be coming to them. It is an inexpensive and non-coercive opportunity for people to settle their disputes based on the information they receive and it is most effective early in the separation process. Secondly, it’s really important for these programs to be linked into research-based content in order to talk to parents about what we know about what impact they have on children’s adjustment, both positively and negatively. Another of the issues is whether they should be offered free or on a sliding scale. We have it both ways: when they’re in court they’re free, when they’re out in the community there’s typically a sliding-scale fee, although when it’s court-ordered from the bench into a community program, there are provisions for the judge to forgive the fee for families that qualify.

**Custody mediation**

Custody mediation has been widely embraced in the United States, as it has in Australia over the past twenty years, and many professionals and many policy makers believe that mediation should be mandatory for parents who have custody or access disputes, because of its demonstrated effectiveness in achieving settlement, conflict reduction and more positive co-parental relationships. What is mandated is an attempt to mediate parental disputes, not settlement. Mandatory mediation statutes send a clear public policy message that the first level of intervention for family law disputes should be in non-adversarial processes, when possible, before proceeding to more conflict-escalating adversarial interventions. More than one-third of the states and many more local jurisdictions have mandatory mediation, all with opt-out provisions for domestic violence and/or provisions for separate sessions. A large body of empirical research indicates that mediation is efficient in time and expense. Settlement rates range from 55 to 80 per cent, depending on the setting and the nature of the clients. The data that have been gathered in the United States in a number of settings, have indicated that mandatory mediation does allow people to reach agreement and move out of the adversarial process and reduces the amount of time that they are in the system.

Compared to just having one mediation session, we have learned that when there are several sessions, that it’s associated with a reduction in parent conflict and improved parent communication and support offered to the other parent. Also, one long-term longitudinal study found significantly higher levels of father involvement twelve
years later among those who were assigned to mediation, compared to those who were randomly assigned to go to trial.

Mediation is not just for those cases of low or moderate conflict. Obviously, mediation is a lot more effective for low- or moderate-conflict parents, but in fact it can be effective with angry and high-conflict parents and can successfully address major concerns and charges made about the parenting of the other parent. Research in the California court program, which by the way had a very well-funded evaluation component almost from the beginning, indicates a clear and accelerating trend over the past decade of more complex and difficult cases that involve parents with multiple and serious problems. Recent research indicates that, even in this difficult population, 44 per cent of parents reached agreement on all issues, 8 per cent reached partial agreement, and higher settlement rates were found among those coming to family court for the first time, compared to those who were returning from modifications or non-compliance. What was fascinating was that about two-thirds of the parenting plans that were mediated contained special provisions, such as alcohol or drug testing and treatment, supervised exchange or supervised visitation, parenting education classes, counselling for parents or children, or attendance at batterer intervention programs. The parents in mediation agreed to incorporate these things into their agreement.

In mandatory and private sector custody mediation, a large majority of parents express moderate to high levels of satisfaction. What they really like about the process is that they feel they are treated with respect, have their concerns listened to, keep the focus on the children, and try to find ways to work together as parents.

So it seems to me the policy questions with respect to custody mediations are: firstly, should it be mandatory and, secondly, when should it be available? All of the evidence that we have suggests that early mediation is so much more effective than later mediation. In California, once you have filed a petition for a separation/divorce, you must call for an appointment for mediation within three to four weeks, so it’s a very early intervention. These are things important to pay attention to when you do research in all of these dimensions.

Okay, limitations on sessions. If I were advocating policy, I would for sure avoid only allowing mediators to mediate for one session. With a decrease in funding, we have been seeing in California that mediators are being more and more squeezed into working with these most difficult families for maybe just one session in some jurisdictions, maybe two in another, and it’s very clear that when they have two to three sessions, the possibilities of reaching agreement in more complex ways are enhanced.

**High-conflict families who re-litigate**

The frustration with the failure of our present legal system to deal effectively with cases that remain highly conflicted and/or with a high degree of difficulty, has resulted in the development of new services, either court-based or offered in the community or the private sector. As good as divorce education and custody mediation are, they are not sufficient for these parents, who consume so much of the court’s time. So we have some programs that are very specialised for chronically litigating parents who demonstrate non-compliance along different dimensions. For example, in Los Angeles there is a 16-hour program which judges order parents to attend if they have a history of repeated chronic litigation. It offers education and skill-building in
a sequence of large- and small-group sessions, followed near the end by one-on-one exercises and negotiations of actual disputes between the parents under the leader’s supervision and observation.

The Parent Conflict Resolution program in Arizona merges therapeutic principles into interventions for very high-conflict personality, disordered parents and uses a very highly scripted program that is based on cognitive therapy principles.

**Case management for disputing parents**

I want to talk about the Connecticut Family Court Case Management Service, which I think is a very exciting and new development. They have implemented a case management service for parents that uses an assessment and triage program to assign parents to the appropriate level of service for their particular problems. The program first evaluated their case load and their services, and they found, among other things, an increase in intractable disputes over a ten-year period, more pro se litigants, one half of their case load was post-judgement, and that the services that they had to offer for repeat litigants were very limited. They set about to develop an effective triage system that required developing a reliable family intake screening tool. This tool has been piloted and revised and is now being used to provide early in-depth identification of parenting issues and conflicts when parents first come to the court. Areas of assessment in this screening tool include level and chronicity of conflict; ability to communicate and cooperate; complexity of issues; levels of danger, including allegations of child abuse; substance abuse; poor parenting; mental health and domestic violence; and the extent of disparity of facts between the parents. They then summate their ratings and, based on criteria they have developed, they assign parents to a particular intervention. The resulting program has an intake assessment with the confidential mediation services they previously offered. The conflict resolution conference is a new service which I’ll describe briefly. Then there is evaluation, where now they send people either to issue-focused evaluation, which is a new service, or to comprehensive evaluation, which is one they have already.

The conflict resolution conference is a confidential six- to eight-week process. It’s a blend of mediation and negotiation that’s intended to be more directive than the mediation that they offer (which is more of a facilitative model). Family Relations counsellors can obtain limited collateral information and make recommendations to the parents within the process. The Family Relations Counsellor writes a report at the conclusion of the CRC outlining agreements reached or indicating no agreement and is sent back to court.

The issue-focused evaluation, as you might imagine, is a new service to deal effectively and immediately with the common range of parent allegations and high levels of conflict, and was intended to bypass mediation and the CRC because of the severity and difficulty of the cases. It is a maximum of 14 hours and can be less than that.

Actually, what we find from the statistics is that the settlement rates are significantly higher across the board, which seems to indicate that the targeting of services to particular populations is, in fact, more effective.

**Parenting coordination for high-conflict parents**

The last thing that I want to say before I have to stop is that the parenting coordinator model has emerged to address the needs of chronically high-conflict
parents that frequently re-litigate issues around their children. It’s most often used as a post-divorce intervention or for never-married parents who continue to come back to the court. And you can see where it fits typically. If you think of this as a spectrum of services going from the least interventionist to the most (including trial), parenting coordinators, we believe, should be reserved for those who have really special problems—that 10 to 15 per cent of parents who continue very high levels of conflict and frequently have serious personality disorders and/or problems. The goals of the model can be seen in the slide (see PowerPoint). The processes are by stipulation of the parties and a court order, and the parenting coordinator functions outside of the court process in private practice offices. At this point in our country, it is a fee-for-service program but, nevertheless, the people who are using the program are saving enormous amounts of money compared to when they were litigating all their issues. The problem is, they do stagger into our offices financially depleted and exhausted, and it’s not intended to be therapy, but to be a process which really focuses on providing a very quick resolution of parenting disputes, reducing the conflict to which children are exposed, and providing education. It is a blend of mediation, arbitration and divorce education, and many jurisdictions now have developed or are developing specific orders that should be used in providing training for those who want to be educators: these are the kinds of disputes we settle and you need to have a court order to do this.

Lastly, I just wanted to say that I believe very strongly that we should promote interdisciplinary efforts to formulate policy and promote program development. We all come from a different perspective and each of our perspectives contributes, I think, to very sound program development. I would encourage you to develop interdisciplinary forums such as those we have in the United States Association of Family and Conciliation Courts (AFCC), where people come together on an annual basis and discuss a lot of the kinds of things that we’re discussing here today. Thank you very much.
Family relationships in transition: The United States experience
Joan B. Kelly, PhD
1 December 2005

Overview of trends: More use of ADR
- Expansion of alternative dispute resolution programs
  - Education programs for separating parents
  - Custody mediation
  - Child protection mediation

Overview of trends: Self-help
- Self-help guides and materials
  - Do your own divorce
  - Limited contact with court
  - Less reliance on lawyers
  - Use of private judging

Overview of trends: Parenting plans
- Rejection of traditional visitation guidelines
- Parenting plan models based on empirical and clinical research
- Multiple options for sharing time
- Workbooks, pamphlets for parents

Overview of concerns: Unrepresented litigants
- Unrepresented (pro se) litigants
- Challenges to traditional judicial role
- New services
  - Family law representatives
  - Family law clinics

Overview of concerns: High-conflict parents who continue to litigate
- Parents with multiple problems
- Chronically high-conflict parents
- New programs
  - Specialised group programs
  - Assessment and triage to appropriate services
  - Parenting coordinator programs

Education programs for separating parents
- More mandatory divorce education policies
- Offered at beginning of separation process
- Objectives of education programs
- Court-connected and community-based
- Evaluation of effectiveness
- Prevention programs for separation parents

Divorce education: Policy issues
- Mandatory for all separating parents or only those who indicate child disputes
- Non-coercive option for resolving disputes
- Early in separation or divorce process
- Least expensive intervention

Divorce education: Policy issues
- Research-based program content that address known factors that impact child wellbeing
- Brief or more extended program (or both)
- Court-based or community-based (FRCs?)
- Free or sliding-scale fees

Custody mediation
- Policies mandating custody mediation
- Effectiveness of custody mediation
  - Settlement rates
  - Parent conflict and communication
  - More father involvement
  - Reduces court time and litigation
Custody mediation
- Higher degree of difficulty and complexity in cases today
- More multi-problem families
- Agreements reached in over half of cases
- Special provisions included in agreements re: drug use, testing, supervised exchanges, etc.

Custody mediation: Policy questions
- Should custody mediation be mandatory?
- When in the process should it be available?
- Who pays for services?
- What type of mediation? Need for clarity in labels (counselling, conciliation, mediation)
- Limitations on number of sessions?
- Confidential or non-confidential?

High-conflict parents who re-litigate: Group programs
- Los Angeles Family Court
- Parental conflict resolution—Arizona
- Expedited visitation services—Arizona
- Therapeutic group mediation

Case management for disputing parents
- Connecticut Family Court
- Targeting the services for the problems
- Objectives:
  - Timely
  - Potentially cost-effective
  - Improved settlement outcomes
  - More beneficial for parents

Case management for disputing parents
- Assessment and triage to appropriate services
- Development of family intake screening tool
- Development of new services to meet needs

Conflict resolution conference (CRC)
- Confidential 6–8 week process
- Blend of mediation and negotiation
- Make recommendations to parents
- Children not included
- Family relations counsellor writes report specifying agreements reached or no agreement
- Report sent to court

Family service dispute resolution process

Intake assessment
- Mediation
- Conflict resolution conference
- Evaluation
  - Issue-focused evaluation
  - Comprehensive evaluation
Outcome overview (10 months)

<table>
<thead>
<tr>
<th></th>
<th>Mediation</th>
<th>Conflict resolution conference</th>
<th>Issue-focused evaluation</th>
<th>Custody evaluation</th>
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<tr>
<td>Referred</td>
<td>480</td>
<td>153</td>
<td>102</td>
<td>365</td>
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<tr>
<td>Closed</td>
<td>381</td>
<td>104</td>
<td>58</td>
<td>261</td>
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<tr>
<td>Agreement</td>
<td>278 (73%)</td>
<td>83 (81%)</td>
<td>47 (80%)</td>
<td>194 (74%)</td>
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<td>No agreement</td>
<td>103</td>
<td>21</td>
<td>11</td>
<td>67</td>
</tr>
<tr>
<td>Statewide total (2003–2004)</td>
<td>Standard 65%</td>
<td>Average 61%</td>
<td>Standard 65%</td>
<td>Average 58%</td>
</tr>
</tbody>
</table>

Issue-focused evaluation (IFE)
- Request for court order includes specific focus
- Process of up to 14 hours includes:
  - conjoint meeting
  - optional individual sessions
  - optional child interviews and/or parent–child observations
  - contact with 1–4 collateral contacts
  - preparation of report
  - presentation to parents and attorneys

Parenting coordination for high-conflict parents
- An intervention for parents who have:
  - a demonstrated history of chronic, high-conflict and repeated litigation
  - limited/no capacity to resolve their disputes
- Non-adversarial forum outside of court
- Focused on children’s needs
- Non-confidential model

Custody and access disputes
- Divorce education program
- Mediation
- Settlement conference
- Custody evaluation
- Settlement conference (Pre-trial settlement)
- Trial
- Parenting coordinator
- Specialised group interventions

Objectives of parenting coordination program
- Quick resolution of post-divorce disputes
- Reduce conflict between parents
- Re-focus parents on children’s needs
- Improve inter-parental communication and problem-solving skills
- Provide education to parents about developmental and psychological needs of child

The parenting coordinator...
- is a professional with expertise in divorce, families, children, and custody disputes
- serves by stipulation of the parents and court order
- combines mediation, arbitration, parent education
- does not provide family or individual therapy
- serves for a specified period of time

Objectives of parenting coordination program
- Provide stabilising presence for families and children
- Provide a channel of communication for children
- Provide buffer for child’s therapy
- Reduce reliance upon courts—interrupt conflict spiral
Range of disputes settled by parenting coordinator

- Scheduling of visits, holidays, summer vacations
- Child’s recreational and enrichment activities
- Education—need for tutoring, summer school
- Medical/dental/psychotherapy decisions, including choice of professionals

The court order for parenting coordinator should include…

- Authority for decisions or recommendations
- Range of disputes to be decided
- Who shall be included and talked to
- Ex parte meetings and communication
- PC ability to report back to court for failure to comply
- Grievance process for parents
- Fees and collection process
- Start and termination dates

Interdisciplinary efforts to promote policies and effective services

- The issues we address are lodged in law and psychology
- Our diverse and overlapping experiences with families in transition enrich the dialogue and lead to better policies and programs
- Regular interdisciplinary conferences provide the catalyst for major review and reform

Relevant Kelly publications


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December 2005
Panel: Innovative practices 1

Chair

Dr Andrew Bickerdike, Relationships Australia

Andrew Bickerdike is the Primary Dispute Resolution (PDR) Practice Leader and Research Coordinator at Relationships Australia (Victoria) and has been working as a mediator for over fifteen years. He is a psychologist with experience and training in individual, marital and family therapy and also holds tertiary qualifications in commerce, with extensive experience in the commercial arena. Dr Bickerdike teaches conflict resolution skills to graduate and undergraduate law and social science university students and regularly provides lectures and seminars to various professional and community groups on the effects of separation and divorce on adults and children. Most recently, he has spent time in Taiwan advising judges and policy makers how they might introduce professional mediation practices into the Taiwanese family law system.

Presenters

Ms Dianne Gibson, Family Court of Australia

Dianne Gibson is the Principal Mediator of the Family Court of Australia. She was previously the CEO of Relationships Australia and the Executive Director of Family Services Australia, a peak body representing family relationship service providers. Ms Gibson is the Chair of the Board of the Australian Institute of Family Studies and a past member and current observer of the Family Law Council. She has lectured for the past fifteen years in the Master of Dispute Resolution Course at the University of Technology, Sydney.

Mr Clive Price, UnitingCare Unifam

Clive Price is the Executive Director of UnitingCare Unifam, a counselling and mediation organisation funded by the Attorney-General’s Department and the Department of Families, Community Services and Indigenous Affairs. Mr Price has worked in this role for eleven years. Prior to 1994, he was the Clinical Director of Dalmar Child and Family Care, a NSW organisation providing foster care and family services, including family therapy. Mr Price’s background is as a family therapist. He is a member of the Family Law Council and was recently on the Reference Group for the Ministerial Taskforce on Child Support. He was also a previous President and Board member of Family Services Australia, an industry peak body.
Dr Adrienne Burgess, Fathers Direct, United Kingdom

Adrienne Burgess is the Research and Policy Officer for the United Kingdom’s Fathers Direct: The National Information Centre on Fatherhood, and has written widely on fatherhood and on couple relationships for more than twenty years, in publications as diverse as *Cosmopolitan* and *Child Development*. She trains family service providers, including some court personnel, in engaging effectively with fathers, and writes books, practice guides and policy documents. Recent publications include *Working with fathers: A guide for everyone working with families* (London: Fathers Direct, 2004) and ‘Fathers and public services’ in *Daddy dearest? Active fatherhood and public policy* (London: Institute for Public Policy Research, 2005).

Mr Matt Miller, Child Support Agency

Matt Miller was appointed to the position of General Manager of the Child Support Agency on 18 April 2005. The Child Support Agency is responsible for supporting separated parents in meeting their child support responsibilities. Previously, Mr Miller was the Queensland Commissioner for Fair Trading. He was responsible for building the Queensland Office of Fair Trading into a nationally respected regulatory agency, which recognised and drove national reform agendas that had an impact outside of Queensland. He has an excellent reputation for developing strong stakeholder relationships and strategic leadership. Over the last fifteen years, he has lead the successful transformation of organisations, with vastly improved performance and re-positional government thinking of the strategic significance and public value of their roles. Mr Miller has worked for over thirty years in the Queensland Government in diverse portfolio areas covering environment, local government, consumer affairs, public housing and building and construction.
Opening remarks

Dr Andrew Bickerdike, Relationships Australia

We are experiencing unprecedented change and enormous challenges in the family law system in Australia. Three of our speakers in this session outline how their respective organisations have been responding to meet these challenges—providing us with perspectives from the court, governments and community sectors. The other of our four speakers hails from the UK and provides a welcome cross-national perspective.

Despite the pace of change, you will notice that the response and programs these speakers outline are neither hasty nor reactive. On the contrary, each is a result of careful consideration, research and planning—producing innovative programs and services that are providing real and positive benefits to the clients (or ‘customers’) they serve.

A second theme evident in these presentations is the acute focus on client outcomes. These are innovations born out of dedication to a client-focused assessment of services and practices. I would suggest the success of these practices is largely due to their designer’s ability to get ‘inside the skin’ of the end user and genuinely observe their experiences.

A final theme in common to all these practices—and, I would argue, to all successful innovative practices—is integration. No practice in the family services sectors (particularly those that support separated families), no matter how innovative or unique, can operate effectively within a vacuum. Contemporary innovation requires an awareness of how the service fits within the system it inhabits. Attention must be paid to the impact of preceding, concurrent and proceeding services and interventions. True innovation requires the responsibility for client and customer outcomes to extend beyond the boundaries of the service itself. Of course, we really start to have an impact when we coordinate between innovative practices—such as those outlined by our speakers in this session.

Dianne Gibson is the Principle Mediator at the Family Court of Australia. Dianne has served in many senior positions in the community and court sector. She is an innovator extraordinaire—responsible for many successful and enduring initiatives. For example, she introduced mediation into the Family Court in the 1990s and, in the process, set the ‘best-practice’ standard throughout the country, against which many contemporary services are measured. Dianne will outline the comprehensive raft of innovations occurring within the Court and explain how the Court is positioning itself to fit within the new family law system.

Clive Price is the Executive Director of UnitingCare Unifam, a leading counselling and mediation community organisation in NSW. Clive will speak about the Contact Orders Program that provides services to highly conflictual litigating families. This is an extremely challenging and specialised area of work. Clive will present an outstanding example of how to develop client-centred innovative practices where client needs, rather than practitioner preconceptions, drive program design.

Our third speaker, Dr Adrienne Burgess, is the Research and Policy Officer for Fathers Direct: The United Kingdom’s National Information Centre on Fatherhood. Adrienne is a widely published and respected commentator on fatherhood and couple
relationships. Adrienne speaks about some of the UK and international innovations in fostering productive fatherhood in both intact and separated families.

Matt Miller is General Manager of the Child Support Agency, and our final speaker. Matt has held a number of senior positions in Queensland Government across a diverse range of portfolios. Matt is highly regarded as a strategic leader who can drive reform and change processes within organisations. Matt speaks about innovative practices at the strategic level, such as how the Child Support Agency has moved from being a ‘collection agency’ to one that supports clients to meet their responsibilities through a variety of innovative products and programs. He also allows us a glimpse into the future strategic direction of the Agency and how it is positioning itself within the wider new family law system.
A ‘child responsive’ program in the Family Court of Australia

Ms Dianne Gibson, Family Court of Australia

Transcribed address

My talk will be more of a conversation than anything else about some of the things that are happening in the Family Court. This is not just in the shadow of the Family Court—this is right in the building. I think we have had a thirty-year quest for less adversarial proceedings. But so many other people have so eloquently laid that out for you today that I didn’t think it was worth recapping this.

So the quest still continues and, from the point of view of the Family Court’s management of child disputes, I think we are really at a very exciting and interesting time as we think about what we are going to do to realign and refocus our services within the Court so that they fit very well in the emerging new family law system. Family Court services need to be integrated with other services to work well for families and with what’s happening in the community sector, particularly in relation to the new Family Relationship Centres that we have heard about today, and also the innovative program that has been mentioned for less adversarial trials in the Family Court itself—that is, the Children’s Cases Program.

Just for the benefit of those who are not familiar with the structure of dispute resolution within the Family Court of Australia at present, I would like to mention that, currently, we have two ways of trying to help families and the Court to get really good outcomes for children. These two approaches are referred to as the resolution phase and the determination phase.

In the resolution phase, when people file an application with a problem in relation to child arrangements, the first thing we do is we invite them to attend—in fact we insist that they attend—a privileged mediation session (maybe more than one), in an attempt to help the parents focus on their children, and make some sort of arrangements for the children at that time so the matter doesn’t proceed to a judicial hearing.

If the matter does, in fact, proceed to trial, this is referred to as the determination phase and, in a lot of cases, the judge orders that a mediator prepare a full family report that looks at all sorts of dynamics within the family, looks at all the issues that are current for that family, and will put some views to the Court about what might be in the best interests of the children when a determination is being made.

So if we are going to have within our community sector Family Relationship Centres as ‘gateways’ to a wider and better supported family law framework that can help families long before they come to court with privileged services, the question arises: when you get to court, would you have the same again, and if you had the same again, would it be any more useful than it was when you had it previously in the community sector? We think that the answer is ‘no’. In fact, it might even be a bit disrespectful to require people to go through the same privileged mediation again when they are in the court building, particularly if they are being required now to undertake mediation in the community sector. So we are trialling in Melbourne, in conjunction with the roll-out of the Children’s Cases Program, a new model called the ‘child responsive model’. This is because, in the literature, there is ‘child-
focused’ work and ‘child-inclusive’ practice, and we didn’t know where we fitted. So somebody in the Court came up with ‘child responsive’, since one of the key elements of this new approach is to be more responsive to children.

Yes, families will have to attend; this will be a compulsory part of court processes, and it will be non-privileged—everything that happens will lead to a report that would go to a judge at trial, if that’s necessary. At the same time, we think we are going to build in better settlement opportunities than we have had previously. That might seem a little paradoxical. One of the ways we hope to do that is by having the same mediator work with the family while they are in court.

Those of you who know about mediation definitions will be thinking: ‘Oh hang on a minute; you just said it’s all going to be reportable—that’s not mediation’. So, in fact, we think we will have to change the name. At the moment, we are probably leaning towards ‘family consultant’. This means that we would have the same worker, where possible, throughout all the court processes that lead up to the trial, and then assist the judge at trial so that there would be continuity. We think that this will be a key element, and that case management will be greatly assisted by that, rather than having the non-privileged mediator and the privileged mediator not being able to communicate along the way, and the family having to go through different processes within the Court.

As I mentioned, I think one of the other key factors in this new approach is that we are going to see children and interview them much earlier than we ever have in the Court before. Currently, we only see children at about the time of trial, when we are preparing a full family report for the judge. But what we all know and what is emerging from all of the studies and research and common practice wisdom is that, if you can see children, support them, help them participate, and give them a ‘voice’, and convey their views and experience to their parents, this can be incredibly powerful in helping parents refocus back on to the needs of their children. So we are aiming to give the children at least some opportunity to have a say along the way before the trial.

Before trial, we are also going to have a roundtable feedback session with all the legal representatives and the parents—this is the ‘no surprises’ model. It’s transparent. We are telling everybody at the same time what our observations are to date. This will be supported by a very brief preliminary report. At the time of trial, if the matter still hasn’t settled—and we are really hoping that there are many opportunities to settle—the same family consultant will then do a much wider evaluation of the family, its dynamics, and other things the Court needs to know in relation to the children. But the family consultant will be able to do that based on having known the family over a period of time. This greatly assists in assessment and report writing. It will also give families more confidence that we have seen them over time, that we know a little bit more about their children, and that we can assist the Court better with those reports. And also, after trial, we are adding in the new post-determination stage, where we will be meeting with families after orders have been handed down. This stage will aim to help parents and children understand the orders, see what we can do to help families implement those orders, and make those wonderful referrals back out into the community sector, because that’s where families need to be to get things up and running after their trauma of a court experience.

Thank you.
Therapeutic program for litigating clients after separation

Mr Clive Price, UnitingCare Unifam

Transcribed address

Thank you for the opportunity to talk about the Contact Orders Program. The program has been developing over the past six years. Three pilot programs were selected: one in Tasmania; one in West Australia; and one in New South Wales, which is the program based at UnitingCare Unifam, where I work.

I want to acknowledge both Anglicare in Western Australia and Relationships Australia, Tasmania, for their remarkable work with families in conflict after separation. Those programs, like Unifam’s, work with highly conflictual, litigating clients after separation, where the conflict is about parent–child contact and residence, as well as probably everything else (including many leftover issues from the relationship and from the break-up of the relationship).

At Unifam, our focus is on the kind of relationships that children have with their parents and other family members after separation. The clients that come to the programs are, as I said, highly conflictual, often have Apprehended Domestic Violence Orders in place, as well as many reports and allegations of violence and abuse, and a history of issues of entanglement in the adversarial system. As you would know, and as other speakers will address over the next couple of days, the children of those families with such experiences are some of the troubled and damaged children emerging from the family law system.

All three programs are groundbreaking and are having remarkable success. Each program is different, reflecting different contexts and, to a certain extent, different clients. They all have a mixture of group work, family therapy, case management and dispute resolution. The Australian Government has begun a roll out of these programs to other centres in other states and territories, and other locations, and I wish those new organisations well. I ask that the family law system give them time. It took us two years to work out that we did not know what we were doing, and another a year or so to work out what might be helpful. After a conference in Sydney last week that Unifam jointly hosted with Relationships Australia, titled ‘Safe Transitions’, I sat down with Megan Solomon, the family therapist who heads up our program, which we call the Keeping Contact Program, and wrote what I wanted to say today.

That conference and its expert presenters, including Dr Janet Johnston from the United States, raised the bar, and has challenged us about how we should reform the family law system. If we are to reform the family law system to a genuine new family law, we need to do more than ‘simply rearrange the deck chairs on a Titanic that has already been holed by the iceberg’. The changes to date, as the new system emerges, include a shift towards a less adversarial system, as epitomised by the Family Court’s Children’s Cases Program. The Keeping Contact Program works closely with the Children’s Cases Program. In effect, we assist the families to manage the orders and agreements that have been reached at the Court. Other welcomed changes include innovations in dispute resolution, especially child-inclusive practice, which hears and responds to the voices of the children.
But what we think is missing throughout the spectrum of family conflicts and issues that emerge after separation, and along the entire continuum from the least adversarial to the most contested trial, are therapeutic programs—what Dr Janet Johnston refers to as ‘treatment options’ for families. To date, the family law system has conceptualised ‘counselling’ as either clinical work to assist families to avoid separation, or to help (usually) individuals with depression to recover from the separation (that is, coming to terms with grief and loss and so on). In a sense, this is done around the ‘real work’—the legal and dispute resolution work that takes place after separation and divorce.

The Contact Orders Program has demonstrated the value of therapeutic programs for families. The program works with the whole family, though this is not often at the same time or in the same place, for obvious reasons. It is systemic work with children, their parents, extended families and other systems, including the courts and legal practitioners.

A new family law system should not simply be about better agreements, negotiations or adjudications, or earlier ones—although all of these are important. The Contact Orders Program has demonstrated that there is a vital need for expert therapeutic reparative work. This work can enable children to have improved relationships with both parents, often allowing them to see parents (usually fathers) whom they may not have seen for many months or years. This work can assist parents who haven’t spoken for six months or six years to manage their parenting better and together—or at least manage the contact at handover of children civilly and practically.

Recently, some of the staff in our program spent some time doing a small piece of evaluation, and spoke to children and their parents who were going through the program. In some cases, the therapist did not think that the families were making very much progress—until they spoke to the children. As one child said, ‘When handover happens, my mum now says, “Hi Dave, how are you going?”’ While it is sometimes difficult to see this as a transformation, in some of those children the transformation is wonderful, remarkable and profound.

The final challenge is how therapists in the Contact Orders Program in particular, and community organisations generally, can link back to the courts when we need to—especially in matters of safety—to best use the authority of the Family Court and the Federal Magistrates Court to keep families on track; to ensure the leverage and accountability that is vital remains while working with such complex matters and such conflictual clients. The Contact Orders Program is an excellent example of some of the innovative programs operating in Australia, and shows the way in which these are working closely with other parts of the family law system to help highly conflicted parents stay focused on their children’s needs.
‘Bringing fathers in’: International perspectives on father-inclusive practice

Dr Adrienne Burgess, Fathers Direct, United Kingdom

Transcribed address

It’s good to be here this afternoon and it’s very nice not to have to tell you (but I will!) that, although I am from the UK, I am nothing to do with Batman climbing Buckingham Palace or other widely reported antics of ‘fathers’ rights’ groups.

It’s really interesting that the word ‘father’ has become so colonised by the separated fathers discourse that I have constantly to explain that we at Fathers Direct have a much broader brief. That we do not focus on separated fathers at all, but look much more at the wider family services, starting with antenatal services, looking at how to help them be more inclusive of fathers.

As I listened this morning to the description of the new family law system emerging in Australia and where it came from and what was driving it, two big worries crossed my mind. The first was that it seemed that the courts were being asked to operate much more of a kind of shared parenting model, and they were being asked to do this in isolation from other services, because all the other services don’t operate in that model. These other services may say they are ‘parenting’ services or ‘family’ services, but really they are services for mothers and ‘their’ children. Now there is nothing wrong with that. It’s perfectly fine to be operating as a service for mothers and children (if that’s what you are), but what is not fine is to be kidding yourself and kidding other people, through the widespread use of gender-neutral words like ‘parent’ or ‘family’, that you are doing something different—that what you are offering is a truly inclusive model that embraces both parents as important figures in children’s lives.

My worry is not that operating a shared parenting model is, in itself, wrong. The evidence is clear that it is immensely to the advantage of children whose parents separate (as to those whose parents stay together), to forge and maintain rich, complex and substantial relationships with both of them. And it is clear that in a post-industrial economy, family services must provide support for both parents as carers and providers. No, what worries me is that if the new family law system is to be linking into community programs (which has been mentioned several times), what will be happening is that they will be trying to operate a ‘shared care’ model while linking into programs that really have no idea how to work with men, or with couples; that often feel very hostile to men; or even if they are not hostile, are really sort of embarrassed. They think, ‘Well what will I talk to him about if I have to talk to him? I don’t know about football. What am I going to talk to him about?’ So they grab the child off him at the nursery gate, say, ‘Thanks very much’, and take the child inside, away from him. Whereas when they are confronted with a mother, they look her in the face, smile at her, learn her name, and bring her inside the ‘family’ service alongside ‘her’ child.

The other thing that worried me was what seems to me to be a widespread perception that what’s been brought in with regard to this new family law system has been riding on the back of the fathers’ rights discourse—a discourse that often adopts the language of the ‘gender-war’ and, understandably, frightens and alienates a lot of
people. Many people also associate it with conservative family values, and my fear is that anything that is perceived to be forced upon the family law system only or mainly from such a discourse is in for a rough ride. It’s going to be very hard to make it ‘stick’. And we have to be clear that no new family law system is going to work unless it has wide buy-in from a lot of people.

So then I thought, ‘Well, what are the solutions to this?’ Well there are no easy solutions, but I thought I could talk a little bit about the innovative practice that is happening in the UK. You see, I think we all know that policy makers in the UK have historically found it difficult to tackle issues relating to separation and divorce. There has been no real political will in the UK, under either Conservative or Labour governments, to tackle this area. And, even today, there is no substantial and systematic funding coming from government and being directed into this area in the way there is here. The money has been going somewhere else. It has been going into early intervention. It has been going to the hugely well-funded Sure Start program, based on the US Head Start program, which is now evolving into a whole new network of centres across Britain, called Sure Start Children’s Centres, which are drawing together maternity and early years services—health, education, everything—to try to make a difference in families very early on.

Interestingly, it is here that in Britain we have been really innovating around engaging with fathers and developing a much more inclusive model for services to address both parents as both earners and carers, in intact and in separated families. A model which takes fathers seriously as carers, just as it takes mothers seriously as earners. And this model is now in national policy, not only for the Sure Start Children’s Centres, but also in the big policy framework that impacts on maternity care—the National Service Framework for Children, Young People and Maternity Services. This model, with its greater emphasis on shared care and shared earning by both parents, of course follows what is happening in the ‘real world’, where fathers in two-parent families now do one-third of the child care; and where fathers’ care of infants and young children has gone up 800 per cent over thirty years.

Out of the recognition that most family services (and I include Family Court services in this) are still operating on the ‘mother as the primary carer’ model, my organisation, Fathers Direct, has been very much charged with presenting the evidence base for why it matters to work with fathers, and why these family services should consider it important that fathers be actively involved in the daily care of their children. We have learned that the way you do that is not to paint this kind of nice picture about how daddies are all lovely and all we have to do is make it easier for them to spend more time with their children; some daddies are lovely and some daddies—like some mummies—are not at all lovely.

What we need are services that also, perhaps most importantly, learn to engage with fathers who are not ‘good enough’ parents, and help them to develop their skills; services that don’t just look at fathers as ‘goodies’ or ‘baddies’ (which is the paradigm that the fathers’ rights discourse carries with it), but which see fathers as human men, who have relationships with women and children that are characterised by strengths and vulnerabilities; services that see fathers as both a risk and a resource (as they do with mothers), and do their very best to sustain relationships between men and their children in as positive a way as possible (as they do with mothers). What this means is that they, and we, learn to have high expectations of the father role (as we do of the mother role) and that means not giving up on fathers who disengage or behave abusively until we’ve done everything we can to bring about
change (as we do with mothers). So whatever kind of service you are, and wherever you engage with families, you learn to look at these men as real people, not as villains or heroes, and you try to build on their strengths and help them with their challenging behaviour.

But what this means is that services need help to change—and this will be the case with the new family law system here in Australia. It is no good just setting out these structures and saying, ‘You will engage with fathers’, because they simply don’t know how. So you have to have a national system that develops standards and targets, and develops techniques, and builds capacity in the field, and helps family service providers learn how to engage effectively with fathers—and also with mothers on the subject of fatherhood, because some of the most important work you will ever do around fatherhood, you do with mothers.

The other thing that I think is really important is that we need to tap into discourses emerging all over the world which have nothing to do with ‘fathers’ rights’, but everything to do with involved fatherhood. So I thought I would mention some international agencies for whom fatherhood is rising up the agenda in a manner that is completely foreign to discussions of fatherhood in Australia. I have been here a lot over the past three years, and I have observed this to be the case.

The first of the international agencies is the Commission on the Status of Women. The Commission meets every couple of years, and it met in New York in 2004. At the end of its deliberations, it urged governments, other organisations, civil society, the UN system—they left nobody out!—to promote, among other things, an understanding of the importance of fathers to the wellbeing of children and to the promotion of gender equity.

The second of the international agencies I’d like to refer to (and there are many more) is the World Health Organization (WHO) which, next week, is running a three-day meeting in Geneva, where it is bringing together academics and practitioners and policy makers to review the impact of programs working in the area of men, young men and gender equality—you hear that phrase again: ‘gender equality’—including men’s participation in maternal health, and in programs impacting on child health and child development.

What that is about is that the current priority for the WHO is infant and maternal mortality, and they are seeing that when you engage with fathers in a proactive way, you reduce infant and maternal mortality, and so they are looking to engage fathers first and foremost for that reason. But they are also concerned with women’s health in other ways—and that is where this gender equality stuff keeps coming in—for we have to recognise that without active, involved fatherhood, without fathers taking on a substantial caring role in raising the next generation, the great project of women’s emancipation can never be completed.

The last chapter in that story will never be written unless it is written by women and men together, and this means that we must all—those who are going to implement the new family law system, the services that must support them, and the whole of society—commit to truly loving and involving both parents in their life’s work of raising their children together, whether or not they live in the same household. So that they, and we, are enabled to do the two things that Freud has said we must all be enabled to do if we are to be fulfilled and productive as human beings and build a human society that will grace our earth: ‘to love and to work’. To love each other as best we can; to love our children and care for them; and to work for our families—together.
Beyond ‘innovative projects’ to ‘innovative strategies’

Mr Matt Miller, Child Support Agency

Transcribed address

Rather than speak about some of the innovative projects and programs that the Child Support Agency has been embarking on recently, I thought it might be useful to take things up a notch by discussing ‘innovative strategy’. This is simply because I think many of us go to conferences and hear about lots of innovative projects and programs which never really make it past the pilot stage. And I think one of the really big challenges, no matter what space it is that we are playing in, is to actually pass the big test of getting past successful pilot projects and get innovative practice embedded into core service delivery, particularly if you are working in somewhere like the Child Support Agency.

So, today, I have deliberately chosen to focus at the ‘strategy’ level. My colleague, Trevor Sutton, who will be speaking tomorrow, will share with you much more of the specific detail of some of the innovative programs that we have delivered, including the evaluation results. I believe that part of the Child Support Agency’s big successes can be attributed to the courage that it has had to move innovative project outcomes into innovative strategy, and to shift from having those sort of things directed at both mainstream customers as well as those with special needs, or those who might be more targeted towards some of the sort of traditional projects that we see.

In looking at the strategy approach, I chose to be mindful that, since its creation in 1988, the Child Support Agency has had three major ‘homes’: one in the Tax Office; one with Department of Families, Community Services and Indigenous Affairs (FaCSIA); and very recently this year, in the new Department of Human Services, which (for our international guests) is a collective of service delivery agencies in the human services area.

One of the fundamental things that I wanted to talk about was, in fact, not only the policy/service delivery issue (which I think Patrick Parkinson in his report characterised very much as a bit of a disconnection in policy versus service delivery in some of those early years; and I must add that’s not the case since I have had the pleasure of working with Geoff Harmer—we’ve forged a very powerful relationship to make sure some of those disconnections don’t in fact continue to occur, and that we do get more ‘joined-up’ policy and service delivery responses, as we say there). There have been some quite fundamental shifts I guess, and the first is at a strategic level in the way the Agency has positioned itself. Being related in its early days to the Tax Office, you’d be unsurprised to know that the focus was largely around collection and transfer, and a heavy reliance on traditional enforcement methods. When the Agency shifted in the mid-90s to a FaCSIA alignment, it quite courageously, I believe, shifted focus to one of greater parental responsibility and a reliance on voluntary compliance. Sure this was underpinned by enforcement methods—but a much greater and more diverse set of enforcement strategies. And this is what I mean by innovative approaches at a strategic level. There was a fundamental shift that proved to be one of the real success stories in the Australian Child Support Agency. However, this innovation was not simply limited to that. They shifted, as you would expect, in all their processing activities—as many organisations have done—but I
think it is worth noting that they shifted their channel management particularly away from mail to phone. They also embarked on a very successful strategy around customer segmentation, and I have listed in my PowerPoint show for you some of the segmentation that’s been explored.

Beyond the day-to-day processing sort of stuff, the Child Support Agency also moved to implement what I think are some really great innovative programs and products. This includes the ‘Me and My…’ series. (Trevor Sutton will talk in greater detail about these tomorrow.) But the challenge is that we are moving beyond the traditional remit of what you might think a Child Support Agency is there to do. But I maintain that if you think back to what some of the fundamental objectives are, then I don’t believe these programs are beyond the traditional role or mandate of a Child Support Agency. The Child Support Agency’s had a workplace program called ‘Staying Connected’, where the program has encouraged employees to access support services. This has increased productivity and reduced workplace accidents, and has proved to be very successful. Trevor will talk more about this tomorrow.

The Agency has also had what I am going to characterise as a welfare-to-work initiative, called ‘Being Connected’, where we have been working with newly separated unemployed dads in particular to help them reconnect back into the workforce. Again, you might say, well, that seems a little bit outside of the remit of a Child Support Agency. And this would be, if you took a very narrow view of what our objectives were. We have also had, as some in the audience would be aware, a very successful counselling support program for people that contact the Agency, particularly some of our parents who are in significant distress. This program involves our direct telephone support service, which has now been implemented across the country after an initial pilot in Queensland. The service provides a three-way hook-up and ‘warm’ transfer to crisis counselling.

The other thing that the Agency has done in that space between mid-1990s and to date is to introduce a whole range of new and innovative products particularly targeted at supporting parents from different perspectives, including the extremely popular What About Me publication, which focuses on parent emotional wellbeing; a CD dealing with separation; a booklet which examines relationships with children; and another specific publication which targets the relationship with the other parent; and another which, importantly, targets financial capacity.

These products, and some of these innovative programs, have positioned the Agency as inarguably world class in this line of innovation. But we know that we can still do better. So we have started to think about what our ‘third wave’ is. Apart from working very much more closely with FaCSIA as we move forward, we see it as quite fundamental that we need to position the child support system as a part of the broader family law system and stop seeing it as something sitting outside and remote from it.

One of the key things that you can expect to see from us is a greater investment in parents with complex cases—much more emphasis on face-to-face support. Over the past 10 or so years we have had a very efficient telephone-based process. We are not throwing that out. We are saying that that’s fine for 90 to 95 per cent of our customers. But for the 5 to 10 per cent who need more care and attention, face-to-face, it seems to us, is the way to go. We are also looking, as you would expect, to improve the customer relationship experience through further exploration
of customer segmentation. And, finally, there will be some other broad strategic approaches that you can expect the Agency to be pursuing.

I have encouraged a shift from ‘client’ to ‘customer’ focus. I am really quite passionate about this. I want people who deal with the Child Support Agency to feel like they have had a positive customer experience, even though many of them would feel like they don’t have any discretion. It might be seen by some as an esoteric debate but, at the end of the day, I would like people going away from the Child Support Agency with that positive customer experience as though they did have a choice.

You can expect, I believe, increased partnering with the non-government sector in service delivery as we go forward. We can’t do it all, and we have already seen, through some of those pilots and some of those early innovative programs that we have delivered (particularly Staying Connected), how, when we work with some of the non-government sector organisations, we get much greater traction and more effective delivery on the ground. So it seems to be a very logical and congruent way to go forward; that we would continue to push in a very increased way down that path.

There is a lot of rhetoric around about more ‘joined-up’ service delivery. One of the challenges that I think we face in government is to turn rhetoric into reality. It seems to me that, by the Child Support Agency participating in forums such as this, we get a chance to emphasise the importance of service delivery perspectives for policy formulation. But we also get to interact with other agencies, such as the Family Court, that are involved in frontline service delivery.

The final thing that you can expect to see from us is a greater emphasis, unsurprisingly, on what I call ‘outreach and support’ for separated parents. I think that’s very congruent with many of the other speakers’ positions.

I would like to leave you with the thought that, whilst innovation is important, I think some agencies can get a little bit seduced by innovation and think that as long as they are doing innovative things that that’s the end game. This is certainly not going to be the case for the Child Support Agency. We recognise that, as I mentioned at the outset, it’s important to take these innovative approaches and embed them in our day-to-day service delivery.

Thank you.
Panel and demonstration: Innovative practices 2—Hearing children

Chair

Professor Alan Hayes, Director, Australian Institute of Family Studies

Alan Hayes took up his appointment as Director of the Australian Institute of Family Studies on 9 September 2004. Before coming to the Institute, he was Dean of the Australian Centre for Educational Studies at Macquarie University, Sydney. He is immediate past Chair of the Australian Council for Children and Parenting (ACCAP), and in 2004 was appointed as Deputy Chair of the Stronger Families and Communities Partnership. He also served as a Board Member of the Australian Institute of Family Studies for several years. Professor Hayes has a PhD in Psychology. His research and scholarship have been disseminated in books, chapters, refereed journal articles and conference proceedings. In addition, he has completed substantial reports flowing from commissioned major evaluation and policy projects.

Presenters

Mr Le Do Ngoc, Director, Family Department, Vietnam Commission for Population, Family and Children

Le Do Ngoc has served his country in both a military and civilian capacity. In the past decade, he has held key government positions, including Director for International Cooperation, Vietnam Committee for Protection and Care for Children (1995–2002). Mr Ngoc is currently the Director of the Family Department in the Commission for Population, Family and Children, and is a key person in drafting the National Strategy in Building the Family 2005–2010, the Party Secretariat’s directive for building the family in national industrialisation and modernisation, and National Survey of the Family. He has trained internationally, at Oslo University and the Academy of Social Science, Moscow.

Ms Hoo Sheau Peng, District Judge, Subordinate Court of Singapore

Hoo Sheau Peng is the Group Manager, Family and Juvenile Justice Division, Subordinate Courts of Singapore. In 1992, she graduated from the University of Cambridge with a BA (First Class Hons). This year, she obtained a Masters in Law (Intellectual Property and Technology Law) from the National University of Singapore. Ms Hoo began her career as a Justices’ Law Clerk of the Supreme Court of Singapore. She has contributed towards various Singapore legal publications.
Lawrie Moloney is Head of the Department of Counselling and Psychological Health in the School of Public Health at La Trobe University and, with Dr Jenn McIntosh, is a co-director of La Trobe’s Children in Focus program. Dr Moloney has published more than 100 articles, monographs and chapters in the socio-legal field, mainly on children’s issues in family law. He is Editor-in-Chief of the Journal of Family Studies, the primary focus of which is to report on research and policy development around matters that impact on children in family-related transitional situations.
Opening remarks

Professor Alan Hayes, Director, Australian Institute of Family Studies, and Associate Professor Lawrie Moloney, La Trobe University

Article 12 of the United Nations Convention on the Rights of the Child reminds us that children have a right to be consulted about matters that are likely to impact significantly on their welfare.

The three papers presented in this segment on hearing children reflect the cultural settings in which these rights are played out when families are in distress.

Mr Le Do Ngoc’s presentation has the hallmarks of a parable—a story that contains a universal truth. The truth in this case is that, in normal circumstances, children do not wish their parents to separate. For Australians and for our colleagues whose cultural heritage is close to the Australian experience, the idea that children might be consulted on the core issue of whether parental separation should happen or not in the first place, presents a significant challenge. In Australia, we tend to argue for a distinction between the roles of partner and parent. Under Australian family law, if the partnership is deemed by one or both adults to have failed in some significant way, the opportunity to separate is regarded as an important right. Children can then be consulted on how this *fait accompli* can now be managed.

But Mr Ngoc gently challenges us to consider the core of the problem (the marriage)—not simply the aftermath (the separation)—from the child’s perspective. We note in this regard that the Australian Government’s Family Relationship Centres proposal envisages a range of dispute resolution and support services, including services that invite couples to think again about whether or not separation is the best option for themselves and their families. We suspect that in Australia, the voice of children in such deliberations would generally be muted or absent altogether. From the perspective of a generally individualised culture, many would probably see such an absence as appropriate. But Mr Ngoc’s presentation provides a different view. And it is no bad thing if that view leaves us with a level of disquiet about our own assumptions and practices.

Ms Hoo Sheau Peng’s paper illustrates how carefully Singapore has thought through the various ways in which children’s voices can be brought into a family law reporting forum. Close attention is paid not just to the concept of reporting on children’s situations and possible wishes, but to which type of report is likely to best suit the needs of which child in which family situation.

An impressive feature of the Singapore system is the amount of time devoted to working with the children and their families in order to provide a report. A custody evaluation report, for example, is the result of forty hours of interviews with parents and children and any significant others. The interviews are spaced over a six-week period. Thus, it would appear that, compared with the Australian situation, child-focused reports in Singapore are generally longer in the preparation. Furthermore, the report is presented only to the judge, and the reporter is not exposed to the rigours of cross-examination—so can presumably spend more time working directly with the family.

Another interesting feature of the Singapore system is the use of a judge in a mediation role. In this role, the judge can be assisted by the receipt of a report
on how the children see the situation, though as I understand it, the contents of the report are, again, not shared with the parents. One gets a sense of how, in a culture that differs from our own, but nonetheless shares elements of a common legal tradition, a different balance is arrived at, between promoting full transparency and running the risk of exposing views of the child that may place him or her in a compromising position. Again, there is much to ponder from the perspective of an Australian viewpoint.

Dr Moloney’s paper explores the journey towards child-sensitive practices that have taken place since the Family Court’s inception thirty years ago. The paper speaks of the limitations of law in dealing with problems that are relationship-based, and the gradual acceptance in Australia of the appropriateness of community-based interventions for many child-related disputes.

The paper focuses especially on two recent initiatives that move family law further away from adversarial processes, and that simultaneously hold out the hope of more child-sensitive practices. The first is the commitment of government to community-based Family Relationship Centres. The second is the development within the Family Court of the Children’s Cases Program. Dr Moloney speaks of some of the challenges these initiatives bring; however, he suggests that, working in tandem with each other, they have the capacity to bring us considerably closer than we have been in the past to a realistic focus on the best interests of the child.

Appended to the written presentation is a transcript of a segment of child-inclusive practice in a community setting that was illustrated on DVD at the Forum. The efficacy of this form of intervention and of child-focused practice (in which the child is not directly involved) is currently being investigated by the Children in Focus research team, led by Dr Jenn McIntosh at La Trobe University.
A case study from Vietnam

Mr Le Do Ngoc, Director, Family Department, Vietnam Commission for Population, Family and Children

Transcribed address

Thank you, Professor Alan Hayes. Ladies and gentlemen, I will be very brief concerning the subject of hearing children. You may know that in the countries in the region that are parties to the Convention for the Rights of the Child, people keep talking about what is best for the welfare of the children, but, in reality, many adults don’t follow that motto.

Let me tell you a story—a case study from Vietnam.

One day, my daughter came home from school and was very upset. I asked her what the problem was, and she told me that, at school, she had seen a classmate crying and had asked her what the matter was. They were good friends. She discovered her secret: after many hard disputes and quarrels, her parents had decided to get a divorce. This was a traumatic situation for my daughter’s friend.

One year later, people saw that the man who was her stepfather brought her to school, and they thought that this maybe was a good father–daughter relationship. However, one day after that, the classmate came to my daughter and was happy. She told my daughter that her mother and the stepfather were having many disputes and it seemed they were going to separate. And, if that happened, her father might return. So, in reality, the children are only thinking about the absent parent. In reality, the stepfather was a good man; he brought the child to school every day and seemed a very good father, but the daughter didn’t like him. She loved her real father.

In the end, we sometimes make decisions, especially regarding the marriage between husband and wife, selfishly, just thinking of ourselves. Quite a few people do ask the opinion of the children, but still consider only what they think is in the best interest of the children. This story reminds us to think carefully when deciding in relationships between husband and wife, to think of the children and what is best for them.

In Vietnam, our law on marriage and family, promulgated in 2000, provides several articles on the right of the child to be heard when a family separates (such as Articles 22 and 23). For example, if the husband and wife decide to divorce, the court would consider the interests of the children. The court would consider the opinion and views of the child (where a child is nine years or older) before making a decision to divorce. Even after that, if the court wants to change who is responsible for the direct parenting of the child, it would seek the opinion of the child.

Thank you very much for giving me the chance to speak.
Hearing children’s wishes: Practice of the Singapore Family Court in divorce proceedings

Ms Hoo Sheau Peng, District Judge, Subordinate Court of Singapore

I Overview of the Singapore Family Court

Set up in 1995, the Singapore Family Court (‘the Court’) is a specialised forum that deals with a comprehensive range of family disputes. The Court has jurisdiction over the following matters:

- divorce, judicial separation and nullity cases
- applications for guardianship, custody, care and control and access of children
- applications for division of matrimonial assets
- applications for protection orders
- applications for spousal and child maintenance
- applications for enforcement of maintenance orders made by the Court, the Maintenance of Parents Tribunal and the Syariah Court
- reciprocal enforcement of maintenance orders made by foreign courts or tribunals
- adoption cases.

The constitutional duty of the Court is to administer justice, by hearing and deciding the legal disputes. However, the Court recognises that family disputes stand in a class of their own. Often, the cases involve dysfunctional families, and parties with complex interpersonal conflicts and deep-seated relationship issues. The Court has to go beyond the legal issues presented, to address the root conflicts, causes and emotions. Thus, the philosophy of the Court is to protect family obligations. The Court challenges itself to ensure that family and marital rights and responsibilities are fulfilled, and the psychological and physical wellbeing of all family members, especially the children, are preserved and protected.

Consequently, the Court provides free mediation and counselling services, to facilitate the conclusive resolution of the disputes and the underlying tensions, and promote the welfare of the parties. Mediation may be conducted by the judges, although a judge who has mediated a case will not hear it. Counselling is provided by the trained counsellors in the Family and Juvenile Justice Centre (‘FJJC’), an integral part of the Court. Further, in close collaboration with other justice constituents,

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1 Part X, Women’s Charter (Cap 353) (‘Charter’).
2 Guardianship of Infants Act (Cap 122) and Part X, Charter.
3 Part X and section 59, Charter.
4 Part VII, Charter.
5 Parts VIII and X, Charter.
6 Section 71 and Part IX, Charter, Maintenance of Parents’ Tribunal Act (Cap 167B) and Administration of Muslim Law Act (Cap 3).
7 Maintenance Orders (Facilities for Enforcement) Act (Cap 168) and Maintenance Orders (Reciprocal Enforcement) Act (Cap 169).
8 Adoption of Children Act (Cap 4).
9 With the consent of the parties, the Court may refer parties for mediation: Section 50(1), Charter.
10 The Court has the power to order parties or their children to attend counselling: Section 50(2), Charter.
such as government and community partners, the Court provides a wide range of programmes and services, to inform, assist and support the parties and their families through the difficult transitions in their lives.

II The divorce process

Like many other jurisdictions, Singapore has been experiencing an upward trend in divorces. In 2004, 5319 applications for divorce were filed. In contrast, in 1994, there were 3554 divorce applications. This represents a 49.7 per cent increase in the number of cases before the Court over a period of only ten years. In the same period, the population in Singapore grew by only about 25 per cent.

Getting divorced is a two-stage process. First, the Court will deal with the divorce issue (that is, whether the marriage should be dissolved, and on what facts) in an open court hearing. Either party to a marriage who wishes to obtain a divorce must file an application to the Court on the ground that the marriage has irretrievably broken down.\(^{11}\) The applicant must satisfy the Court as to one of several facts before the Court will be satisfied that the marriage has irretrievably broken down.\(^{12}\) The application may either be contested or uncontested by the other party to the marriage. If the Court is satisfied that the marriage has irretrievably broken down, and it is just and reasonable to make a decree,\(^{13}\) it will grant the application, and pronounce the *decree nisi*.

Thereafter, the Court deals with the ancillary matters (that is, the issues that are consequential upon a divorce), in a chambers hearing. Again, these may be contested or uncontested by the parties. Evidence is given through the filing and exchange of affidavits between the parties. The parties will then make their submissions based on the evidence in the affidavits. If required, and with leave of the Court, they may apply to cross-examine any of the deponents of the affidavits. Once the ancillary matters have been fully dealt with, the Court will then make the decree nisi absolute in the divorce application, which dissolves the marriage\(^{14}\). Mediation and counselling services are weaved seamlessly into both stages, as alternative means to resolve the disputes.

III Children in divorce proceedings

In divorce proceedings, battles over the children concern disputes over orders as to the custody, care and control of the children, and access to the children (‘children’s matters’).\(^{15}\) Briefly, a custody order grants the right to make major and long-term decisions for the child, such as decisions pertaining to religion, education and healthcare for the child.\(^{16}\) Parents may fight to obtain sole custody of the children.

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11 Section 95, Charter.
12 The facts are: (1) the other party has committed adultery and the applicant finds it intolerable to live with the other party; (2) the behaviour of the other party is such that the applicant cannot reasonably be expected to live with the other party; (3) the desertion of the applicant by the other party for a continuous period of at least 2 years immediately preceding the presentation of the application; (4) the parties have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the application, and the other party consents to a decree being granted; and (5) the parties have lived apart for a continuous period of at least 4 years immediately preceding the presentation of the application: Section 95, Charter.
13 Section 95, Charter.
14 Section 99, Charter.
15 Other issues to be dealt with include maintenance of the spouse and children, division of the matrimonial assets and costs.
16 The landmark Court of Appeal decision in CX v CY [2005] 3 SLR 690.
They may allege that they are unable to cooperate with each other, or cast doubt on the other parent’s ability to make decisions for the child for a multitude of reasons. However, save in exceptional circumstances, joint custody is to be ordered to promote and support joint parenting.\textsuperscript{17}

The care and control order determines which parent shall be the daily caregiver of the child, and with whom the child shall live. Disputes focus on who would be the most appropriate caregiver, in all the circumstances of the case. The parent without care and control has an access order that determines the level of contact the parent has with the child. Disputes over access are wide-ranging, and include whether access should be supervised or unsupervised, whether there should be overnight access, whether there should be overseas access, how long access should be, or whether a third party should be present during access.

For the 5319 divorce applications filed in 2004, it is estimated that there were 7978 children involved in the families.\textsuperscript{18} It is well acknowledged that family disintegration has a tremendous impact on the children caught in the web of conflicts. Research has found that fifteen years after divorce, 80 per cent of the divorced mothers and 50 per cent of the divorced fathers felt the divorce was good for them. However, only 10 per cent of the children felt positive about the divorce.\textsuperscript{19} Further, it has been reported that, compared to children from intact, two-parent families, children from divorced homes performed more poorly in reading, spelling and mathematics.\textsuperscript{20}

Research has also shown that children of divorce can carry on the devastation. The cycle can be inter-generational. Daughters of divorced parents tend to divorce more frequently\textsuperscript{21} and the risk of divorce is increased by as much as 620 per cent in the early years of marriage.\textsuperscript{22} The next generation of divorced parents was more likely to cohabit or marry early, and experienced more break-ups in relationships or marriages. The female children were also 25 per cent more likely to become teenage mothers.\textsuperscript{21}

Criminogenic roots can also be traced to family disintegration. In a study of juvenile delinquents from three institutional homes in Singapore, almost half had either only one parent or at least one parent who did not live in the same dwelling as the child.\textsuperscript{24} In another local study of 155 female juvenile delinquents from cases in 1998 to 1999, it was found that 28 per cent came from divorced families.\textsuperscript{25}

\textbf{IV Welfare of the child}

Given that children are directly affected by the court orders in relation to children’s matters, it is regrettable that they are not formally parties before the Court and, as

\textsuperscript{17} CX v CY (supra).
\textsuperscript{18} This estimate is worked out on the basis that there are 1.5 children per marriage.
\textsuperscript{24} Huan, V., & Tan, E. (1999). The relationship between different parenting techniques and the social adjustment of adolescents. Singapore: National Institute of Education.
minors, they do not have the right to participate fully in the process. Nonetheless, in dealing with children’s matters, the law provides that the paramount consideration of the Court shall be the welfare of the child.26 ‘Welfare’ is to be taken in its widest sense. It means the general wellbeing of the child and all aspects of his/her upbringing—religious, moral as well as physical—and is not to be measured in monetary terms.27 The welfare concept is akin to the best interest principle within the United Nations Convention of the Rights of the Child (CRC),28 which states that in all actions relating to children, the best interests of the child shall be a primary consideration.29 These general principles safeguard the children. More importantly, in deciding on children’s matters, the Court is to have regard to the wishes of the child, where he or she is of an age to express an independent opinion.30 Again, this is in accord with the best interest principle within the CRC, providing for consultation of children and promotion of their decision-making abilities.31

V Hearing wishes of the child

While it may seem obvious and uncontroversial that the Court should have regard to a child’s wishes, soliciting the child’s wishes is not an easy task, especially in the following two scenarios. First, where children’s matters are bitterly contested, even well-meaning parents cannot always be relied on to act rationally and reasonably for the sake of the children. Often, parents forward conflicting pictures to the Court of what the child wishes that paints the other parent in the worst possible light, and throws allegations of varying degrees, ranging from mere incompetence as parents, to neglect or to physical, mental or sexual abuse of the child. In other situations where the Court may be called upon to make a decision for a child, the Court may place considerable weight on the views of the parents as to a child’s wishes, as a form of ‘substituted judgement’. In disputes over children’s matters, the Court cannot safely and reliably depend on what the parents say to be the child’s wishes. Similarly, it is doubtful whether close relatives such as grandparents are able to give fair and unbiased opinions.

Secondly, in the majority of cases where parties contest children’s matters, the children are young. The Court is wary to accord much, if any, weight to any affidavits deposed to by the children because the affidavits may have been prepared by either one of the parties and their solicitors. For the same reasons, the Court is reluctant to give any weight to letters, cards or other documents written by the children, filed by either or both of the parents as exhibits in their affidavits.

Therefore, in the straightforward cases where the parents remain on reasonably good terms, and hold the same or similar opinions on children’s matters, the Court may find it sufficient to have regard to the views of the parents or other witnesses, such as close relatives, on the children’s wishes. Further, where the children are

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26 Section 125, Charter.
28 In fact, the welfare concept was first enunciated in case law: see In the Matter of the Intended Marriage between Lee Keng Gin and Catherine Wong Kim Lan [1935] MLJ201. The welfare concept was subsequently enshrined in various statutes dealing with children, including the Charter, the Adoption of Children Act (Cap 4) and the Guardianship of Infants Act (Cap 122). Thereafter, in 1995, Singapore acceded to the United Nations Convention of the Rights of the Child (CRC).
29 Article 3(1), CRC.
30 Section 125, Charter.
31 Article 12, CRC.
on the brink of adulthood, such as children in their late teens, the Court is quite willing to accord due weight to such affidavits filed for the ancillary matters stage, or documents written by the children attached to the parties’ affidavits. However, where the disputes over children’s matters are serious and acrimonious, and where the children are fairly young, other means of ascertaining a child’s wishes become critical.

The Court’s fundamental concerns over any means to be used to obtain a child’s wishes are as follows: first, within the process, there should be an assessment whether the child is sufficiently mature and independent to express a view. If the child falls short, there should be some indication of the child’s level of such attributes, to allow the weight to be accorded to such views to be adjusted accordingly. Next, care should be taken to ensure that the view expressed is the child’s, and that the child is not under any pressure, coercion or undue influence to state certain views. Third, the process should not traumatised the child. Lastly, the child should not fear repercussions from expressing a view, and his/her safety and wellbeing in the future should not be compromised.

With these factors in mind, where necessary, both for mediation and adjudication purposes, the Court’s practice is to obtain the children’s views through the following means:

- preparation of reports by trained persons
- conduct of interviews by the Court
- counselling by trained persons
- separate legal representation for the children under the Court Appointed Counsel Scheme.

Generally, for each case, the Court resorts to one of these processes, rather than a combination of them. This is to prevent imposing too much strain on the children through multiple interviews, assessments and examinations. Depending on the facts and circumstances of the case, the Court will choose the most appropriate method. Each of the processes will now be described.

**VI Reports from trained persons**

The Court will order a report if it is of the view that the input of someone trained and experienced in child welfare would be useful in coming to a decision on what orders to make in relation to children’s matters. In the cases, the levels of conflicts vary as well as the nature of the allegations. The facts and circumstances of the children and the parties also differ. Recognising this, the Court has implemented arrangements for various sources to prepare different types of reports to meet the needs of the different cases. These are the Social Welfare Report (SWR), Custody Evaluation Report (CER) and Access Evaluation Report (AER), Child Guidance Clinic (CGC) report, Assisted Access or Assisted Transfer reports, and reports from professionals in the private sector.

Further, the Court has established a set of guidelines for the calling of such reports. The guidelines are not exhaustive. In fact, there may be some overlap in the different

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Section 130, Charter states, ‘When considering any question relating to the custody of any child the Court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.’
categories of reports, in that different types of reports may be equally suitable for the same situation. Which type of report is appropriate, and which type of report is ordered is a matter for the Court’s discretion, and will depend on the facts and circumstances of the individual case. Some facts that the Court would take into account would include (but are not limited to): the age of the children in question; their relationships with each of their parents, their siblings and any significant third parties; their academic performance and behaviour in school; their living and sleeping arrangements; and their mental and physical health.

For each case, the practice is to call for only one report, save in exceptional circumstances. For each type of report, the trained specialists would interview the children, and observe their interactions with the parties. Usually, the reports are called for in the early stages of the proceedings by the mediating judge or deputy registrars conducting pre-trial conferences to monitor the cases. If not called for at earlier stages, the hearing judge dealing with children’s matters at the ancillary matters stage may do so.

**Social Welfare Report**

The Social Welfare Reports (SWRs) are prepared by officers of the Ministry of Community Development, Youth and Sports (MCYS officers), trained in child welfare issues and custody dispute investigations. However, MCYS officers are not trained psychologists or psychiatrists.

To prepare a SWR, the MCYS officer will interview both parents, as well as any significant third parties. The officer will also speak to the child (if he or she is old enough to converse with the officer), and observe the child’s interactions with the respective parties. The officer will try to establish rapport with the child at the interview, so that when the officer conducts a home visit, the child will recognise the officer, and be more open. To build rapport, the officer may play games with the child. Home visits will be made by the MCDS officer to the child’s home and/or the homes of other relatives, such as the grandparents, if necessary.

The Court calls for SWRs for disputes over custody, care and control, and generally not access disputes, save for those disputes which are whether or not to grant overnight access (since that involves spending time in a particular place, which may make a home visit necessary) and, possibly, whether or not to grant supervised or unsupervised access. Where there is no dispute over care and control, but only a dispute over sole or joint custody, a SWR is unlikely to be ordered, as this is more of a legal issue, and submissions and affidavits by the parties themselves should suffice. Appropriate circumstances in which to order an SWR would include those situations where:

- the child is not really able to express themselves verbally (usually if they are under 10 years old)
- the custody, care and control, and access disputes are serious ones—usually a situation where both parties have indicated consistently during the early stages of the proceedings that they will be contesting the issues
- there are allegations about the place the child would be spending a significant amount of time (either because of access or because he or she would be cared for

33 For more information on the investigation process, see the article by the Ministry of Community Development, Youth and Sports in the *Singapore Law Gazette* (July 2003 issue) entitled ‘Custody dispute: Social investigation’.
in that place), which would make home visits useful. For example, if there are allegations that the home environment is noisy and messy, MCYS can examine the child’s sleeping and studying arrangements there and/or

- there are specific allegations, such as physical or sexual abuse, alcoholism or drug use.

It takes about three months from the time it is ordered for the preparation of a SWR, and parties do not have to pay for it. The SWR is a confidential report, for the use of the judge mediating or the judge hearing children’s matters. As a general rule, it will not be shown to parties, and the maker of the report will not be cross-examined.\textsuperscript{34} Further, as a general rule, the Court does not grant parties’ applications to inspect or make copies of the SWR, or to cross-examine the maker. The rationale for this is public policy—to ensure that those who prepare the reports can do so without being constrained by the fear of retribution from the subjects of the report. Equally, the children would not have to fear the repercussions of stating their views to the officers.

\textit{Custody Evaluation Report (CER) and Access Evaluation Report (AER)}

CERs and AERs are prepared by the counsellors from the FJJC. The counsellors are trained in social work, counselling or psychology, as well as in the preparation of such reports. The CER is called for to decide which parent should have custody, care and control of the child or the access the other parent may have to the children, while the AER assists the Court in resolving access disputes.

CERs and AERs are based on interviews and observations which take place in the Court. The counsellors do not conduct home visits. A CER requires about forty hours of interviews with the parents, the child and any significant third parties. The interviews take place over a six-week period, at the end of which the CER will be written. An AER would take a shorter time to prepare. In this respect, the preparation of a CER or AER is much faster than an SWR.

The CER or AER focuses more on the interaction between the parties and the children, and the developmental needs of the child. The CER or AER is suitable for:

- children who are able to express themselves—those over 10 years old, usually
- very acrimonious custody, care and control, and access disputes
- situations where there are allegations that one child is alienated from one parent, and of brainwashing and/or
- where home visits would be pointless because there are no allegations of the home environment being unsuitable, the key issues being the nature of the relationships between each of the parties.

Parties do not have to pay for the preparation of the CER or AER. Like the SWR, CER or AER is treated as a confidential report to protect the maker of the report as well as to protect the children. The CER or AER is furnished to the judge mediating or the judge hearing children’s matters.

\textsuperscript{34} Soon Peck Wah v Woon Che Chye [1998] 1 SLR 234 and Lim Chin Huat Francis & Anor v. Lim Kok Chye Ivan & Anor [1999] 3 SLR 38, both Court of Appeal cases.
Assisted Transfer or Assisted Access Report

The Assisted Transfer or Assisted Access reports are furnished pursuant to orders for Assisted Transfer or Assisted Access under Project Contact. In this program, certain Family Service Centres (FSCs), being community groups, collaborate with the Court to provide services to facilitate access by parents to their children.

Under an Assisted Transfer order, the parents will hand over and/or return the child at a participating FSC. The handover will take place in the presence of a counsellor. The child may also be returned at the same place, in the presence of a counsellor. Alternatively, the child may be returned at a different place, without the presence of a counsellor. The latter order would be appropriate if the problems seem to occur at the initial handover rather than the return. The latter order should be used, if possible, as it gives parties greater flexibility in terms of place and time. The Assisted Transfer order will also allow the counsellor to observe the dynamics of the relationship between the parents and the child at the handover stage over an eight-week period. The counsellor will then write a report on this for the Court.

Assisted Transfer is suitable in cases where the relationship between the mother and the father is very acrimonious, but the relationship between each of the parents and the child seems to be all right. The Assisted Transfer will reduce the opportunity for the parents to quarrel when the child is handed over, thus reducing trauma for the child.

Under an Assisted Access order, the parent has access to the child at a participating FSC under the supervision of a counsellor. It will also allow the counsellor to observe the dynamics of the relationship between the parent and the child over an eight-week period. The counsellor will write a report on this for the Court. An Assisted Access order is not meant to encourage bonding between the parent and the child, and the sessions are not meant to be therapeutic. The report made after an Assisted Access program has been completed will be more in-depth, but is much more time-consuming and resource-intensive than an AER. It is ordered when in-depth observation is necessary, and is suitable in the following circumstances:

- children are not really able to express themselves verbally (usually if they are under 10 years old)
- there are very serious allegations of alcohol abuse, child abuse, family violence, and so on against the parent who wishes to exercise access, but there is some evidence that the relationship between the parent who wishes to exercise access and the child is actually quite sound
- there seems to be little or no bonding between the parent who wishes to exercise access and the child and/or
- where home visits may not be necessary because there are no allegations that the home environment is unsuitable, the key issue being the nature of the relationship between the parent who wishes to exercise access and the child.

Assisted Transfer or Assisted Access orders are both intended as interim measures, to give a counsellor the opportunity to observe the parties and the children during handover or access. The reports to the Court are confidential, and will make recommendations as to what steps should be taken next. Thereafter, the Court will review the matter. It is intended as a tool for the Court to make a decision as to what kind of access orders to make, to finally dispose of the matter, taking into account the views of the children.
The FSCs charge an average of $50 to $100 an hour for assisted access. Assisted transfer fees would be about $25 to $50 for each transfer (so, a two-way transfer—handing the child over, and then handing the child back—would be $50 to $100). Usually, these fees are ordered to be paid by the parent wishing access, or to be shared equally.

**Reports from Child Guidance Clinic, Institute of Mental Health**

A psychiatrist in the Child Guidance Clinic (CGC), Institute of Mental Health, prepares the CGC report. There are interviews with the relevant parties and the children, and observations of parties. However, there are no home visits. A CGC report is ordered in exceptional circumstances, such as where:

- a party is alleged to have exhibited behaviour consistent with a mental disorder (for example, paranoia, seeing evil spirits, extreme confusion)
- a party is suspected of having a medical condition (such as alcoholism, mild mental retardation) that may diminish their capacity to fulfil their parenting duties
- there are allegations that the child’s mental health is being seriously affected or would be seriously affected by the child’s interaction (or lack thereof) with his or her parents—and that the child may suffer a mental problem as a result and/or
- there are serious allegations of child sexual or physical abuse.

A CGC report is not confidential, and is prepared in four to six weeks. While CGC reports are sent directly to the Court, parties can obtain copies from the CGC, if they wish. The makers of the CGC reports may be subject to cross-examination. The CGC usually charges about $600 for the preparation of a CGC report. For parties who are financially strapped, there is the possibility for parties to explore with the medical social worker in the hospital as to whether the fees can be waived.

**Reports from professionals in the private sector**

Prior to April 2005, reports from professionals in the private sector, especially private psychiatrists, could be filed by parties, on their own initiative. The reports were given by the psychiatrists to the parties themselves. The opposing party could apply to cross-examine the psychiatrist. Conflicting reports could be filed. There was the obvious danger of the disturbing phenomenon of parents bringing the child to see many psychiatrists in order to obtain a report favourable to themselves, and traumatising and damaging the child in the process.

In April 2005, the Court imposed restrictions over the preparation of expert evidence by professionals. After divorce proceedings are commenced, a party who now wishes to cause a child to be examined by any professional, be it a psychologist, psychiatrist, counsellor or other social work or mental health professional, must obtain the leave of Court. The Court may make any order which it deems fit, including the appointment of an independent expert, structuring the examination process and defining the scope of the brief to the expert. A detailed framework is set out that ensures that all parties direct their minds to such questions which the expert is required to present in his/her report, and sets out who is to bear the costs of the report, the documents to be furnished by the expert and the persons whom the

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35 Rule 26A(1), Women’s Charter (Matrimonial Proceedings) Rules (‘Rules’).
expert is entitled to interview in preparing the report. Where leave has not been obtained, any evidence obtained may not be adduced without leave of the Court. In this way, the Court can reduce the stress to the child who is in the middle of the dispute.

VII Interviews by the Court

The hearing or mediation judges may also choose to interview the children themselves to ascertain their wishes on the issues, or to clarify certain matters they are in doubt of. Usually the children should be over 10 years old so that there may be meaningful communication during the interview. Further, in deciding whether or not to interview the children, the hearing or mediation judges will keep in mind the following factors:

- The risk of ‘over-interviewing’ the child—The child may be traumatised and damaged by being interviewed too many times on these very sensitive issues. If there has already been a report, the child would already have been interviewed several times. In such a situation, the judge gives serious thought to the issue of whether the value added by the interview with the child justifies the trauma that may be caused to the child by yet another interview. If there is already a report in the file which provides adequate assistance in making the decisions, then the children should preferably not be interviewed further.

- Judges have not been trained in child-interviewing techniques—For young children, MCYS has developed a special interview kit that involves soft toys, a doll house (actually a model of a Housing and Development Board flat, which many Singaporeans live in), and a snakes-and-ladders game. FJJC has similar games. Such interviews aim to build rapport with the child first, and may extend to several sessions of several hours. When a judge interviews the child, the judge will be dressed in black and white, which can be rather intimidating, and will not have the same luxury of time or the benefit of these interview tools. Judges are therefore aware of such deficiencies when deciding to have the interview.

- Judges are also aware of the pressure on children of having to ‘choose’ between their parents, no matter how carefully the questions are couched. The interview may potentially be stressful for children. The parents will also inevitably interrogate a child on what he or she has said to the judge during the interview, even if they are warned against doing so. A younger child may not be able to withstand this kind of interrogation. It may also be stressful even for an older child. The parents may interpret any hearing outcome as resulting from what the child has told the judge. This may have a damaging effect on the parent–child relationship in the long term.

Should the judges decide to interview the children, the judges would follow the guidelines below:

- The interview is usually conducted in chambers or a counselling room instead of the court room, (which is rather intimidating) to facilitate easier communication.

36 The Subordinate Courts Practice Directions contain a standard form application which parties have to use when applying for leave for the child to be examined under r 26A(1) and a standard letter addressed to the expert appointed to brief him on the case. Applicants must annex a draft of the standard letter to the expert to the application for the Court’s consideration at the leave application hearing.

37 Rule 26A(3), the Rules.
Parents and counsel are not present during the interview.
Parents are cautioned not to interrogate the children about the interview.
The children are informed during the interviews that the contents would be kept confidential.
The minute sheets are kept sealed in an envelope, and are not available for inspection or copying by the parties.

In an appropriate case, where parents are willing to abide by and respect their children’s wishes, an interview with the children provides the judge with an invaluable opportunity to clarify the issues, and ascertain their views. Also, some parents are more accepting of the outcomes on children’s matters, given that their children have had their say in the decision-making process to the Court.

VIII Counselling—Use of KIDSLine

The Court may order counselling at any stage of proceedings, conducted by the FJJC counsellors. Counselling focuses on emotional issues and the dynamics of the family members, and helps the person counselled come to a better understanding of themselves, the members of their family and their situation. In particular, the FJJC carries out a great deal of counselling work for children that focuses on child-related issues. In some cases, where emotional support and comfort is needed for children who are deeply troubled by divorce proceedings, support counselling will be given. These sessions are confidential, and the notes will not be made known to the hearing judge. However, the notes may be made available to the judge–mediator. Further, the judge–mediator who wishes to know what the wishes of the child are may specifically order counselling for mediation and the notes of these sessions will be made available to the judge–mediator. This will assist the judge–mediator in mediating the case with the children’s wishes in mind. To prepare the children for the counselling sessions, pamphlets have been developed to explain to the children what is involved in the sessions.

For the purpose of counselling children, KIDSLine, which stands for Kids in Difficult Situations, was developed by FJJC. KIDSLine is an interactive CD-ROM, with games, colourful images and simple dialogue, to help children aged between 7 and 10 years of age who are caught in the midst of their parents’ divorce to understand what divorce is about and to address their own feelings. It also explores family violence with the use of light-hearted digital animation. The programs contain easy-to-use information about who children can turn to if they are troubled by their parents’ divorce or if they are witnessing, or have witnessed, violence at home.

In individual counselling provided for children caught in highly contentious disputes, KIDSLine is used together with the counselling work such that it is played by the child together with a trained counsellor, who will guide them along the way. Emotions of trauma and grief experienced by children in such cases are also addressed in the program. The views of children obtained through counselling, while not available to a hearing judge, are available to a judge–mediator. In fact, the judge–mediator, when ordering counselling for mediation, can direct that KIDSLine be used during the session. Alternatively, the counsellors will use KIDSLine when they deem it necessary to do so.

38 The pamphlet is entitled ‘Why do I have to see a Counsellor?’
IX Separate legal representation

The Court implemented the Court Appointed Counsel scheme to help children embroiled in high conflict cases where there are intractable conflicts between parents, allegations of child abuse, evidence of alienation from one parent, or cultural or religious differences between the parents affecting the child. In these highly acrimonious battles, if the child is above 8 years old and capable of forming an opinion and expressing his or her preferences, the Court will appoint an amicus curiae who is well versed in family law matters to interview the child to find out his or her views and other concerns which are relevant to the child’s wellbeing. The counsel will be assisted by FJJC counsellors when he or she interviews the child.

The counsel will see both parties thereafter and act as a neutral moderator to assist parties to settle children’s matters. If the matter goes to hearing, the counsel will give a legal submission to the Court that highlights the child’s wishes as well as all other relevant factors which may not be disclosed by the parties. In this way, this scheme gives full cognisance to children’s right to be heard in a matter that affects their future and also reminds parents to consider seriously the interests of their child when at conflict with each other. Since the inception of the scheme, the Court has had to resort to this scheme only in a handful of cases, while relying on other means to hear the child’s wishes in the majority of cases.

X Conclusion

In the difficult cases that trouble the Court, and where the children are young, the above processes are invaluable to the Court to hear the wishes of the child, particularly for the purposes of mediation and adjudication of children’s matters. The Court is acutely conscious of the strains imposed on children in court processes, and endeavours to use the most appropriate method in each case. Thus equipped with the children’s wishes, the Court then makes the best decisions possible on children’s matters, based on the facts and circumstances of each case.
Child sensitive practices in family law disputes:  
Are we finally beginning to get it right?

Associate Professor Lawrie Moloney*, La Trobe University

In this address, I attempt to capture the essence of two important family law initiatives—the creation of Family Relationship Centres and the development of less adversarial approaches to litigation. Both promote processes capable of radically altering a family’s experience of post-separation conflict. Both offer the prospect of many more children being less traumatised by medium to high post-separation disputes. I conclude with fragments from a case study (shown on DVD at the presentation), in which the practitioners aim to place the needs of the child squarely at the centre of the process.

Law, love and mayhem

In perhaps the most famous soliloquy in perhaps the most famous play in the English language, Hamlet reflects on ‘The pangs of despis’d love, the law’s delay’. It is not the only time that Shakespeare juxtaposes love and law, and not the only time he suggests that the latter does not always impact positively on the former.

Shakespeare could not have been familiar with the recently developed concept of Family Relationships Centres. Thus, we can only speculate on what might have happened had Denmark put aside the equivalent of A$400 million to create such a network of relationship and conflict resolution services. Might a family tragedy have been averted? Might we also have been deprived of a quintessential piece of English literature?

In Shakespeare’s world, one senses a common belief that there was little that could be done to forestall tragedy. Tragedy has a sense of inevitably—as if events that influence our lives were written in the stars. In contemporary times, we tend to be less fatalistic. We put more faith in rational analysis and the possibility of progress; we search more actively for ways of improving our lot.

But rational analysis does not sit comfortably with questions around intimate relationships. The fact that some personal relationships and some families thrive and some disintegrate is not in itself a new phenomenon. What is ‘new’ is that, over the past thirty years, we have been afforded greater legal opportunities to declare publicly our dissatisfaction with the family we have helped to create. The formal processes associated with dismantling a family have become much easier.

Whether or not we have become more fatalistic about the chances of sustaining a long-term relationship is too large a debate to enter into here. But when families disintegrate and fights erupt over parenting issues, we have tended to be fatalistic about the impact of the fights themselves on the welfare of our children. In particular, the dispute resolution processes sanctioned by the laws we have created, have been more focused on ourselves as adults than on our children.

* My thanks to Dr Jenn McIntosh, who was unable to make it to the Forum, but whose clinical ideas and insights are heavily drawn upon in this paper. A referenced version of this paper has been published in the Journal of Family Studies, 12(1), May 2006.
For all of its social radicalism in 1975, the Family Law Act 1975 has, until very recently, remained firmly entrenched within adult-to-adult adversarial ways of resolving disputes about both money and children. The argument is often put that this position is overstated, because only 5 to 10 per cent of disputes (depending on which state one lives in) commence serious litigation. But the counter-argument—to extrapolate from Mnookin’s and Kornhauser’s (1979) now-famous phrase—is that the majority of parents have continued to bargain in the shadow of these laws and, perhaps more importantly, in the shadow of these legal processes.

In 1975, we thought it was divorce itself—‘broken homes’, as we then called them—that was the main cause of children’s difficulties. Later, there were studies that seemed to suggest that differences between children of divorced and non-divorced families could only be detected at the margins. This was very reassuring during a period of steadily increasing divorce rates, because divorce itself seemed unstoppable. We wanted to think that children were generally coping. We used words like ‘resilience’, which had a comforting ring to them.

Thus, for a number of years, there was little support for seriously examining the role of the dispute-resolution processes themselves on the subsequent wellbeing of children and families. The impact of entrenched parental conflict on the wellbeing of children was only poorly understood. We will never know how many children’s lives have been diminished as a result of our ignorance of this dynamic.

It is true that, from the outset, the Family Law Act envisaged non-litigious ways of resolving disputes over children. These processes, delivered by Family Court counsellors, had names like Conferences (Sec 62(1)), Supervision (Section 64(5)) and Family Reports (Sec 62(4)). In its public statements, the then new Family Court made much of its court counselling arm. They were portrayed as a success story. The counsellors did some good work (I know, because I was one of them). Occasionally, they helped to stop families from separating (we were sworn in as marriage counsellors, as this was also to be one of our roles under the then new legislation). Court counsellors’ conferences also stopped a reasonable proportion of separating families from self-imploding around parenting disputes, or from continuing along a path of potentially destructive litigation over their children.

In the early days, supervision orders were also used extensively. Court counsellors were requested to reintroduce a parent to a child, to facilitate handover in high-conflict situations, or to assess parental capacity. But because of the considerable resources required to sustain them, responding to supervision orders in this manner fairly quickly became a thing of the past. They were, in effect, replaced much later by community-based contact centres and the Contact Orders Program.

Family reports, the third major function of the court counsellors, have remained to this day, but from the child’s perspective they have always been a mixed blessing. At times, family reports represent children’s worlds and children’s views with clarity and conviction. Usually, at such times, the cases do not proceed or are resolved more quickly, so that they do not run their full destructive course. At other times, however, counsellors’ reports serve to provide more fodder for an adversarial process determined to establish a ‘winner’ and a ‘loser’.

Over the last thirty years, court counsellors have sometimes joined forces with legal practitioners and, together, the two professions have achieved good outcomes for children. This level of cooperation requires creativity and mutual good will. It has had little to do with formal rules of family law practice which, over most of the
period we are considering, have remained committed to the promotion of ambit
claims and tactical manoeuvres.

Over the past thirty years, the core assumptions that claim the allegiance of
counsellors and mediators, and the core assumptions that inform traditional legal
practice, have continued to be framed in very different languages. The former
assumptions have always been process-oriented and open-ended. The latter have
been far more rule-oriented and prescriptive. Consider, for example, the following
two questions: ‘Now that I am separated, how do my ex-partner and I propose to
parent our children?’ and ‘Now that I am separated what do I need to do to win
residence of the children?’

Process-oriented practices are focused on the interactions between the parties and
place primary responsibility for the outcomes and ongoing arrangements on the
parents. Even when parties cannot reach agreement, process-oriented practice takes
a relational perspective that recognises and attempts to accommodate the unique
features of each separating family. By way of contrast, rule-oriented approaches
search for precedents whereby it can be argued that if Family A’s situation is
comparable to that of Family B, a similar judicial outcome could be predicted and
justified. This forms much of the basis for legal advice about parenting disputes. Its
strength is that it attempts to reflect social norms. Its weakness is that it is largely
blind to the complex interactions and web of relationships that make up the unique
characteristics of a given family.

Precedents and rules accommodate themselves readily to adversarial processes. A
focus on process is more complex and, it must be said, less tidy in its delivery. Until
recently, process-oriented interventions were seen to be the domain of child and
family counsellors and some (but not all) child and family mediators. Until recently,
mediation came to be seen as something ‘at least worth trying’ in many disputes.
However, when this sort of mediation ‘failed’, bargaining would commence (or
recommence) against a backdrop of legal precedents, and with the prospect of an
expensive and potentially destructive adversarial hearing as the end game.

And though all experienced practitioners could point to cases in which a combination
of skill, good will and common sense triumphed over largely fear-driven adherence
to rules, too many medium- to high-conflict families have continued for too long
to be offered services that focus on ‘winning’. We now know that, for children, the
consequences of win–lose approaches to post-separating parenting disputes have
been serious.

The present reforms: What’s new?

Time is a relative concept in more senses than one. Ask any child who is waiting for
Christmas or a birthday to arrive—or waiting to seem mum or dad again. Perhaps it
is the child in me that speaks with some frustration that it has taken us so long to
arrive at a time when finally we will be required to:

- justify why and when litigation-driven processes over children of separated
  parents should occur
- ensure that if litigation is deemed necessary (as it sometimes must be), the
  procedure should not automatically proceed down adversarial pathways.

These two changes are at the core of the current round of reforms.
From the perspective of the history of divorce (which for practical purposes in our culture begins roughly in the mid-nineteenth century) and the many and varied impacts divorce-related decisions have had on children’s welfare, the thirty years it has taken to try to put real meaning behind processes designed to serve the ‘best interests of the child’ is perhaps not so long. Looked at from this viewpoint, my impatience turns to guarded optimism about the future.

I also recognise that it is a tribute to a dedicated group of socio-legal policy makers, politicians, judges and magistrates, and social and psychological researchers, that past difficulties and failings have been acknowledged and changes have been embarked upon that put more emphasis on good process (as Professor John Dewar pointed out earlier in the Forum), rather than an ever-increasing number of rules and regulations.

In my view, the two major changes are:
- the establishment of the community-based Family Relationship Centres (FRCs) and the bolstering of related early intervention and post-separation support services
- the move towards more flexible child-centred litigation options in the Family Court via what has been called the Children’s Cases Program.

In Australia, the Family Relationship Centres concept has grown out of a confluence of ideas and debates that I shall not dwell on here. The political debate has moved beyond considering only the challenge of how to provide more appropriate and more child-focused dispute management services. Refreshingly, the new Centres will also link into and promote a broad range of family relationship services that will focus on reinforcing families’ existing strengths, resilience and commitments. Fifteen Centres are currently at the approval stage. Over the next few years, we shall see the funding of sixty-five Centres and a large number of linked family relationship services.

This is an ambitious project, not just because of the sheer number of Centres and services envisaged, but because of the emphasis in the selection documentation on links, referral networks and, wherever possible, the forming of inter-agency consortia. Thus, thirty years since the Family Court’s hopeful beginnings, government seems determined to tackle not just the question of more appropriate dispute-resolution processes, but many of the core issues that have lead too many families through the Court’s doors in the first place.

The preventative thrust has two central and overlapping features. First, problems that contribute to families unravelling in the first place are to be tackled via:
- assistance targeted at men
- family relationship education
- services to prevent family violence
- early counselling programs.

Second, family conflict, especially conflict that arises from separation-related disputes over children, is to be tackled as early as possible by facilitators who have child-sensitive mediation skills. These facilitative services are to be further supported by post-separation assistance for families and children, especially through contact centres and the Contact Orders Program.

It would be a brave individual who would predict exactly how the new Centres and their relationship to the decision-making part of the system—the Family Court and Federal Magistrates Court—will play out over the next few years. There are
many challenges, and I could easily use up the time I have left in giving you my views on the systemic issues that need to be tackled. They include questions of how centre staff will be trained and supported in keeping children at the centre of their work, how the Centres will provide continuity of service for individual families, and how the Centres and other relationship services will work with the less adversarial processes being promoted within the Court via its Children’s Cases Program.

This last issue will be a critical one for families at the high-conflict to abusive end of the spectrum. As Professor Janet Johnston pointed out at the Safe Transitions Conference held in Sydney in late November 2005, at this stage we need to do more work on setting up the feedback mechanisms between the decision-making part of the system and the facilitative and supportive parts that will be provided by the Centres, other Family Relationship Service Providers (FRSPs), contact centres, and the like.

For many families, and especially for the children, it is not enough (and has never been enough) for courts to make orders and then hope for the best. We have a different family law system to any of those in North America, but we would do well to consider carefully those developments in the United States noted by Janet Johnston, whereby community-based family coordinators with limited and defined powers of arbitration are appointed to offer ongoing assistance in complex and high-conflict cases that have had the benefit of a court decision.

The link back to children

I spoke earlier about the time it has taken for us to focus more clearly on the connection between inappropriate conflict resolution processes and outcomes for children. It would be useful, therefore, to recap on a few core things we know about the impact on children of separation and divorce, and the processes that accompany them.

First, we know that, in Australia, approximately 1 in 12 children in the general population will at some time present with a mental health problem. Among the divorcing population, however, we know that this ratio increases to 1 in 4.

Second, we now know that this dramatic increase in child mental illness rates is caused less by the separation or divorce than by a failure to manage the pre- and post-separation conflict. Ongoing parental conflict damages children.

Third, we know far more about how adversarial processes (which normally begin the moment the first solicitor’s letter of claim is received) have for many years, modelled inappropriate ways of dealing with post-separation conflict. The government’s report, *Every Picture Tells a Story*, got it right in this regard. It recognised that adversarial processes have endorsed, or at least permitted, ambit claims, denigration of the other parent and a win–lose mentality. Under this system, the chances are for increased rather than decreased inter-parental conflict to ensue. Increased inter-parental conflict, in turn, continues to impact negatively on the children’s mental health.

Fourth, adversarial processes have also supported what I would term the ‘big bang’ theory of litigation. By this I mean that, under this system, litigation is seen as a process supporting a build-up to a single hearing, a single set of findings and a single outcome. The outcome is usually a case of too much, too late. I noted earlier that only a small proportion of cases filed within the courts (somewhere between 5
and 10 per cent, depending on which figures one consults from which registry) go on to commence formal litigation. But, as I also noted, this analysis begs the more important question of the impact on parents and on their children of this way of bargaining in the shadow of the law.

Finally, we know that within both adversarial and non-adversarial dispute management processes, we have struggled to represent or ‘see’ the child, even though the legislation requires us to adhere to the child’s ‘best interests’ as the core principle that guides our work. Numerous studies over the past ten years or so conclude that most children feel disempowered by dispute resolution processes that are about them, but do not include them in any meaningful way.

Because ongoing parental conflict impacts badly on children across a range of dimensions, a core recommendation of the Every Picture Tells a Story report was that child-sensitive, non-adversarial processes should become the norm when parents are in dispute about their children. These processes should be facilitative where possible. But when facilitative processes such as mediation are not recommended or not possible, the decision-making process itself should remain child sensitive and non-adversarial.

Thus, in essence, our options are:
- child-sensitive decision-making processes
- child-sensitive facilitative processes.

Both of these can be further divided into:
- child-focused decision-making and facilitative practices
- child-inclusive decision-making and facilitative practices.

My colleague, Dr Jenn McIntosh, suggested to the Family Pathways Forum in 2003 that child-focused practice can broadly be defined as finding the child’s voice in the absence of the child, whilst child-inclusive practice can broadly be defined as finding the child’s voice in the presence of the child.

I want to say something briefly about child-focused and child-inclusive decision-making. I then wish to draw your attention to some work in progress in the area of child-focused mediation. Finally, I will move on to child-inclusive mediation via a video demonstration [a transcript in the present written version] of two parts of a case study.

**Child-focused and child-inclusive decision-making practices**

History may judge the most lasting legacy of the former Chief Justice of the Family Court of Australia to be the Family Court’s Children’s Cases Program. I am not a lawyer and have only a perfunctory knowledge of the constitutional issues that such changes in procedures have raised and will, I imagine, raise in the future. At the same time, a non-legal historian may well ask why it took so long for such a program to be instigated.

My knowledge of the Children’s Cases Program comes mainly from listening to two of its most enthusiastic judicial advocates, Justice Linda Dessau, from Melbourne, who spoke at the Australian Institute of Family Studies Family Research Conference earlier this year and, more especially, Justice Mark Le Poer Trench, who has presided over a considerable number of such cases in Sydney. In his paper given to the Safe Transitions Conference in Sydney (November 2005), Justice Le Poer Trench noted that one of the flexibilities in the Children’s Cases Program is that decisions can be
made regarding certain aspects of a case that, in effect, permit parents and children to get on with their lives. Such interim decisions are not stop-gap measures until the ‘real trial’ is held; rather, they take the form of an enabling suggestion that can be revisited if and when needed.

In this sense, what I have called the ‘big bang’ approach to litigation, which sees anything less than a full hearing as something of a disappointment, has been turned on its head. Rather, the litigation processes is more iterative and responsive to changing needs. The whole future of a separating family does not hang on one or two decisions that arise out of the hearing of many hours of evidence. Further, the re-visiting of a case can, if required, be relatively informal. Justice Le Poer Trench spoke of taking conference calls by telephone at a prearranged time, to monitor progress and possibly make suggestions, or, if necessary make further orders. He noted that parents are sworn in on the first occasion only and remain on oath during subsequent sessions.

Much more can be said about the Children’s Cases Program by those more qualified than me. Suffice it to say here that two elements within the process go a long way towards dealing with criticisms of the impact of traditional family law litigation on families and children. The first is that parents are not set against each other via adversarially driven ambit claims about the merits of their own case compared with limited virtues in the claims of the other. Rather, they are provided with an opportunity to tell their own story, to describe what sort of parenting arrangements they believe would be best for the child(ren) and, importantly, to explain how they see their former partner’s parenting contributing to this best outcome.

The second is that children are given a voice. I understand this usually comes about via the input from a court-employed child consultant who, having spent time with the children, is able to represent their world and their aspirations as part of the court hearing. This meets the definition of child-inclusive practice—finding the child’s voice in the presence of the child—even though the child is never, as I understand it, present during the hearing. I can imagine a child-sensitive process also being achieved in cases in which it was not possible or practical to spend time with the children (when, for example, the children are too young). In such cases, a child consultant with knowledge of children’s developmental needs can be asked to comment directly on proposals specifically from the perspective of what we know about how children fare under differing arrangements post-separation. This, in my view, would be a form of child-focused practice.

As the first evaluations of the Children's Cases Program are yet to be completed, one must exercise some caution. Barring something in the order of a successful constitutional challenge, however, it would appear that the principles that inform these processes are destined to become the principles that inform future litigation over children when parents separate. Of course, difficult process issues arise when, for example, allegations of abuse or violence need to be ruled upon. The temptation, I imagine, will be to revert, in these cases, to adversarial methods of establishing truth. On this, I am again venturing outside my area of expertise. I simply point to an authority of no less eminence than Justice Michael Kirby of the High Court, in his assertion that there is no evidence to support the contention that adversarial procedures are intrinsically superior to a range of other options at weeding out the truth of a particular matter.
If Justice Kirby is right, then the retention, modification, or elimination of adversarial procedures from litigation over the children of separated parents will not centre on the question of the superior capacity of these processes to reach a higher form of truth. Rather, outcomes will have more to do with a tension between continuing to be mindful of children’s real needs, and the desire to stay within a legal comfort zone of processes that are seen as ‘tried and true’.

**Child-focused and child-inclusive mediation**

**Child-focused mediation**

Dr Jenn McIntosh and I have suggested elsewhere that child-focused practices should now be the minimum standard to which all family law practitioners agree to adhere in facilitating the resolution of parenting disputes. Briefly, child-focused approaches require that the child and the child’s needs remain central in the dispute. Jenn and I, with another colleague, Francesca Gerner, have recently completed a training film designed to demonstrate ways of maintaining a child-focused approach in the face of high parental conflict after separation during facilitative processes, such as mediation. This, and an accompanying handbook, forms a package due for release by the Attorney General’s Department in June 2006.

What we have endeavoured to demonstrate in this package is one model of intervention that can hopefully be used by Family Relationship Centres workers and others when, for whatever reason, it has been decided that children should not or cannot be involved more directly in the dispute management process. The film assumes that capacity of the parents to participate in mediation has been assessed in separate intake sessions. It first highlights an educational session run by Jenn, which is based on ideas from *Because it’s for the kids*, a booklet written by Jenn as part of our La Trobe University-based Children in Focus program. Like the booklet, the session invites parents to consider questions and issues like:

- What is it like to be your child at the moment?
- What will your children’s best (and worst) memories of this time of separation be?
- What hopes do you and your partner share for your children?
- When your children are adults and look back on the separation, what do you hope they will say about each of you as parents?

The film then tracks two high-conflict couples who are in dispute about their parenting. The task of the child-focused mediator (Lawrie Moloney in case 1 and Francesca Gerner in case 2) is to listen attentively to each parent, while resisting the inevitable invitations to make judgements on who has the more compelling case.

High-conflict parents frequently present issues that would challenge King Solomon himself. Child-focused mediators need to keep reminding themselves that their task is not to unravel the Gordian knots that family dynamics can generate. These disputes can be, in one sense, endless and endlessly impossible to ‘resolve’. Did she have an affair because he was ‘never there’ and neglected her? Or did he spend more time away because he was getting ‘nothing’ from her when he came home? Is a private conventional school better for the children than an ‘alternative’ one? And so on!

The child-focused mediator’s role is not to bring his or her views to bear on such questions, but to listen empathically and at the same time to bring the child or children and their needs into the room. Empathic listening helps the mediator
earn the right to invite and, at times, to challenge parents to refocus. ‘I notice how conflict distracts you from being the parents to Susan that you both agree you want to be.’ Or, ‘I sense in this moment that the children’s bridge you are working to build between you is again becoming shaky. If they are to do well, the children will need to cross this bridge without fear or anxiety many times in the years to come’.

Child-focused practice requires clarity of purpose, high-level communication skills, considerable flexibility, and control over one’s ego. The child-focused mediator has knowledge of children’s needs and, especially, knowledge of what research is telling us about the impact of ongoing parental conflict on children. But that knowledge is of little or no use if it is, as American researcher Dr Joan Kelly would put it, simply ‘laid on’ the parents. Parents need to come to the knowledge, and a willingness to act on that knowledge, through processes that are clear and consistent, but essentially invitational. The Irish have a saying that a person can only go as fast as s/he can go. We might dismiss such a saying as one that ‘states the bleeding obvious’, but for mediators, it deserves close reflection. As in music, in mediation timing is critical.

**Child-inclusive mediation**

Child-inclusive practice involves mediating between disputing couples and simultaneously working therapeutically with the child or children. On the assumption that each picture is worth a thousand words, I want to now show a segment from a demonstration tape Dr Jenn McIntosh and I did on child-inclusive practice in 2003 [reproduced in this written paper in transcript form]. We would do it a little differently now, but the basic principle remains the same. In the piece that follows, we see first a segment of this work in which, through play, the consultant (Jenn McIntosh) is exploring issues of concern to six-year-old Anna, whose parents are in high conflict following separation. The segment takes place after Jenn has worked with Anna to:

- introduce herself and establish a working contract
- from the child’s perspective, explore the family situation and explore the conflicts around the separation.

Following this segment, Jenn then speaks with Anna about her intention to meet with her parents. She is careful to clarify what, if anything, Anna would not want her parents to know. She tells Anna that she can make no promises about ‘fixing’ things, but will give it her best shot.

As a party to that experience, the child consultant will then join the mediator, usually on another day, in a session with the mediator and the parents. In that session, the mediator, who has by then established a working relationship with the parents, supports the child consultant in representing the world of the child to the parents.

It is, of course, important that the representation made by the child consultant is accurate and empathic. One of the skills at this stage is to assist the parents to appreciate better what impact their blaming or competitive focus on each other is having on their child or children, without furthering the ‘blame game’. The starting point is that parents are doing the best they can.

Issues of parental responsibility may need to be addressed formally, but again, within a framework of an explicit assumption that, if provided with sufficient cognitive and emotional space, the parents would want the best for their child or children. We have
found that if the consultant’s representation to the parents is clearly recognisable to them, the impact is usually significant—even dramatic.

What follows is part of Jenn’s exploration of the conflict experienced by Anna in moving between her parent’s houses. Jenn uses doll play as the medium of exploration. In the second segment (Transcript 2), Jenn represents Anna’s world to her parents with the support of the mediator.

Transcript 1 (extract)

Jenn: Okay, Anna. Now do you like dolls?
Anna: [Nods]
Jenn: Yep. Okay. Well I’ve got lots of dolls here. Would you like to choose some that maybe look a little bit like your family?
Anna: Me…
Jenn: Hmm.
Anna: Jake, dad…
Jenn: Hmm.
Anna: And mum.
Jenn: Okay, good. And maybe we could choose a house over here. That one would be mum’s house. And one would be dad’s house. Which would be which?
Anna: Mum’s, dad’s [points at houses].
Jenn: Okay, good. And maybe we could choose a house over here. That one would be mum’s house. And one would be dad’s house. Which would be which?
Anna: Mum’s, dad’s [points at houses].
Jenn: Yep, okay. Would you like to get the dolls to, into their houses and get them to maybe, to play a little bit, just where a normal day is like these days.
Anna: No, I don’t wanna do that. Let’s pretend this is a little girl’s house and this is the fairy’s house.
Jenn: A fairy’s house, uh huh. You’ve got something in mind, hey?
Anna: Hmm.
Jenn: Is that a fairy?
Anna: Yep, but she hasn’t grown wings yet.
Jenn: She hasn’t grown her wings yet?
Anna: Yup.
Jenn: Right. Okay.
Anna: But she’s a great jumper [takes another doll].
Jenn: And is that you?
Anna: Hmm.
Jenn: Okay.
Anna: Every day the little girl wants to go to the fairy’s house, but doesn’t know how, ’cause there’s an ocean between them.
Jenn: An ocean. Oh, I can see it, yes. So what happens?
Anna: So, one day, she jumps in the ocean, tries to swim to the fairy's house and gets gobbled up by a shark.

Jenn: Oh.

Anna: Then the, um, the fairy waves her wand, but it's brokened. So the, so dad goes out and swims and cuts the shark's belly open, gets me out, um, the little girl out, and then swims to the other side. Then the fairy comes out with two towels and says, 'Would you like to live with me forever?' And they did, and helped her fix her wand.

Jenn: Gosh, Anna, what a story. So here you were over here trying to get to the fairy house, but there was a big ocean in between. And you got gobbled up by a big, angry shark, huh?

Anna: Now the shark's, um, in the fire and now we're going to have some good dinner.

Jenn: Oh good. Fish and chips for dinner!

Anna: Nup, shark bits for dinner!

Jenn: Shark bits! And along came daddy and helped you to be safe over here. Right? Okay! Well, can we, could we maybe pretend that that's daddy's house over there and that you're having your visit with daddy over there. Maybe you can play a little bit about what it's like to visit daddy.

Anna: I'm watching TV while daddy's cooking...

Jenn: You're watching TV while daddy's cooking.

Anna: ...and then we have dinner and then I go to bed and daddy goes to bed too. In the morning, daddy, um, comes in and wakes me up and says, 'Good morning, it's time to go to mum's house. You don't want to be late'. And then I call mum and say, 'Mum can I please stay at daddy's house until tomorrow?'

Jenn: Oh, let's have mum over here. Why don't you come over here... and... Ring, ring on the telephone! 'Hello?'

Anna: Hi mummy. Can I please stay at daddy's house one more day?

Jenn: Another day?

Anna: Yes.

Jenn: Are you happy there?

Anna: Yeah.

Jenn: Alright then. I suppose so.

Anna: Cool. I'll see you tomorrow. Bye.

Jenn: Bye.

Anna: Beep, beep, beep. Heh heh! Let's watch TV, daddy.

Jenn: Okay, so you're having a good time over at daddy's house.

Anna: Hmm.

Jenn: And you wanted to stay a bit longer did you?

Anna: Yep.
Jenn: Right, okay. So you stay for another night, and then what happens?
Anna: Then daddy wakes me up again and says, ‘It’s time to go’. So me and my daddy go in the boat.
Jenn: In a boat!
Anna: Yeah, and sail...
Jenn: Oh, across the ocean, yep.
Anna: And sail, but daddy has to stay in the boat because he’s too angry. ‘Hi mummy.’
Jenn: ‘Hi sweetie.’
Anna: Daddy has to stay in the boat because he’s really angry mum.
Jenn: So what would happen if, if daddy came out of the boat?
Anna: I don’t know. They’ll just start fighting again, I suppose.
Jenn: You don’t want that to happen do you?
Anna: [Shakes head]
Jenn: No.
Anna: So get back in the boat daddy.
Jenn: Get back in the boat daddy. okay! Don’t get out of the boat or else you might start fighting again. What would the little girl do if they started fighting again?
Anna: She will say, ‘Stop fighting and... and push daddy back in the boat.
Jenn: Oh, over you go daddy.
Anna: And I’ll... I’ll push the boat and he’ll just sail back to his house—and I’ll pull out the motor.
Jenn: There you go. Would you like to sail daddy back to his house then?
Anna: Hmm.
Jenn: And, now you’ll stay with mummy at this house, will you?
Anna: Yep.
Jenn: Okay.
Anna: And every week I’ll go back to daddy’s house. But he’s not angry that I did that. He’s happy, because he doesn’t really like fighting and making me sad.
Jenn: He doesn’t like fighting and making you sad. I’m, I’m sure he doesn’t! And what about mummy?
Anna: Oh, mummy’s happy that I did that too, ’cause she doesn’t like making me sad too. And... and she’s happy that she’s not fighting with daddy again.
Jenn: Hmm... okay... alright. So we might say, ‘See you next weekend dad’.
Anna: ‘See you next week dad.’
Jenn: ‘Bye.’ Off they go. Okay!
Anna: Now daddy’s going to bed.
Jenn: Thank you very much. Daddy’s going to bed, is he?
Anna: Hmm.
Jenn: Alright.

Transcript 2 (extract)
This transcript portrays the concluding segment of Jenn’s feedback to Anna’s parents. The parents, Karina and Dan, have worked with the mediator for two sessions using the sort of child-focused techniques mentioned earlier. The primary task of the mediator in this session is to support the child consultant as she helps Dan and Karina to appreciate the world through Anna’s eyes. 
Jenn: …because one of the really interesting things, Lawrie, is that you know, through Anna’s eyes, um, she doesn’t see blame. She’s not looking at her world as, you know, is it daddy’s fault, is it mummy’s fault. [Turns to parents.] She’s more inclined, in fact, to worry that it’s her fault that you’ve separated, and even a fantasy that the fighting is… is because of her too. Now this is something that really needs to be thought about in the mediation, and it’s not to say that, um, that’s the situation you’ve put her in. It’s… it’s something we kind of have to understand through 5-year-old eyes.
Lawrie: This is very like a 5-year-old, yeah.
Karina: Sorry I don’t… I don’t understand how she could see that it was her fault; how she could come to that conclusion.
Jenn: Look it’s very normal… and a lot of parents with kids at this age kind of think, ‘What!’ You know, when… when we talk about this, it’s a very common kind of way of a 5-year-old coping when they don’t understand what’s really going on—that they take things very literally, you know, given the kind of equipment they’ve got up here to make sense of very complex emotions. What can come out is… is very strange sometimes. But Anna is seeing the fighting goes on about her, about who can have her, about is she late home, about, you know, all the issues around contact and the to-ing and fro-ing between the two houses. So through a 5-year-old’s eyes they’re fighting about me. Therefore I caused it.
Lawrie: She caused it! Do you, you might remember… I mean, I remember as a 5-year-old being certain that the moon followed me when I walked around. Now it’s that sort of sense that I’m causing these things to happen around me.
Jenn: And… exactly! We… I mean, we know it’s sort of vital for all kids when their parents are in conflict to try to keep it away from them but, particularly with this age group, it’s important not to give her
any evidence that she could turn into this sort of fantasy of, ‘I’m causing it... its because of me’. Do you see?
Karina: Yeah.
Jenn: It’s, like, triply important to keep her out of the middle of it.
Karina: Oh, I had no idea that she was feeling that it was her fault.
Jenn: Yeah, she... she worries about being little and about being a burden on you and about being dependent, I guess, on you at a time when you guys are very taxed and it’s... it’s hard enough isn’t it? Like we—for those of us who’ve been through this—when you separate and things are just a mess emotionally and the kinds of feelings you have are primitive and they are strong and they’re urgent and sometimes they don’t have words, it’s hard enough for us, isn’t it, to cope with that, let alone a 5-year-old, you know, who’s looking at it with her little bag of equipment and trying deal with it at her level. So I guess things do spill over onto her currently... and what it makes her feel is that things are not safe; things may get out of control in the family.
Karina: Well, they have, haven’t they? They’ve got out of control to the point where we’re not together anymore and, I mean, they’ve got out of control...
Dan: Well, you...
Karina: ...and anger's got out of control.
Dan: Well, you... you know how to push my buttons and you can also be a bit more, I don’t know, conscious, conscientious about not pushing them... my buttons, I mean.
Karina: Why can’t you be conscientious about controlling yourself, Dan?
Dan: Well, I’m doing my best. Why can’t you help?
Karina: Everything, everything you say, everything you have said so far is blaming somebody else for what you need to take responsibility for...
Dan: Anna’s happiness?
Lawrie: So where do we need to get to from Anna’s perspective?
Jenn: From Anna’s perspective, um, again I want to say that, through her eyes, it’s not about blame. But I think the word you use is... is a good one, Karina: ‘control’. It’s about, I think, using this mediation space with Lawrie to figure out some ways of at least controlling the conflict in front of Anna, okay? Lawrie will have lots of ideas to walk you through around how that might happen, um, but finding a way to keep the... keep it from being so toxic and so frequent around Anna, because those are the things that are beginning to eat at her.
Karina: This is one of the reasons why I don’t feel comfortable or like, um, letting Anna go over to Dan’s place, because every time we do, there’s a fight, and every time it happens, she seems so... that she
just doesn’t want to go, and I feel very uncomfortable about that. I... I feel, as a parent, it’s my job to protect her from that. And I do give Dan short shrift when he comes over, because I just don’t want to get into a situation where we are embarking on this, an argument or something like that. I just want her to come or to go and for that to be all it is. I don’t...

Lawrie: This is the paradox, isn’t it? You know, she likes being here [points at picture of two houses Anna has drawn]; she likes being here too. What she doesn’t like, is having to get across this gap past the sharks [Anna has drawn the space between the two houses as a shark-infested sea].

Karina: And I don’t, I don’t like her having to go across that gap. It does upset me to see her going off with her dad and not really wanting, being upset for some reason, and if the reason is that she’s feeling guilty or whatever, then I want her to go even less.

Lawrie: That’s... that’s one solution.

Karina: I mean really, but...

Lawrie: …that’s a solution but, again, if we go back to what Anna wants, we need to think about whether that’s really going to be a proper solution for her.

Jenn: Yes, its interesting—through Anna’s eyes. Um, the word you used just now is about protecting her, and one of things that Anna’s very concerned about, she talked about, is her feeling that she somehow needs to protect both of you, in fact, from each other, which is a very big job for a 5-year-old to take that on. And particularly wanting to protect mum from being sad and it seems that she’s very worried when she leaves you, Karina; that you will be sad without her. And that going to dad’s house, through Anna’s eyes, is something that she enjoys, something that she really wants to do, but the difficulty for her is two-fold. One is, are they going to fight again and, when I go, will mummy be sad. And, again, I... I don’t feel this is something that you are lumping on her; I think this is 5-year-old world and what a 5-year-old does when they love two people very much and they haven’t got a clue how to sort it out.

Karina: But, in a way, what she’s detecting is exactly what I am feeling. I am sad when I let her go and I see that she’s upset. I am, so she’s not wrong, her equipment is not wrong.

Jenn: No, its pretty finely tuned, in fact, isn’t it! Yeah, and so....

Dan: Well, she’s just as upset about leaving my place, and I am just as interested in protecting her from what seems to be, as you say, the... the reason for her guilt—which sounds like our fights—and the only time we fight is when we see each other, and we only see each other when we’re exchanging...

Karina: And on the phone, and you know, blah, blah, blah. We fight, Dan. Come on, we fight!
Dan: Alright, we fight, but we don’t… I mean it’s not like we call each other on the phone for the sake of catching up.

Karina: Having a chat? No bloody way!

Dan: Well, so whatever…

Lawrie: So, Dan, you’re saying the fight is often in the presence of… of Anna. Is that correct?

Dan: Well, our only… our contact is about Anna.

Karina: But so are the phone calls. Like phone calls are in the presence of Anna too.

Jenn: It’s very important to think about that.

Karina: They know who we’re talking to.

Dan: Yeah.

Jenn: I think Anna in this drawing… if I can explain it a little bit more, because I… it’s fascinating what she’s been able to pack into this drawing. One of the ways that she’s dealing with fighting is to kind of float away in her fantasies, as 5-year-olds do. So she’s put herself up here in a balloon and floating around with a fairy godmother, and you know she’s right into fairies at the moment, it seems. She told me about her fairy party, um, so part of her is happy, in a 5-year-old way, to float away with the daydreams. But Anna is a realist as well, isn’t she? She’s quite mature for her 5 years and she talked a lot about what’s happening down here on the ground. It’s that mum and dad are fighting at each other. ‘Why did you let her go in the balloon? How are you going to get her down?’ And up here she’s feeling sad and lonely that you’re not going to be able to get her down safely because you’re so busy fighting, okay? And that’s a really… it’s a strong worry for a 5-year-old to have. Can mum and dad look after me? Can things be safer? ‘Cause at the moment it feels a bit dangerous through her eyes and she’s worried about that. It’s so dangerous that, well, you know, dad left for a while and she didn’t know where he was and she was desperately worried about, you know, where is daddy? And is he okay?

Karina: And that was very difficult to try and explain to her…

Jenn: Yes, it must have been…

Karina: …at the time, because I didn’t know where he was either, so…

Jenn: And the conflict has been so strong that Jake has felt like running away sometimes and that you’ve both said things—in the heat of the moment it seems to me. For example, Anna talked about the time where she heard you fighting about… that maybe she would even just disappear. Do you recall a conversation about…

Karina: Where she would disappear?

Jenn: Yeah. Do you recall, you know, maybe in an argument talking about, um, that maybe Anna might just disappear?
Dan: I... I, yeah... I... in the heat of the... the anger, I... I... for the sake of protecting her from these fights we’re having... I guess I... well, you remember me blowing up about taking her and, to avoid these fights that we have all the time...

Karina: And she...

Dan: ...and not bringing her back or...

Karina: And she... and she heard that?

Jenn: Yes, she... she heard that.

Karina: She talked about that. You’ve got to be so careful what you say, Dan, and that wasn’t about protecting her either! That was about getting at me. Why can’t you just be bloody honest about your feelings? It was about getting at me. So it’s no wonder that Anna feels that she has to protect me. Jesus Christ!

Dan: Well, I didn’t know she was there.

Karina: Bloody dickhead, mate!

Jenn: Well, okay, look, I...

Dan: Thank you!

Jenn: What I wanted to say is that, through Anna’s eyes, she’s actually... she hasn’t taken this on board as daddy’s going to take me; daddy’s going to, you know, abduct me. But she’s... it has drained her of more energy that... Like I said, at this stage she can’t afford to be so stressed and strained by threats. And this kind of thing really eats at... at children, and it’s the kind of thing that I’m hoping in your discussions with Lawrie that you can build up ways of agreeing to protect her from it. And the first step is, I suppose, realising that, although you may think you’re protecting her from it, she’s... she’s got ears and eyes and it’s registering with her. Um... so there’s maybe another level of protecting her from this stuff that you need to think about.

Karina: Sorry. Is that one of the reasons why she doesn’t like going over to Dan’s—is that she thinks she... that she won’t come back because he's going to take her away... ‘cause she overheard that argument? Is that...

Jenn: Some children do very much worry about that. Anna doesn’t seem to be worried about that. She knows through her eyes that her dad loves her deeply and wouldn’t hurt her. She seems to understand, um, that that wouldn’t happen and she seems even to understand that was a heat-of-the-moment thing to say... like she dismissed it.

Karina: Right.

Jenn: But the general theme is she’s worried about things being out of control and dangerous in her life because, ah, you guys, through her eyes, have been a bit dangerous with each other. So how can you look after her and keep things safe when you can’t keep them
safe between the two of you, I guess, is a 5-year-old way of thinking. Does that make sense? Yeah?

Dan: Yeah, again, I guess it’s the fighting… it’s the heat of the moment—I tend to say stuff I don’t necessarily mean. [To Karina] And, I’m sure you understand I want Anna to be happy. Don’t think that I am some ogre and I don’t know that she loves you just as much as she loves me. I just wish you’d appreciate or understand the fact that she has a good time when she’s at home with me… when she spends time with me. It’s us together…

Karina: Yeah, but I can’t take that for granted. I can only go on what I see in her and what she says to me. I’m not there, so I can’t see it with my own eyes. I’m not experiencing any of that. I’m experiencing something different, which is that she seems to be unhappy. So… but we’ve heard otherwise! I’ve heard otherwise now.

Jenn: I think, Karina, that what Anna… what I get from the time with Anna is her… it’s very clear that… that her desire to be with both of you is strong. She finds the gap between seeing Dan, you know, fortnightly is a long time, as she would… It would be too long for her to be away from either of you. In a sense, she has to hold her breath for a long time and she seems to me that she doesn’t want to see any less of you, Dan. In fact, she’d like to see you more often, but only if it meant that could happen in a more peaceful kind of space. That, I don’t think she can see her way clear at the moment; to having more contact if it continues to be so volatile, but if you can sort it out, then I think she’s saying I want to be with mummy and daddy. Right? Does that make sense?

Karina: Yes, Yes.

Lawrie: So she’d like to have less than the fortnight’s gap?

Jenn: Mmm, but it’s a package deal, and we’d be setting her up for all sorts of problems if you agreed for her to have, you know, more time with Dan… if the same dynamic keeps happening. That’ll just be way too much.

Karina: ‘Cause more time at the moment would mean more arguments, so…

Jenn: Yep, yep.

Karina: …and more conflict! Yep, I get that.

Jenn: And I think that you know, Dan, you’ve got a strong relationship with her. There are lots of ways that you can reassure her about things you’ve said… about her disappearing, about her not being to blame for the separation. There’s lots of ways of reassuring her that you can see through her eyes now a little… a little more clearly, and that you can kind of make some adjustments now around that. It would be a really important message for her to get.

Lawrie: Mmm.
Jenn: There um, there ... I always ask kids if they have any advice to give their parents, and Anna was pretty full of it and...

Karina: I can imagine.

Jenn: ...she's given me some messages to pass onto you. Would you like to hear them?

Karina: [Smiles nervously] Mmm?

Lawrie: Are you sure you'd like to hear them?

Karina: Mmm, no! Yes!

Jenn: Alrighty. Anna wanted me to say, you know, having got all of this off her chest, she also wanted to talk about, as all 5-year-olds do... Look, in an ideal world, what she dreams about is all of you being back together in one big house and being together with the fairies in the sky and everything was rosy. Now, but 90 per cent of kids dream that way and wish that way and it's really hard for them to understand why the two people that they love most in the world don't love each other. Okay, but she is a realist as I've said before, and she seems to understand that's not going to happen and, given that's not going to happen, she says, alright, well, tell mum and dad this: 'Please stop fighting so much. Tell daddy to let mummy speak and don't talk louder than her so that you can hear each other'. She also wants: 'Daddy could you please get more toys at your house. And mummy could you please not always be so sad?' Okay... so from a 5-year-old, there's three pretty profound little pieces of advice which kind of sum up what we've been talking about and I guess if... if... if I could sum up what I've been saying, I think what... what we know is that, um, she'll always remember, you know, you guys separating. She'll always remember the conflict, but she will also always remember how you dealt with the conflict, how you handled it. So although things have been volatile and very tricky, you have got a window of opportunity to handle it a bit differently, so that her memories will be different of this time.

Lawrie: It might kind of be worth thinking about what it would be like to be sitting here in 10 years’ time and, ah, with Anna aged 15, and what would she think about, and how would she have experienced the way you two managed this separation. Would it be an experience that was tough, but, you know, it felt like you two really did the best you could around this for her—which is what I see you doing right now? [Long pause]

Jenn: Something to think about and talk some more, you know, together and talk with Lawrie about.

Karina: Well, I mean, the answer is that you just want her, want her to feel as though she's been loved and taken care of.

Lawrie: Mmm... and there's a lot of that... there's a lot of that here in what you're both doing.
Jenn: Is that, um, is there anything you want to ask me or, you know, for me to talk further about, or has that given you enough to think about for the time being?
Karina: Ah, just what’s the next thing that we do? How do we learn to control ourselves?
Lawrie: We’ve got some practical things now, I think, to do together. You know, in the light of what, um, we’ve learnt from Anna and from… from Jake. And, um, I feel pretty confident we can get there. You know there’s a lot of difficult stuff between you, but there’s a lot of things that you’ve actually got some control over too. So, like, Dan, when you say, ‘pushing buttons’, I know what you mean, but it’s not really like a button gets pushed and you have to respond in a certain way. You know, we have control over these things and I think you’ve shown that here as well. So there’s, I think there’s lots of, ah, things that we can do to now see if we can, you know, make this gap between the two houses less frightening for Anna—and for Jake, in his own way. He’s got a different sense of that, but there’s still an issue of moving freely between two parents who… who love him. So, thanks Jenn for that.
Jenn: Yep, you’re welcome. I hope it’s been helpful.
Karina: Thanks.
Dan: Thank you.
Karina: Yep, we’ll get there, I guess, in the long run.
Lawrie: Yes, I think you will.
Jenn: Yeah, you will.
Karina: Yeah, and thanks for talking with Anna and taking so much care with her.
Jenn: You’re welcome.
Karina: I really appreciate it. Thank you.
Jenn: It’s a pleasure.

**Child-focused or child-inclusive facilitative practice?**

In this field, practice necessarily precedes empirical investigation. Frequently, practitioners work intuitively, basing their intuitions on the best research and theory available to them. Next, they attempt to articulate more clearly what they are doing. The final step (though unfortunately one not always taken) is to research the efficacy and limitations of the model that has been developed.

The Attorney-General’s Department has supported an empirical investigation into the impact of these child-focused and child-inclusive mediation models. Lead by Jenn McIntosh, the project has been described in the April edition of the *Journal of Family Studies*. The early data are currently being analysed and these will be reported over the next twelve months.
Concluding remarks

It is said that hard cases make bad law. In family law, hard cases probably also distract us from considering processes more suitable to the large majority of situations. There are thousands of successful interventions made by thousands of practitioners (legal and non-legal) who, in a variety of ways, help steer separating couples and their children through the reefs and the quicksand. These interventions occur in the privacy of the rooms of mediators, counsellors, and lawyers but, by their very nature, are unable to be reported. Reported cases, those that have become more publicly derailed or entrenched, are the cases we tend to hear about. Some are in the criminal category and some are not.

We need to pay considerably more attention to good process in the highly problematic cases than we have in the past. We need, for example, to extend concepts such as Magellan and its more comprehensive development in WA, the Columbus Project. Proposed changes to the structure of the Court Counselling Service, whereby Family Consultants will attempt to facilitate, but will be in a position to report the contents of all sessions, are also an important development in this regard. Whether, or to what extent, a Children’s Cases Program format can be incorporated into cases in which criminal violence or abuse is alleged will also present a challenge, but one that, in my view, is worth considering.

We also need to pay considerably closer attention to the non-criminal moderate- to high-conflict cases, especially those in which the pre-separation conflict was low or moderate. Too many of these cases pass rapidly into litigation-driven processes, usually to the detriment of all family members. We now understand much more about processes that encourage a once more or less functioning family to tear itself apart once parents separate and disputes about children arise. We are learning how to handle these cases more appropriately and are in the fortunate position of having these efforts supported by a range of government initiatives that are the envy of colleagues in other countries.

Even the best processes will not avert all tragedies. Hamlet would have been a handful for any system or any practitioner. But knowledge that family tragedies will always occur should not prevent us from continuing to find ways of doing better.
Controersy over family law in Canada

It is an honour and a pleasure to be here and I am very grateful for the invitation from the Australian Institute of Family Studies to speak about developments in family law in Canada.

In many ways, Australia is at the vanguard of family law policy and there are many areas in which other countries, particularly Canada, are learning from you. There are, however, some developments in Canada that may of interest to you.

Today I would like to provide you with a very quick overview of a number of issues in family law in Canada—particularly focusing on children’s issues.

We had a very significant period of law reform in Canada, as in Australia and many other countries, to give recognition to gender equality in family law and in other areas of law. In the family law field in Canada, this period of legislative reform was essentially from 1968 to 1997. This was a period during which many laws were changed to give women greater rights and protections in family law cases, as well as to change divorce legislation to establish a regime in which almost all divorces are now based on no-fault grounds (one-year separation). Since the mid-1990s we have had a lot of controversy in Canada about family law issues, especially related to children, but no statutory reform on a federal level. While women’s groups were very influential in law reform in the period until 1997, in the last decade we have seen women’s groups being effectively challenged by men’s groups. I understand
that you’ve had the similar law reform controversy in Australia—a ‘gender war’ on law reform that often reflects what happens in individual high-conflict family cases, with allegations on both sides. Some of the allegations are extreme and some of the rhetoric is excessive, but there are also some reasonable and important points being made.

We have also had other competing groups involved in seeking family law reform: grandparents against parents; religious groups against civil liberties groups; and, interestingly more subtly, disagreements between professional groups (not just lawyers, but also judges, mediators, people who work in the family justice system) challenging advocacy groups about what the problems are and how to solve them. As a result of this controversy and lack of consensus, since 1997, we have had no significant family law reform at the federal level, with one important exception: same-sex marriage (which I’ll discuss shortly).

We’ve had a lot of systemic change, particularly for practitioners. I use the word ‘practitioner’ here very broadly—including judges, lawyers, academics and bureaucrats. Professionals who are involved in the justice system have had a role in changing the family justice system in important but subtle ways. These changes are largely procedural and attitudinal—new approaches which reflect a growing recognition of the importance of non-adversarial dispute resolution; a growing recognition of the need to distinguish the high-conflict cases from the low-conflict cases; and recognition that family violence is a serious issue.

We have begun research into family justice issues, particularly over the past ten years, but certainly nothing like the sophistication of research that you’ve had in Australia. Sometimes I think that in Canada, and perhaps elsewhere, the debates about reform of family law have been more influenced by misinformation coming from advocacy groups than good solid research.

One of the questions in Canada (bearing in mind that we have not had much recent legislative family law reform) is to consider the role of statutory reform in changing the family justice system. In Australia, you had major legislative reform related to children’s issues in 1995. My sense from listening to people here is that it has had limited impact, and so one has to ask: Is legislative reform necessary to change the family justice system? Is it important? How does legislative reform fit with things like attitudes of professionals, and public resources and programs? I’d like to address some of these issues.

**Demographic change in Canada**

But before getting into that, I want to talk briefly about demographic change. I note that there’s been a lot of discussion about this at this conference, including, in the last few days, recent data provided by the Australian Bureau of Statistics. I think that the kind of change we have seen in Canada is very similar to what you have experienced in Australia: the population is ageing; it is increasingly diverse. Canada historically was a largely Caucasian country. Now 18 per cent of the population is foreign-born and many of those are from Asia, Africa and the Caribbean, so Canada is an increasingly racially diverse country, particularly in the large cities. Toronto, the country’s largest city, is expected to be 50 per cent non-white within a decade. We also have an aboriginal population. It is about 3 per cent of the adult population, a little bigger on a percentage basis than in Australia. The aboriginal population in Canada is growing much faster than the rest of the population, with more than 5
per cent of the population under 21 years of age aboriginal, and in Canada and there are many issues of concern about aboriginal children and youth.

Canada’s population is increasingly urban (with almost two-thirds of the population living in the twenty-five largest cities) and increasingly secular (with less than one-third attending a religious service at least once a month). The birth rate in Canada (1.50 per fertile woman) is actually below that in Australia, and average family size is shrinking. The marriage rate is falling and there’s been an increase in unmarried cohabitation.

For the first time, in 2001, the census in Canada began to collect data on same-sex couples (at 0.5 per cent of all adults, very likely under-reported, as many same-sex couples are not willing to reveal themselves, even to Census Canada). Some of those families (15 per cent of female couples and 3 per cent of males) have children living with them, so when we’re thinking about same-sex families, we want to recognise we’re thinking about children as well.

One of the pieces of research that we’ve done in Canada, and I know you’ve done similar work in Australia, has studied changes within the ‘intact family’. I think that these changes are related to changes occurring in the context of divorce and separation. Within the family, we have seen in Canada a very significant change in gender roles. Women are much more involved in the labour force than was the case thirty to forty years ago. Fathers are now more involved in parenting in intact families. There are families where the father is the primary caretaker, but in a typical family, the mother is still doing more child care, and has more household responsibilities. Interestingly, we see that when children are young, the mother is clearly spending more time with them in the average family, but as children age, according to recent Canadian research, fathers are equally involved, and sometimes more involved than mothers in terms of time spent with their adolescent children.

We have a high divorce rate, but it’s stabilised at about 38 per cent of marriages.

Let me briefly mention joint custody and what’s going on post-divorce. We have had a very significant increase in what we call ‘joint legal custody’—a form of shared parenting, an issue that I will return to.

We have a significant domestic violence problem in Canada, but there is some good news: our rates of domestic violence seem to be slowly coming down.

**Constitutional issues and family law**

I won’t go through the constitutional issues in Canada, as there is actually a very complicated division of responsibility for family matters (again, we could learn from what you have done in Australia to consolidate jurisdiction in the federal government—a simple resolution politically unattainable in Canada). I will just mention that, largely, I’ll be talking about matters within the federal jurisdiction, which includes divorce law and in matters related to divorce, principally support and custody issues for divorcing couples. There are also significant areas of provincial responsibility around property and unmarried couples, and important jurisdiction for the administration of justice. So the federal government and provinces, in practice, have to agree about various issues to achieve effective reform.

One significant thing that we’ve been working on is unified family courts. These are courts that have a comprehensive jurisdiction for all family law cases, including child protection, specialist judges and support services. This, I think, is a very good
model to be used in different countries, and in fact I understand that it is being used in Western Australia, so you don’t have to look to Canada. It is a very important model.

One very significant development in Canada was the introduction of a constitutionally entrenched Charter of Rights in 1982. I know you don’t have a Charter of Rights in Australia, but increasingly countries are adopting constitutions to protect individuals from arbitrary state power, promote equality and protect fundamental rights. One day Australia may join that group of nations.

One thing that has happened in Canada because of the Charter of Rights is that in child protection cases, in particular, there is increased respect for the rights of parents, and in some cases even children. Child protection agencies in Canada cannot remove children from the care of their parents without giving respect for the principles of fundamental justice. This gives parents certain protections—for instance, low-income parents have the right to have legal representation paid for by the state. Every constitution always has some internal balancing, and so they are not absolute rights, and certainly, in appropriate cases, abusive and neglectful parents may lose custody of their children.

The equality provisions of the charter have also had significant impact on same-sex relationships, and fathers have gained some rights.

**History of family law reform in Canada**

Very briefly, the history of family law reform in Canada is broadly similar to that of Australia and the United Kingdom—there was a ‘gender equality’ revolution in family law. If one goes back and looks at the law in 1960, in most countries you will find specific statutory references to ‘husband’ and ‘wife’, with unequal rights in terms of various issues. In custody cases in the middle of the twentieth century, women had the presumptive right to custody of their children if the parents separated. There was gradual reform.

In 1968, Canada had its first national Divorce Act, with another major reform in 1986. Under the 1986 reforms, the usual grounds for divorce is one year of separation, though there is also the possibility of a divorce based on adultery or cruelty. In practice, we don’t have contests over the legal issue of divorce (dissolution of the marriage), nor do you in Australia. Gradually we have moved towards a regime of equal rights in regard to property in the context of separation, and the focus in child-related issues is the ‘best interests of the child’. There has been the removal of any legal presumptions in favour of mothers in terms of children, and we’ve moved slowly, much later than Australia, in having child-support guidelines.

**Same-sex marriage**

I would like to address two major family law issues that we’ve dealt with in the last year in Canada: same-sex marriage and Sharia-based family arbitration. These have received a lot of international attention, and both raise issues of the relationship between family law and freedom of religion and multiculturalism.

The issue of same-sex marriage is an issue of family law, but it’s also an issue of fundamental human rights that is more symbolic than practical. The public, politicians and academics have become very engaged in this issue in Canada—I think because it speaks partly to the nature of the society, and partly to the nature
of the family. What is the ‘family’? This is a fundamental issue that affects everyone in society, so many people care about it and got very engaged in the debate over same-sex marriage.

We had constitutional litigation that began in 2000. When the litigation began, a majority of politicians were opposed to recognition of same-sex marriage. Most politicians were prepared to recognise limited rights for same-sex partners, but were not prepared to allow ‘marriage’ for same-sex partners. Gradually, we had some court decisions—the most famous one being the 2003 Ontario Court of Appeal decision in Halpern v Toronto that ruled that the definition of marriage of ‘one man and one woman to the exclusion of all others’ violates the charter, as it discriminates based on sexual orientation. Our charter actually does not explicitly prohibit discrimination on the basis of sexual orientation; it simply says that people are ‘equal’ and entitled to ‘equal benefit of the law without discrimination’. It has been interpreted by the courts to include a prohibition on discrimination based on sexual orientation. Initially in these cases, the federal government argued to uphold the traditional definition of marriage, but gradually the attitude of the then Liberal government started to change, as public opinion began to change.

Same-sex marriage is now supported by a narrow majority of Canadians, who view this as a matter of fundamental human rights. In 2005, the litigation ended when, after contentious debate, Parliament voted by a narrow majority to enact the Civil Marriage Act, allowing same-sex marriage. Part of the debate focused on what would be the effect of recognising same-sex relationships on families and marriage. One of the very important aspects of this has been social science research that clearly indicates that same-sex parents, gay and lesbian parents, do as good or bad a job as opposite-sex parents. The outcomes in terms of education, behaviour, emotional wellbeing and so on are no different for children of same-sex relationships to children of opposite-sex relationships. Furthermore, excluding same-sex couples from the opportunity to marry sends a negative message not only to gays and lesbians, but also to the increasingly large number of children who are growing up in these relationships in Canada (and in Australia). Many of these children are the product of artificial insemination, some are children from a prior relationship, and they’re getting an unfortunate message if their parents’ relationships are regarded as ‘second class’. Same-sex marriage is partly an issue of children’s rights. The Federal Parliament acted before the Supreme Court of Canada ruled on this issue, as a result of the Civil Marriage Act, and we now have same-sex marriage everywhere in Canada. Very recently, a South African court made a decision to recognise same-sex marriage too, citing some Canadian jurisprudence on this issue, though I understand that decision is being appealed.

One of the interesting things that came up in the course of the debate was that if you are going to change the definition of marriage from ‘one man and one woman’ to allowing two men or two women to marry, why stop at two? What about polygamy? And, in fact, this is an issue in Canada. I think it’s an issue elsewhere, as there is an increasingly large immigrant population. Muslims are now moving to countries like Canada and Australia in large numbers, and some of them are involved in polygamous marriages. Should we recognise those marriages? In Canada, polygamy is a criminal offence. There are also issues in Canada concerning a significant number of fundamentalist Mormons who have been practising polygamy for a long time. I think that polygamy is a very different kind of issue from same-sex marriage, but
there is a growing controversy over polygamy in Canada, and the courts are likely to have to resolve the issue of the constitutionality of our prohibition on polygamy.

**Faith-based family law arbitration**

Speaking about Muslim families, in Ontario in particular, but also in other provinces, we have allowed arbitration of family law disputes, and the issue of Sharia-based family law arbitration has been controversial. Traditionally, arbitration of family law cases was done by psychologists and lawyers, but there are people who want religious leaders to do family arbitrations. In the Orthodox Jewish community there were some families, though a very small number, who were going to rabbis and the Jewish tribunal, the Beth Din, to have issues related to separation arbitrated and decided under Jewish rabbinical law. Muslim groups have argued that if the Jewish community can do it, they should also be able to do so. The Government of Ontario commissioned a study about this. Marion Boyd, a former Attorney-General who is a prominent feminist wrote a report that argued that, as we respect multiculturalism in Canada, and if both parties to a marriage want to choose to have faith-based arbitration, they should be able to do that. The Boyd report caused great controversy. The Government of Ontario was unsure of how to respond, and for months wavered back and forth. There were demonstrations in Europe and across Canada to protest against allowing people to choose to adopt Sharia law to resolve family disputes. There was a concern that some women would be coerced into accepting Sharia law, which very much favours husbands. The Ontario Government recently introduced legislation to prohibit arbitration based on religious principles in family law cases. Any family arbitration not based on the laws of Canada will be denied any legal recognition, and family arbitrators will be regulated.

**Child-related issues at separation**

**Fathers**

One of the issues in the Western world has been the growing role of fathers in intact families and then after a separation. In Canada, as in many other countries, we now have the ‘best interest of the child’ test for dealing with many legal issues. The courts in Canada have abandoned any presumption in favour of mothers, but many judges believe that there should be a ‘primary caregiver’ presumption. Many fathers argue that this is just a masquerade for the continuation of the now-abandoned ‘tender years’ doctrine that favoured mothers. This is an ongoing controversy in Canada. We don’t have any legislative kind of presumption in favour of primary caregivers, but it is an approach many judges follow.

One significant victory for fathers was a Supreme Court of Canada case based on the Charter of Rights. In a number of provinces, legislation said that when a child is born out of wedlock, the mother has the right to name the child if the parents can’t agree. There’s a long history of this issue based on illegitimacy, which has largely been abolished. The Supreme Court ruled that fathers who wish to identify themselves have equal rights to mothers in regard to naming their children. Different provinces now have different processes, but generally if the parents can’t agree about what the order that their names will be used for naming, there’s an alphabetical rule.

Fathers in Canada, as in other countries, have enormous concerns about enforcement of access. It’s a big problem in Canada. Courts are struggling to deal with it and we certainly don’t have anything as sophisticated as the Australian Child Support
Agency. I am very impressed with how the Australian Child Support Agency has created better enforcement of child support, but also has recognised they have to deal with access problems; this both promotes the interests of children and increases the likelihood that child support will be paid.

Child-centred family justice strategy

In 1997, the federal government made a promise to the fathers and grandparents advocacy groups, who were raising concerns about the guidelines and a range of child-related issues, that after the guidelines were in force, a special Parliamentary Committee would be established to study child-related aspects of the Divorce Act. In 1998, we had a lengthy set of parliamentary hearings held across the country. I was an expert witness before the committee, but there were literally hundreds of other people, primarily father’s groups. Mother’s groups were also involved. Professionals and academics had a relatively small role in the hearing process. The committee heard from the most voluble spokespersons, and the committee, I think, was clearly sympathetic to fathers and grandparents. When you look at the committee composition, you wouldn’t be surprised, because there were about three times as many men as women on the committee. There were also grandparents on the committee, who were clearly sympathetic to grandparents and fathers. The 1998 committee report, For the sake of the children, advocated moving in the direction that you have gone in Australia, removing the language of ‘custody’ and ‘access’, and using concepts like ‘shared parenting’.

Another issue examined by the committee was domestic abuse. The committee’s report had a list of factors that should be taken into account in making post-separation decisions for the care of children. The report suggested that domestic violence should be considered, but only if ‘proven’. Interestingly, that’s the only part of the report that used the word ‘proven’. There was concern that domestic abuse allegations had to be proven in a criminal court to be considered in a family proceeding.

The committee said it wanted to really open up and give fathers more rights, similar to where Australia’s going. However, the Department of Justice and the federal ministry had a more temperate response and said: maybe the committee and politicians are going too far: ‘Yes, we want to move in that direction, but we need to do more research. We should have new concepts, but maybe not the concepts the committee reported and suggested’. So there was both public consultation and the government began to sponsor research around various issues. (I’ll come back shortly to one of the papers that I co-authored on domestic violence which they sponsored.)

Custody and access

Then, in 2002, the Liberal government proposed new legislation (Bill C-22) to deal with custody and access. We had a number of Australians to Canada, including Justice Chisholm, who told us about things happening in Australia. Our proposed legislation was largely modelled on Australia’s 1995 reforms, with some other ideas included. It removed the use of ‘custody’ and ‘access’ terminology, and adopted ‘shared parenting’ language and parenting plans. There was no presumption of equal-time parenting. Family violence was mentioned. This was the first legislation that would specifically refer to family violence in the context of parenting arrangements at the federal level. The Bill was brought before Parliament and again there was lots of controversy. The Minister let it sit on the Order table, and while hearings
started, these were not concluded and so nothing was done. That legislation was not enacted, although in 2005 Alberta, interestingly one of the more conservative provinces in Canada, did adopt legislation that is largely modelled on your 1995 Act, which eliminates the concept of ‘custody’ and ‘access’, and uses the language of parental responsibilities and parenting time. This legislation deals with a relatively small proportion of cases in Alberta where people are not married.

While federal legislation has not changed, we’ve had very significant change in terms of practice, and so joint custody in 2002 (the last year we had data) was up to 42 per cent of cases. This is legal custody or decision-making, but not equal time. Even so, equal time has gone up to 8 per cent of cases and that’s been a very dramatic increase. A decade ago those numbers were much lower. Judges are more receptive to the idea that joint custody, in appropriate cases, can be imposed upon couples even if there is intense conflict, provided there is a history of cooperation. On the other hand, the Ontario Court of Appeal recently said that it should not be imposed merely ‘in the hope’ that there will be cooperative parenting.

The other area of change has been in the practice of lawyers. I’ve been involved in doing some work with the Canadian Research Institute for Law and the Family in surveying lawyers about how they deal with different issues. It’s clear that lawyers in practice have been significantly influenced by the literature, the discussion, what’s going on in other countries, and even by Bill C-22, despite the fact that it was not enacted. Interestingly, lawyers we interviewed said that they thought that some type of reform legislation would eventually be enacted, so they had already started to use the new concepts. Even though Parliament still has not passed the legislation, lawyers are using those new concepts in their settlement agreements. My sense is that most lawyers in most cases are trying to encourage their clients to settle, and say to clients: ‘You’ve got to be reasonable and you’ve got to think of the best interests of your child’. In fact, in some provinces, like Ontario, there is an ethical obligation written into the code of professional conduct stating that lawyers have a responsibility to advise their clients about the best interests of their children. Lawyers are generally trying to get settlements and they’re not pushing the parties further apart. However, when you get very high intensity family litigation, there are some lawyers who act like barracudas (we call them ‘sharks’); clients often choose them because they reflect some clients’ innate tendency to want to litigate. While some lawyers may heighten animosity, I don’t think that is the norm. Most family lawyers in Canada are encouraging use of parenting plans, working very much with mediators, psychologists and so on.

**Child support**

We have child support guidelines in Canada. I won’t take you through all of the details. Essentially it is a percentage-of-gross-income model, although a little more complex. We have certainly, on the whole, been satisfied with the guidelines in the sense that they have produced greater consistency and have significantly reduced the level of litigation. More child support cases are settled, and the guidelines have resulted in an increase in the amount of child support. Interestingly, one issue that the child support guidelines in Canada don’t deal with very well are situations where there is joint physical custody (where each parent has the child at least 40 per cent of the time). The guidelines essentially allow the judge to decide what is appropriate. Trial judges tried to develop a formula for joint custody cases, and we had different approaches where trial judges tried to encourage settlement by
articulating a formula. The Supreme Court of Canada recently ruled that Parliament didn’t have a formula for joint physical custody cases, and trial judges should not impose one. The circumstances of each case are to be assessed. There have been research reports written saying that we should have clear guidance for dealing with child support where each parent has the child at least 40 per cent of the time, but no such guidance exists at present.

In most provinces in Canada, the amount of access that a father has is not taken into account for the purpose of child support until he has 40 per cent of the care, which is a fairly high threshold. That, of course, is controversial, particularly with father’s groups.

You might notice that I haven’t said anything yet about Quebec, Canada’s largely francophone province with its civil law heritage. Quebec has a different system of child support guidelines, where they take into account access time to reduce child support—if an access parent (usually the father) has an increase in time spent (above a 20 per cent threshold), this will reduce child support. There is lots of controversy about this in Quebec, as a change in the father’s time from 23 per cent to 24 per cent would result in the readjustment the child support. We’re starting research to compare those kinds of models. I think the view among most professionals is 40 per cent is a high threshold, but because it gives a lot of certainty, you get a lot more settlements.

**The definition of ‘parent’**

One controversial issue in Canada that is also an issue in Australia is: ‘Who is a parent, and when does childhood end?’ In Canada, if parents have separated, the legal obligation to pay child support continues as an adult child is going through college or university, reflecting the moral obligation that most parents assume in intact families. There is controversy over this, with fathers who no longer live with their children arguing that they should not have a legal obligation that is not imposed on parents in intact families. This has been challenged under the Charter of Rights, but the courts have upheld this law.

Another issue in the definition of parent relates to ‘de facto’ or social parents or ‘psychological parents’. In Canada, a person who has ‘stood in the place of a parent’ has a child support obligation, and also a right to seek access or custody of the child. In Canada, the obligation of a non-biological parent is secondary in theory to that of a biological parent. Often the biological parent is unemployed or hard to find and so the psychological parents may play a full role, and the intention here very much is to focus on the best interests of children. The message to psychological fathers, largely stepfathers, who separate is that if they had a significant relationship with their ex-partner’s children, they should continue that relationship. That is in the best interests of children. The implicit message to these step-parents is: ‘Don’t think if you stop seeing children you won’t have to pay child support. You’re going to have to pay support. We don’t want to give financial incentives for determining that relationship’.

As in Australia, there has been considerable controversy in Canada about cases involving ‘paternity fraud’. A recent article in the *Journal of Family Studies* on ‘paternity misattribution’ suggests that these cases are not uncommon. While judges in Canada have had different views, most courts have ruled that an established psychological
relationship between parent and child does not end merely because it turns out that this was a situation of paternity fraud, and the child support obligation continues.

There is also lots of discussion in Canada about grandparents’ rights. They have limited opportunity to seek a right to custody or access, especially if they have had a significant care relationship with children as a result of actually having cared for them. The general attitude of the courts is that merely having a ‘grandparental’ relationship is not enough to give a legal right of visitation if the parents are not agreeable.

**Spousal support guidelines**

Spousal support is another issue worthy of brief mention. This is an interesting issue because there has been tremendous variation in Canada in how judges were dealing with spousal support because of a very vague set of legal provisions. Spousal support was typically not awarded, given that there is a primary obligation to pay child support, and child support has to be fully paid before a court can even consider awarding spouse support. But in a range of cases, particularly involving long-term, middle-/upper-middle-class women, spousal support has been given. The vagueness of the law and the discretion encouraged litigation, as well as pressure on the risk-averse, usually women, to give up the possibility of seeking spousal support. So people in the Department of Justice as well as lawyers, judges and academics have been arguing that we should have guidelines for spousal support, just as we do for child support. These advocates for spousal support guidelines approached politicians, who quickly recognised the relatively complex and contentious nature of the issue, without wishing to totally reject it. So in 2003, the then Minister of Justice authorised the establishment of a committee of professionals, including lawyers, judges, mediators and assessors to study the issue. In 2005, they proposed a set of spousal support ‘advisory guidelines’, which involved a fairly complex formula based on differences in income, the length of the relationship, whether there are children, resulting in a presumption of amounts of spousal support. For each case, there is a possible range of spousal support, rather than a single number. This range is now being used by judges and lawyers to help resolve cases, though it is purely advisory. Although this is still early days, it would seem that the spousal support advisory guidelines have significantly increased predictability and resulted in more cases being settled.

**Property**

As in many countries, there is a rough presumption in Canada of equal division of property. This is a provincial area of jurisdiction and there is significant variation and controversy around important details, such as how to deal with property that was inherited or owned before the marriage, and there’s a certain amount of variation around the issues like the division of businesses. Pensions are equally divided, and marriage contracts are permitted, though they’re not used very frequently.

**Unmarried partners**

Canada has had a very significant increase in unmarried cohabitation. All provinces give some legal recognition to unmarried cohabitation, but there’s considerable variation in how this is done. Some provinces limit legal recognition of non-marital de facto relationships. The Supreme Court of Canada has ruled that there has to be
some legal recognition of these relationships, but because people who are in this
type of relationship have chosen not to marry, the law does not have to give them
all the rights and obligations of a marital relationship. Interestingly enough, some
people argue: ‘If there is legal recognition of these relationships, it will discourage
people from marrying’. And that’s certainly a plausible argument. Interestingly, in
Quebec, which has a somewhat different regime and gives by far the least rights
to non-marital relationships for a variety of social and cultural reasons, also has
by far the highest rate of non-marital relationships. The denial of significant legal
recognition, as occurs in Quebec, has not discouraged people from entering into
these relationships; it simply means that those who are vulnerable or dependent
(usually women) may be denied legal redress.

Family violence

I want to talk a little bit about family violence. This is clearly an issue everywhere in
the world. In Canada, as elsewhere, we have seen increased social awareness, more
effective social responses, and more effective legal protections, but still significant
inadequacies. Some provinces have enacted Emergency Civil Orders legislation,
for example, allowing victims to have speedy access to the courts to get orders for
exclusive possession of their homes. We increasingly have criminal courts that are
specialised and deal exclusively with spouse abuse cases. The ‘Domestic Violence
Court’ is generally not a physical court room, but it’s a designation for a type of
process. There is a team approach, with police, the prosecutors, social workers and
victims witness workers, having special training and better coordination; they give
priority to these cases. These courts also generally have diversion to counselling
programs for abusive partners, and they have a range of sentencing options. The
judges, however, are not part of the team, but rotate through so that they can remain
independent. We’re trying different things in Canada to deal more effectively with
spouse abuse, and have seen progress.

There are more cases being reported to the police, and more and more victims
are coming forward. So if you look at police reporting statistics, we’ve had a very
significant increase in domestic violence, but I think it is because more victims are
coming forward. We have two measures that suggest over the last two decades we’ve
had a gradual decrease in actual rates of spousal violence. First of all, the domestic
homicide rate has slowly been coming down. Secondly, we do large-scale telephone
survey victimisation studies every five years, which ask people if they have been a
victim of a crime. Women have reported a gradual decrease in spousal abuse. I’m
talking about going from about 30 per cent of women to the low 20s, so we still have
a lot of domestic violence. Spouse abuse affects all social groups in Canada, but rates
are higher among low-income couples, the young, non-marital relationships, and
the aboriginal population.

Turning to legislation, most custody/access legislation does not specifically refer to
family violence, but many judges, I think the majority of judges, do take spouse
abuse into account in resolving cases. The biggest issue in Canada in the family
law context, as in Australia I suspect, is not the theoretical legal issue of whether
spouse abuse should be taken into account in dealing with custody and access, but
the practical question of whether a victim can prove that she has been abused. The
issue of false allegations that the Attorney-General referred to yesterday is certainly
an issue in Canada, as it is elsewhere, and I think it’s an important issue. My own
view, and we have research around this in Canada, is that while there are women,
primarily women (but also men sometimes), who make false allegations of domestic violence, the problem of false denials is a much more widespread problem. There are many more abusers who will falsely deny their abusive acts than victims or alleged victims who are making these allegations falsely, so it’s important to see this issue in its proper social context.

Dispute resolution services

In Canada, as in other countries (and we had a very good presentation from Joan Kelly about different things that are happening in the United States), a number of things have been done to improve access to justice and to family dispute resolution. I will just touch on a few developments. Joan mentioned parenting courses in the USA; in Canada, these are also being established and are often called PAS courses—Parenting After Separation. These are courses that are specifically intended to work with parents to help educate them to deal with their responsibilities in their relationships with their former spouse, with a special focus on child-related issues. In a few places in Canada, attendance is mandatory for those who have children and are bringing an application in the courts. We’re doing research around it, and, similar to the USA findings that Joan Kelly discussed, our research suggests that Parenting After Separation courses do have a positive effect on parents and children. It’s social money that is well spent, but it’s by no means a panacea—you get a real significant reduction in child-related problems and you get parents being more satisfied, but it’s a small part of a larger picture, and has only a limited effect on the more difficult cases.

As in other jurisdictions, we have begun to recognise the need to distinguish high-conflict cases from the medium- and low-conflict cases in order to have case management for the high-conflict cases. Case management is not in place everywhere, but there’s a recognition that high-conflict cases need one judge for one family, because the case might be in the court system for eighteen months or two years before you get to trial. We’ll have one judge handling all the interim applications, who tries to encourage settlement, with another judge taking over if the case goes to trial. A big change in Canada is in judicial settlement conferences or dispute resolution conferences. We are now having judges educated by trained mediators in how to help resolve disputes. Obviously in a different role from a private mediator—with different leverage and so on—but it’s been effective. It is not perfect, but it’s helping.

As in other jurisdictions, we have a growing number of people without lawyers in family courts. Although compared to the United States we have a relatively generous legal aid system, self-representation is a major issue. One initiative to help self-represented people is the establishment of Family Law Information Centres (FLICs). There’s usually a social worker there, a library of pamphlets, videos and DVDs, and lawyers who do free advice clinics for people. The centres are an important way to get information out. Nonetheless, self-representation remains a significant issue.

We also have a growing number of government-assisted supervised access and exchange programs. Parents can use them, with fees charged on a scale that reflects income. This is an important part of the government’s response to high conflict cases.
Collaborative family law

We also have collaborative family law. This was originally developed in the United States in Minnesota. Some lawyers just started dealing with family law cases in this way in about 1990. It has really caught on in Canada. All across the country, family lawyers are using collaborative family law. We’re doing research around this. Generally, it’s having a positive effect. Of course it’s not a panacea.

I’ll just say a word about collaborative family law for those of you who do not know what it is, though some of you already know a great deal about it. Essentially, it is an approach to family law cases where the parents each have their own lawyer and agree in writing to two things: (i) they are going to use their very best efforts to come up with a settlement in a constructive, collaborative way that focuses on their needs and the needs of their children; and (ii) if they were to litigate, they cannot use either of those two lawyers, but have to get new lawyers, which is a big incentive for everyone to settle the case. Collaborative law is being done across Canada, more in some places than others. Seemingly it works better in smaller places—places with a population of 500 000 or less. In large cities, the family bar is less cohesive and it may be more challenging to use this approach, but it is also being done in large cities in Canada.

Assessments and lawyers for children

We have court-ordered assessments available in most places in Canada. These are most commonly done by social workers, who may do home visits and interviews with children. In some provinces, the government pays for social work assessments. If the parties can afford it, a psychologist or psychiatrist may do an assessment.

In a number of provinces, particularly in Ontario, we have lawyers appointed for children, especially in high-conflict family cases and also child protection cases. It’s provided without cost to parents, by the Office of the Children’s Lawyer (OCL). The Office of the Children’s Lawyer is an agency that has both social workers and lawyers. They have a central office in Toronto, the biggest city in the province; there is a small full-time staff, while lawyers and social workers in private practice handle most of the cases. All of the lawyers and social workers who are in this program have to undertake joint training and education. It’s a very good model of education. Most of the lawyers and social workers who do this are in private practice; it’s very helpful for them not only to represent children, but also to deal with other family law cases. It’s a very interesting program. When the Ontario government went through a major process of cost-cutting, it didn’t cut this program at all. They saw it as not only socially valuable, but ultimately saving resources, especially in the court system.

The office decides on a case-by-case basis whether the child should have a lawyer, a social worker, or both. Each professional has different roles and they can work together. The lawyer’s major function, usually, is to help settle cases. In effect, they are mediators with a very high degree of leverage and it’s ‘open mediation’ (these are not the words they use, but are my words). They sit down with the parents and give them the assessment of the child that was done by the social worker. Parents are in effect told, ‘We think that this is the best outcome for your child and if you don’t like that we can go to court and I’ll tell that to the judge’. As you can imagine, that prompts most people to settle. Now, they’re not always right and sometimes a judge
disagrees with them, but in a lot of cases the judge is going to do what the children’s lawyer is suggesting, and that obviously helps people to settle cases.

**Family law reform: The role of legislation and research**

So where are we going? I don’t expect much from our federal government in terms of legislative change. We are actually just starting an election campaign in Canada. There are many issues, but family law is not one of them. I think that Canadian politicians want to keep their heads down on this type of contentious, complex issue. It’s not going to be a ‘vote-getter’, no matter what they say. I doubt that we will see major legislative changes in the foreseeable future in Canada, but I think we are going to continue to see systemic and service changes.

My own view is that legislation is significant for changing the family justice system, and it helps to change attitudes, but it’s never enough alone. I think the limited impact of your 1995 legislation is an example of the limited impact that legislation alone can have. You have to work with and educate the professionals. It’s a long process that goes on over time. The day the legislation comes into effect, it’s not going to have the effect; it’s the change in attitudes, education, and working on a community-by-community basis. It’s not at a national level; it’s in each community. We talk about ‘the family law system’. Well, in some sense, we do have a family law system, but really you have a system that’s in each community, and that’s where the work has to be done.

The Federal Government and the state governments clearly have a role. Giving adequate resources is certainly a way to help encourage and move the system along. And I should say, in fairness to Canada’s Federal Government, while they haven’t been changing legislation, they have quietly been putting more money into the system—nothing like Australia, but we have a lot more spending on family justice than we had in the past. We certainly look to Australia as a leading world jurisdiction and, in fact, I think it is right now the leading jurisdiction in the world. I think the Governor-General, in his speech, appropriately recognised that Australia in many ways has a leading role in the world. Everyone can learn from Australia. It doesn’t mean Australia can’t learn anything from other countries, but I think you’re being very innovative, you’re being collaborative, your politicians are prepared to confront controversy and take a stance to improve the justice system, and you have community resources. I think this conference is a very ample demonstration of that and, of course, you have very sophisticated research.

The work that the Australian Institute of Family Studies is doing is unique in the entire world and, again, this is one of your ‘exports’. I believe that the work of AIFS is of great social and economic value to Australia, though I must acknowledge that the rest of us also get to use this research without paying for it. That’s always the nature of research. It’s a great service that you’re providing for the rest of us.

Thank you for your attention.

*Postscript:* On 23 January 2006, a conservative minority government was elected. As of 25 May 2006, there were no announcements of any family law initiatives of the government, though in other areas, such as criminal law, there have been significant new initiatives and Bills introduced.
Changes in family life and controversies over family law

Cautious politicians and activist professionals slowly changing Canada’s family justice system

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Gender wars and other controversies slow reform, but systemic change is occurring in Canada

- 1968–1997 reforms strongly influenced by women’s movement
- In 1990s other groups organised around family law issues
  - Women vs. men ‘gender wars’ that mirror litigation
  - Grandparent groups
  - Religious versus civil liberties groups
- Since 1997, politicians cautious about family law reform controversies
- Systemic changes achieved by activist practitioners (lawyers, judges, academics, bureaucrats) rather than legislation from cautious politicians
  - Growing emphasis on non-adversarial dispute resolution
    - Procedural changes and new services
    - Practitioners adopt new approaches
  - Recognition of high vs. low conflict
  - Recognition that family violence is a serious issue
- Increase in Canadian government-sponsored research, but less than in Australia
  - Controversy often framed by interest group advocacy and misinformation
- Query role for legislative action?
  - Nature of issues
  - Attitudinal vs. legislative change
  - Resources and programs vs. statutory reform

Family demographics in Canada
Similar to Australia

- Population ageing: Median age 37.5 years and only 18% under 15 years
- Increasingly diverse: Increasing immigrant population, especially non-Caucasian—18% foreign-born; aboriginal population increasing, especially children—3.3% of total, but 5% of under-18
- Increasingly urban: 64% in 25 largest cities
- Increasingly secular: 32% attend church at least 1 per month, still predominantly Christian, but Muslims and ‘no religion’ growing fastest
- Smaller families and falling birth rate: 1.50 per woman
- Marriage rate falling and later average age at marriage up to 29 years
- More single persons
- Increase in unmarried cohabitation: 14% of couples
- Same-sex couples: 0.5% (likely under-reported), with 15% of female couples and 3% of males having children

Families and separation
Roles within the family are slowly changing, but still significant gender differences. In intact families gradual increase in dads’ role, but dads still do less childcare than moms
- Many women take maternity leave, but 81% of married women in labour force by the time youngest child is 6 years; most women with young children work part-time
- Never-married women without children earn almost as much as men, but poverty rate is highest for female single-parent families
- Divorce rate has stabilised at 38% of marriages
- Higher separation rate for cohabitants than married
- 20% of children experience parental divorce before age 10 years
- Joint legal custody increasing: 42%, dad 9%, mom 49%
- 12% of families are step-families
- Spousal homicide and violence rates are slowly declining
Constitutional context

- Complex division of powers (Constitution Act, s.91 and 92)
  - Divorce and related support and child issues are federal
  - Property and most issues for unmarried provincial
  - Administration of justice is largely provincial
  - Gradual de facto increase in federal power
- Unified family courts
  - Requires federal–provincial cooperation—very slow implementation
- Since 1982 Charter of Rights
  - S. 7 state deprivation of ‘liberty and security of the person’ only ‘in accordance with the principles of fundamental justice’
    - Right of low-income parents in child welfare proceedings to counsel paid by state (SCC, 1999)
  - S.15 equality
    - Same-sex marriage
    - Fathers claiming equal rights to mothers
    - Limits to differential treatment of non-marital partners
  - S. 1 all rights subject to ‘reasonable limits’
    - Balancing of interests
    - Freedom of religion (s.2) does not prevent child protection agency interventions to protect children

History of family reform law in Canada

- Pre-1968
  - Explicitly gendered rules (‘husband’ and ‘wife’)
  - Presumption of maternal custody unless guilty of adultery
  - Fault-based laws with limited rights to wives
  - Provincial laws
- 1968 Divorce Act
  - First national divorce law
  - Allowed for no-fault divorce (3 years separation), but retained fault grounds
  - Movement towards gender equality
- 1976 Murdoch in SCC denies property rights to married women
  - Provincial legislative responses to give equal property rights to married women
- 1986 Divorce Act
  - 1-year separation principle divorce ground
  - Best interests of child
  - Marital fault not a factor in support or custody
- 1993 Moge in SCC recognises compensatory spousal support
- 1997 Child Support Guidelines
  - Organised lobbying by fathers and grandparents
  - De facto federalisation of family law (except property and unmarried cohabitation)

Public controversies of 2005

Secular rights triumph over religion

- Same-sex marriage
  - Constitutional litigation begins in 2000, results in ruling that marriage to ‘one man and one woman’ violates charter (Halpern v Canada, Ontario, CA, 2003)
  - Federal government refuses to appeal, but seeks opinion of SCC on reference, but SCC declines to take heat for politicians
  - Politicians, feeling pressured by litigation, enact Civil Marriage Act to allow same-sex partners to marry (July 2005)
  - Challenge to Criminal Code prohibitions on polygamy may be next
    - Politicians unwilling to prosecute for polygamy or legislate to allow
- Sharia-based family law arbitration
  - Dec 2004 report recommends if parties agree (Ontario)
  - After eight months of debate and protest, Ontario government prohibits legally enforceable religious-based arbitration of family law issues
    - Concerns about exploitation of women
    - Concerns about limits of multiculturalism—one law for all

Fathers

- In theory, end of ‘tender years’ doctrine
  - Best interests test of Divorce Act 1986
  - Is ‘primary caregiver presumption’ just a gender-neutral form of tender years doctrine?
- Equal rights to name children (Charter of Rights) (Trocuk SCC 2003)
- Enforcement of access problematic
- Controversy about child support
Child-centred family justice strategy


- Parliamentary Special Committee (1998)
  - “Gender war” at committee hearings
  - Committee sympathetic to fathers and grandparents
  - Replace ‘custody’ and ‘access’ with ‘shared parenting’
  - Right to contact in preamble
  - Ambivalent approach to domestic abuse (only a factor if ‘proven’)
- Justice Department response
  - 1999 paper:
    - Affirmed idea of no presumptions: ‘one size does **not** fit all’
    - Supported change of ‘custody’ and ‘access’ concepts
  - Sponsored family research (1998 to present) and undertook more public consultations (1999–2002)
  - Federal–provincial report 2002

Custody and access

- 2002 Bill C-22
  - Compromise
  - Elimination of ‘custody’ and ‘access’
  - ‘Parenting orders’ allocating parenting time and ‘parental responsibilities’ (decision-making)
  - No shared parenting presumption
  - Only weak presumption of contact
  - Best interests checklist with ‘history of care’ and family violence
  - Not enacted due to controversy, but promises of new Bill
  - Alberta has reformed law to eliminate custody and access (2005)
- Changes in practice without legislative reform
  - Joint legal custody up to 42%
  - Shared physical custody: 8% (each at least 40% of time)
  - Courts may impose joint custody despite ‘intense conflict’ if ‘history of cooperation’, but not if mere ‘hope of cooperation’ (Ontario, CA, 2005)
  - Lawyers increasingly using ‘shared parenting’ concepts in separation agreements
  - Increasing use of parenting plans

Child support

- 1997 Child Support ‘Guidelines’ (CSG)
  - Mandatory unless contrary consent
  - Percentage of gross payer income (8% if 1 child; 12% if 2)
  - Limited flexibility
    - About 2/3 settle at table amount
    - Raised for share of extra expenses if payer can afford day care, extracurricular activities
    - ‘Undue hardship’ to lower (narrow)
  - CSG have resulted in more consistency and higher awards
  - Government agencies enforce child and spousal support
  - Controversial issues:
    - Child support if shared custody (SCC, 2005, Contino)
      - Growing portion of cases (8% and rising)
      - Each parent at least 40% of time
      - Individualised determination due to lack of CSG guidance
      - No automatic trade of time for money—more shared custody
    - Fed government has not yet acted on 2002 Federal–Provincial Taskforce recommendations for CSG change (e.g. presumption of amount for shared parenting)

Who is a ‘parent’ and when does childhood end?

- ‘Child support’ may continue while adult child is in university
  - Controversial with fathers
- Person who has ‘stood in the place of parent’ has child support obligation
  - ‘Victims’ of paternity fraud have to pay support if relationship established
  - Secondary to biological parents, if providing adequate support
- Right of psychological parents to seek custody/access
- Grandparents want more rights
  - Advocacy groups—limited recognition in Bill C-22 (not enacted)
  - Reluctance of courts to recognise rights unless parent is dead/unengaged or grandparent had primary role as caregiver
Spousal support
- Only about 10% of divorce orders provide for spousal support
- Great uncertainty and variation until SSAG
- Spousal Support Advisory Guidelines (SSAG, 2005)
  - Fed government sponsors practitioner/academic proposal—advisory
  - ‘Average justice’ rather than ‘individual justice’
  - ‘Cross check’ for courts and used to facilitate settlement
- Perhaps somewhat higher (especially at low end) and more certain
- Quantum only and not entitlement—is there a difference?
- Will more women seek spousal support?
- Two basic models: ranges not numbers
  - No dependent children—‘merger over time’
    - 1.5–2% of difference incomes and 1/2 to 1 year per year of marriage
    - Indefinite after 20 years of marriage or rule of 65 (age + length of marriage)
  - Dependent children—‘parenting partnership’
    - After child support and taxes, transfer by higher income spouse to leave that spouse with 54–60% of income
    - Continue until youngest child graduates high school and then end or shift to no dependents formula if eligibility left

Property
- Fundamental model of ‘marriage as partnership’ with equal division of ‘marital property’
- Variation between provinces
  - Pre-marriage property
  - Family use vs. all property
  - How strong is the presumption of sharing?
  - Government unwilling to tackle issues like pension reform
- Marriage contracts permitted
  - Increasing use, but still not common
  - Difficult to overturn (Hartshorne, SCC, 2003)

Unmarried partners
- About 14% of couples, with highest rate in Quebec, which has least legal recognition
- In all provinces (except Quebec), ‘spousal support’ obligations after period of cohabitation
  - Varies from any period to 3 years
- Some types of unequal treatment violate charter (SCC, 1995), but different property laws acceptable, since ‘choice’ not to marry (SCC, 2002)
- Statutory status for some purposes after cohabitation
  - 1 year for taxes (federal)
  - 3 years for all property rights in Saskatchewan
- Little-used registers in Quebec and Nova Scotia
- In most provinces, property claims only based on contributions to home or business (constructive trust)

Family violence
- Changes in police and prosecutor policies
- Legal aid priority for victims
- Civil emergency orders
  - Alberta, Saskatchewan, Manitoba, Prince Edward Island statutes
- Domestic violence criminal courts
  - Specialist police and prosecutor teams
  - Diversion
  - Sentencing options
- Case law takes this into account for child-related issues
  - Difficult issues of proof, especially at the interim stage
  - Victims may be pressured to settle
- Gradual decline in family violence in Canada
  - Increase in cases reported, but victimisation studies indicate decline
  - Prosecutions and programs having an effect
  - Change in public and professional attitudes
  - Effect of ageing population?
  - Domestic violence still serious problem
Improved family dispute resolution I
- Most cases are settled
  - Judicial dispute resolution
  - Difficult to overturn separation agreements (Miglin SCC 2003)
- Mediation
  - Mainly private
  - Limited court-affiliated and government support (Quebec and Ontario)
- Parenting After Separation courses (mandatory in Alberta and Toronto)
  - Parenting plans more common
- Collaborative family law: lawyer-led
  - Increasing use, especially in smaller cities (close family bar)
- Assessments
  - In some provinces, government will pay, at least for social work assessment (Manitoba and Ontario)
- Child representation
  - Ontario Office of the Children’s Lawyer (OCL)
    - Lawyer and/or social worker
    - Lawyer in guardian role
  - Quebec
    - Lawyer to be advocate if child expresses wishes (Quebec, CA, 2002)

Conclusion: The way ahead
- By late 1990s major responsibilities for family legislation largely shifted from provinces to federal government
- Little federal legislation since 1997
- Since 2004 minority federal government makes legislative action on contentious issues even less likely
- But systemic change is occurring, especially in regard to spousal support, dispute resolution, and custody/access
- Changes in professional attitudes and practices more important than legislative change, especially for child-related issues
  - Good research to convince professionals and policy makers
  - Professional and public education
  - Resources for services
- Arguably for some important problems, legislative change is less important than changes in attitudes and services (e.g. dispute resolution, domestic violence, custody/access)
- Canada looks to Australia as a ‘leading jurisdiction’
  - Innovative
  - Prepared to tackle controversy
  - Sophisticated research

Improved family dispute resolution II
- Access to justice
  - Legal aid: duty counsel, special family law clinics (Alberta, Ontario)
    - Great concerns about lack of access/funding
    - Increasing self-representation
  - Family Law Information Centres (Ontario)
    - Government in effect helps the self-represented
- Recognition of different types of cases
  - High-conflict vs. low-conflict
  - Denigration of other parent (alienation) by both parents common
  - Increasing use of case management
  - Parenting coordinators (only by agreement)
  - Parallel custody being tried
  - Recognise special needs if high-conflict, especially if violence
    - Supervised access and exchanges (Ontario)

Some Canadian resources
Institutes and websites
- Vanier Institute of the Family, Ottawa (policy and social science research) http://www.vifamily.ca/
- Canadian Research Institute for Law and the Family (socio-legal research) http://www.ucalgary.ca/~crilf/

Recent books
- Hovius, Family Law (Carswell, 2005)—law school casebook
- Bala et al., Canadian Child Welfare Law (Thompson Education, 2004)
- Payne & Payne, Canadian Family Law (2nd ed. Irwin Law, 2005)

Journals
- Canadian Family Law Quarterly (Carswell—practice focus)
- Canadian Journal of Family Law (scholarly)
Panel: Practical resources for separating families

Chair

Dr Bruce Smyth, Research Fellow, Australian Institute of Family Studies

Bruce Smyth is a Research Fellow at the Australian Institute of Family Studies. Prior to joining the Institute in 1995, he was a freelance professional drummer. He has published widely in the area of family law, and is a member of the editorial board of the Journal of Family Studies. Bruce is currently managing several large collaborative research projects at the Institute. Most recently, he and Juliet Behrens (ANU) have been awarded an Australian Research Council (ARC) Discovery Grant to explore the experiences of parents and children after the making of relocation orders.

Presenters

Dr Joan Kelly, Psychologist, California, United States of America

Joan Kelly is a clinical psychologist, researcher, teacher and consultant. She received her PhD from Yale University. For thirty-five years, her research, practice and teaching focused on research in children’s adjustment to divorce, custody and access issues, divorce mediation and applications of child development research to custody and access decision-making. She has published more than eighty articles and chapters, and her 1980 book, Surviving the breakup: How children and parents cope with divorce, remains a classic resource. Dr Kelly was Executive Director of the Northern California Mediation Center for 20 years, and mediated divorce and family disputes. She developed and provided training programs in mediation, and in parenting coordination. She was also a forensic expert, custody evaluator, therapist, consultant, and parenting coordinator in high-conflict custody cases. Now retired from the Mediation Center, Dr Kelly continues to speak and teach seminars in the US and elsewhere and publish articles. She was a member of the recent AFCC Taskforce on Parenting Coordination to develop standards of practice. Dr Kelly has been honoured with many awards, including Fellow of the American Psychological Association, the Distinguished Mediator Award from the Academy of Family Mediators, and the Stanley Cohen Distinguished Research and Meyer Elkin awards from the Association of Family and Conciliation Courts. She is Past-President of the boards of the Academy of Family Mediators, the Northern California Mediation Association and the California Dispute Resolution Institute.
Dr Paul Murphy, Family Court of Western Australia

Paul Murphy is a post-doctoral scholar in the School of Psychology at Edith Cowan University in Perth, Western Australia. In early 2002, he was seconded to the Family Court of Western Australia (FCWA) to lead an interdisciplinary, inter-university research team evaluating the Columbus Pilot project, an innovative program to better manage difficult cases involving allegations of spousal violence, child abuse or child sexual abuse, and family violence. Dr Murphy and his colleague, Professor Lisbeth Pike, have published a number of articles covering various aspects of the Columbus Pilot project. They are currently evaluating the Case Assessment Conference process in FCWA, and a highly innovative model of child-inclusive family reports. Dr Murphy has worked as a facilitator in post-separation parenting and stepfamily education programmes for the past fifteen years.

Mr Trevor Sutton, Child Support Agency

Trevor Sutton is Deputy General Manager of the Child Support Agency. He is responsible for Business Strategy and Innovation, including strategic and business planning, change management, business development, research and business analysis, electronic service delivery and the National Compliance and Enforcement Strategy. Prior to this appointment, Mr Sutton was Director of Marketing for the Australian Taxation Office. During this period, he managed major marketing campaigns associated with the government’s major tax reforms of the early to mid-1990s. He also was the National Campaign Director for the Australian AIDS Education Campaign in the Department of Health during the late 1980s. Mr Sutton holds an Honours degree in sociology and is currently completing a PhD in Public Policy at the Research School of Social Science at Australian National University.
Opening remarks

Dr Bruce Smyth, Research Fellow, Australian Institute of Family Studies

This session explores practical resources for separating parents and their children. Practical resources are likely to play an important role in the ‘new family law system’—particularly at the brand new entry point to the system: Family Relationship Centres.

The raft of family law reforms currently being operationalised comprises an interesting mix of both aspirational and practical macro-level initiatives. But at the micro-level, practical resources—such as contemporary models for parenting plans, graphic tools to help parents reflect on more lateral arrangements for the care of their children, information brochures, telephone- and web-based information tailored to Australian families, and so forth—can resonate with the broad thrust of the reform package by helping to reduce conflict, and by offering practical ideas for sharing the care of children.

How can practical resources help reduce conflict and foster the involvement of both parents? Binary ways of thinking create fertile ground for parents to get stuck, and to become entrenched. Worse still, all-or-nothing binaries can escalate conflict—‘They live with you or they live with me’, ‘Fifty–fifty or nothing’, and so forth. Practical resources can help parents to consider a broad range of options, and help them to explore possibilities that might best fit their own and their children’s particular needs and circumstances. Qualitatively richer options make sense in a more complex social world.

Recent work at the Australian Institute of Family Studies warrants brief mention as further context for this session. Catherine Caruana, Anna Ferro and I found that parents often report having limited information about formulating creative and individualised parenting arrangements, and are not sure where they can obtain this kind of information easily. Running on ‘automatic’ in the confusion, pain and stress of relationship breakdown, parents go along with what is suggested to them by legal or other professionals, who themselves may lack access to more creative approaches. Alternatively, parents are told by some counsellors, mediators and legal professionals: ‘Work it out yourselves’.

Surely we can do better than that? While parents are, in the long run, usually the best judge of what will work best for their children, resources that can help them to reflect sensibly on the possibilities can make a critical difference. To this end, recently we have been mapping different patterns of care in Australia to help parents see some workable possibilities.

In passing, I note that while much of the material being developed aims to support parents, pockets of innovative work are beginning to emerge in Australia and elsewhere that directly aims to provide practical help for children themselves. Let’s hope that this line of work burgeons quickly and responsibly.

Each of the three presenters in this session has been developing ideas and tools to support separating parents for some time. Dr Joan Kelly has spent the last thirty-five years as a leading clinician and researcher in the United States, and works tirelessly educating legal professionals and parents about post-separation parenting. Dr Kelly
is a legend, and continues to be at the vanguard of practical ideas and resources to help separating parents.

Dr Paul Murphy, who wears many hats as an embedded academic and clinician within the Family Court of Western Australia, has been doing some interesting work recently on parenting plans. Parenting plans are featured in various parts of the Australian reform package, and all the evidence from the US is that they have a vital role to play in the conflict-reduction arsenal of mediators.

Trevor Sutton, from the Child Support Agency, is the final speaker in this session. As many people here know, the Child Support Agency has been producing an array of useful booklets and education programs to help parents manage money, stay connected to their children, get along with their children’s other parent and look after themselves. This holistic and practical approach to the many challenges of post-separation parenting sets the tone of this session.

I look forward to seeing the many new practical resources for families, and hopefully their coherent coordination, in wide use throughout the new family law system.
Parenting plan models: Ideas and examples

Dr Joan Kelly, Psychologist, California, United States of America

Good morning. My interest in the types of living arrangements that parents make with respect to their children goes back many years.

When I first started doing divorce research in 1970, it was really compelling to hear from children aged as young as 5 or 6 years who were saying in interviews for our research project, ‘Would you please tell my mum I want to see my dad more?’ or ‘Would you please tell my dad that I want to see him? It makes me really sad that I don’t see him’. There were a lot of pleas and requests from the children at a time when the traditional parenting plan was every other weekend, if that. This sparked a career-long interest in the kinds of living arrangements in which children benefit, recognising, of course, that there are multiple situations and therefore many different possible ways in which parents can share the time with their children based on their particular family characteristics.

A strong influence on parent–child access has been a very traditional gender belief that children really belong with their mothers, and that’s been true in our culture and everywhere in the Western world and, I suspect, in many other cultures as well. This was amplified by psychoanalytic theory that placed tremendous emphasis on the importance of the psychological parent, which was most often the mother. In the 70s and 80s, mental health professionals, in particular, believed that children had to have one home base or setting. This belief guided a lot of the thinking about how living arrangements are made when parents are in dispute or simply functioning in the shadow of the law when deciding on their contact arrangements.

As a result of all these strands we ended up with either formally written laws in jurisdictions or informal guidelines for every-other-weekend arrangements. You don’t have to have them written down. My experience with custody evaluators and assessors and judges has been that they hold ideas about what’s right for children. Often their belief about what is right for children is that every other weekend is fine, or there should not be any overnight stays during the week, or children need a home base.

In the last thirty-five years there has been a lot of divorce research and child development research that informs the discussion about what kinds of parenting plans might be appropriate for different children and of different ages. For example, if you just look at the infant attachment research, when I was in graduate school it was believed that babies first formed an attachment to one parent and then only after that to the other parent—but that’s wrong. We now know from research that babies form attachments to both mothers and fathers at the same age, about 6 to 7 months. That kind of research informs how we think about children’s needs for continuity after separation when they have strong attachments to both parents—because they’ve lived with them and interacted with them—and other issues about child development. Child development research has been germane in showing that children typically, as a result of separation, show evidence of more insecure attachments. This is a function of the separation or, more specifically, the conflict surrounding the separation, but this research also suggests that, if things simmer
down and children maintain a relationship to both parents, they will move back in the direction of more secure attachments.

The problem with the guidelines that we've had is that they have been ‘one size fits all’. It has been mentioned several times at this forum that ‘one size doesn’t fit all’ absolutely. It is not suitable for children who have a very emotionally abusive parent to have the same visiting plan or schedule as children who have a very loving relationship with a parent. The biggest problem with restrictive visitation schedules has been that the quality of the parenting and the quality of the parent–child relationship were not considered. They were just blindly applied and certainly didn’t take into account cultural and ethnic and other kinds of issues.

From the divorce research field, we’ve learned a lot that has informed how we think about parenting plans. Among others, research both in New Zealand and Australia has asked children about access and the kind of time that they would like to spend with their parents. More than half of kids say that they would like to spend much more time with their non-resident parent, usually fathers, and if you ask college students whose parents have been divorced for ten years what they would have liked, more than 50 per cent of those kids say, ‘What I really wanted was equal time, but I also knew that my mother was opposed to it’. There is now a range of feedback from children about what it is they think would work for them.

We also have research that suggests that when children have a close relationship with the non-resident parent, the more contact, warmth, support and involvement they have with the parent, the better the child’s adjustment is post-divorce. There is some research that has found that when children continue to have a meaningful involvement with both parents after separation, there’s no difference between those children and married family children, in terms of psychological adjustment, social and emotional adjustment.

We’ve had research about sole physical custody and joint physical custody. Among other things, when you compare these groups, sole physical custody kids express much more pain and longing about the separation compared to children who have lived in shared physical custody arrangements. There is also some evidence, although some of the research has been problematic, that joint physical custody children are significantly better adjusted than are sole physical custody children, even after you control for any number of relevant factors.

What I really wanted to talk about this morning is that in the United States we have seen a movement towards developing research-based models of parenting plans that take into account some of the things which I’ve just mentioned previously, and creating tools for parents to use which will help them think about their particular family, their child’s age and the type of relationship that mothers and fathers have had with these children.

I will give you some samples of the Arizona model parenting time plan. This work was commissioned by the Arizona State Supreme Court. The court pulled together an interdisciplinary group (I was a consultant to this group) and spent a year developing this product, and it’s a very good product. This booklet—which is, I think, 47 pages—is wonderful, with really good drawings and tremendous information. It is available both online and in hard copy to parents in Arizona. The booklet addresses the key question for parents: ‘What kind of plan should we choose for our children?’ The booklet differentiates between parents who want to be very involved in their children’s lives following separation, usually the non-resident parent, versus those
who may want less involvement. It encourages parents to consider factors that are important in deciding what is an appropriate living arrangement for their children.

It is interesting to note that one factor highlighted by the booklet is a parent’s ability and willingness to learn basic care-giving skills, such as feeding, changing and bathing a child. This was inserted because there are many fathers who are less involved in the very direct physical care of their very young children. The belief underlying its inclusion in the booklet is that this should not be a barrier to having extensive contacts with children who have an attachment to a parent following separation; the issue is willingness and ability basically to learn. This is based on evidence that good parenting is all about on-the-job training—and that’s how all of us have learned to be good parents—and whether or not we’ve been parented well ourselves.

The information contained in the booklet for parents is research-based. Every one of these things has come out of research projects, particularly information concerning the things parents can do to benefit children.

In the end, the booklet divides the parenting plan options by age so that there are three different ways fathers can be involved with their children following separation for children from birth to 12 months and going on 12 to 24 months of age. There are ideas and examples for parents to use as a basis for their discussion and their negotiation. There are suggestions also for 3 to 5 years olds. The predominant plan all the way through is basically shared physical custody, typically 40 to 50 per cent of the time. Plan A is less extensive contact and Plan B somewhere in the middle.

I have developed parenting plan options that I’ve used over the years both for training purposes and also, in a different format, for parents in mediation, to help them think about the options to reach settlement about their children’s living arrangements.

The parenting plan indicates how many overnights the child is spending with the father in a four-week period. For example, 4 out of 28 overnights is every other weekend, where the child spends 4 nights a month essentially with dad. The plans are also annotated from a perspective of child development research and divorce research, so they are used as a teaching tool for parents along the way. For example, one of the biggest problems with every-other-weekend arrangements is that for many children the 12-day wait between seeing their father from one weekend to the next is intolerable, especially where there is an adequate or better relationship with the parent. It’s very upsetting to kids who have a warm relationship to wait that long. So when we started doing every-other-weekend and a mid-week visit, they only had to wait 7 days. The parenting plan deals with the extent of separation issues as well.

There are different kinds of joint shared physical custody resources that are available on the web that have to do with both divorce education programs. Software such as ‘Our Family Wizard’ have been developed to help parents negotiate their way through the process with a lot of structure and ideas for settlement. Finally, there are some publications that are relevant to this.
Parenting plan models: Ideas and examples

Joan B. Kelly, PhD
2 December 2005

Common determinants of parent–child access

- Traditional gender-based belief that children should live primarily with mothers
- Theory of one psychological parent
- A belief in the importance of one home for children after separation
- Resulting formal or informal guidelines for access used within jurisdictions

Child development: Relevant research

- Infant attachment formation
- Gender differences in parenting
- Separation anxiety
- Loss of important attachment relationships
- Overnights and infant sleeping patterns
- Secure and insecure attachments
- Sources of stability for child
- Child’s cognitive, memory, and language abilities

Problems with simple guidelines

- One size fits all—no assessment of child’s best interests or developmental stages and needs
- Quality of parenting not considered
- Quality of each parent–child relationship not considered
- Cultural, ethnic, socioeconomic, employment not considered

Parenting plans and empirical divorce research

- Children’s views of access
- Adjustment and academic outcomes associated with greater or lesser paternal involvement (not specific plans)
- Weaker father–child ties long-term
- Sole physical custody vs. joint physical custody
- Effect of overnights for young children

Options for parenting plans

- Arizona: Model Parenting Time Plans—www.supreme.state.az.us (AOC/Fam Law/Publications)
- AFCC website: Planning for shared parenting—www.afccnet.org
- Alaska Model Parenting Agreement—www.state.ak.us/courts/forms/dr-475.pdf
- Joan B. Kelly, PhD—Parenting Plan Options, jbkellyphd@mindspring.com (and included in materials)
Model parenting time plans for parent/child access (Arizona)
See www.supreme.state.az.us for full publication

Which plan should we choose?
- A parent who has an extremely busy work schedule, has not been the child's primary caregiver or wants regular access without extensive caregiving responsibility may consider Plan A.
- A parent who has been involved in the day-to-day care of the child may desire greater access. This parent may consider Plan B.
- A parent who has caregiving experience and desires maximum access may consider Plan C. For ages three and older, all Plan C schedules are for shared access.

Important factors to consider when choosing a plan
- The child's age, maturity, temperament and strength of attachment to each parent
- Any special needs of the child and parents
- The child's relationship with siblings and friends
- The distance between the two households
- The flexibility of both parents' work schedules and the child's schedule to accommodate extended access
- Childcare arrangements
- Transportation needs
- The ability of the parents to communicate and cooperate
- The child's and parents' cultural and religious practices
- A parent's willingness to provide adequate supervision, even if the parent has not done so in the past
- A parent's ability and willingness to learn basic caregiving skills, such as feeding, changing and bathing a young child, preparing a child for day care or school or taking responsibility for helping a child with homework
- A parent's ability to care for the child's needs

Children benefit when parents:
- Initiate the child's contact with the other parent on a regular basis by phone, letter, audio and videotapes, email and other forms of communication
- Maintain predictable schedules
- Are prompt and have children ready at exchange time
- Avoid any communication that may lead to conflict at exchange time
- Ensure smooth transitions by assuring the children that they support their relationship with the other parent and trust the other's parenting skills
- Allow the children to carry 'important' items, such as clothing, toys and security blankets with them between the parents' homes
- Follow similar routines for mealtime, bedtime and homework time
**Children are harmed when parents:**
- make their child choose between mom and dad
- question their child about the other parent’s activities or relationships
- make promises they do not keep
- argue with or put down the other parent in the child’s presence or range of hearing
- discuss their personal problems with the child or in the child’s range of hearing
- use the child as a messenger, spy or mediator
- withhold access because child support has not been paid

**Model parenting time plans**

**Birth to twelve months**
- Plan A(1): Three periods of three to six hours spaced throughout each week.
- Plan A(2): Two six-hour periods spaced throughout each week.
- Plan B: Two three-hour periods and one eight-hour period spaced throughout each week.
- Plan C: Two periods of three to six hours and one overnight each week.

**Twelve to twenty-four months**
- Plan A(1): Three periods of three to six hours spaced throughout each week.
- Plan A(2): Two six-hour periods spaced throughout each week.
- Plan B: Two four-hour periods and one eight-hour period spaced throughout each week.
- Plan C: One daytime period of three to six hours and two non-consecutive overnights each week.

**Three to five years**
- Plan A(1): Two consecutive overnights every other week and an additional overnight or afternoon/evening period each week.
- Plan A(2): Three consecutive overnights week one. Another overnight or afternoon/evening period of three to four hours may be added in week two.
- Plan B: Four consecutive overnights week one. Another overnight or afternoon/evening period of three to four hours may be added in week two.
- Plan C(1): Parents split each week and weekend.
- Plan C(2): Each parent has the same two consecutive mid-week overnights each week and alternates the weekends.

**Six to nine years**
- Plan A(1): Two consecutive overnights every other week. An additional three to six-hour period or overnight may be added each week.
- Plan A(2): Three consecutive overnights every other week and an additional four to six-hour period each week.
- Plan B: Four consecutive overnights week one with an additional overnight week two.
- Plan C(1): Split each week and weekend.
- Plan C(2): Each parent has the same two consecutive mid-week overnights each week and alternates the weekends.
- Plan C(3): The parents share time with the child during alternating seven-day periods. A mid-week overnight period is optional for the parent who does not have access that week.
Parenting plan options: Limited access (school age)
- Every other weekend (48 hrs = 4/28*)
  - 12 days separation too long for many children
  - Non-resident parent (NRP)–child relationship diminishes in meaning
  - NRP less involved in school/homework/projects
  - Resident parent (RP) has little time off
  - May benefit children if NRP angry/inept/rigid
  - 14% time-share
- Every other weekend and brief mid-week visit
  - 7 days separation too long for many children
  - Transition back to RP home has potential for conflict
  - Little time for homework or reconnecting
  - Often seen as rushed, hectic
* Number of overnights each four weeks with non-residential parent

Parenting plan options: Mid-range (expanded) contact
- Every other weekend and mid-week overnight (8/28)
  - Friday to Sunday p.m. and Wednesday p.m. to Thursday a.m.
  - No separation greater than 6 days
  - NRP engages in school and homework
  - RP has regular mid-week evening off-duty
  - No transition and conflict Wednesday evening
  - 28% time-share
- Every other extended weekend and mid-week overnight (10/28)
  - Same as above, with weekend to Monday a.m.
  - NRP assumes more responsibility for homework
  - Potential for conflict eliminated with school/day care pickups
  - 36% time-share

Parenting plan options: Joint custody (pre-school)
- All weekends and mid-week split
  - Each week:
    - Mid-week divided as described above
    - Friday p.m. to Saturday p.m. or Sunday a.m.
    - Saturday p.m. to Sunday p.m. or Monday a.m.
  - No separation from parents greater than three days
  - More appropriate for pre-school or two-year-old
  - An interim schedule until child is 5 or 6
  - Weekend transitions may be problem for high conflict

Parenting plan options: Limited access (school age)
- Every other extended weekend (6/28)
  - Friday p.m. to Monday a.m.
  - More expansive weekend
  - Child dropped off at school/day care
  - Reduced opportunity for conflict
  - One less transition for child
  - Not workable if NRP lives too far away
  - 21% time-share

Parenting plan options: Shared physical custody
- Every other weekend and split mid-weeks (14/28)
  - Each week:
    - Parent A: Monday p.m. to Wednesday a.m.
    - Parent B: Wednesday p.m. to Friday a.m.
    - Alternating Friday to Monday a.m.
  - All transitions at school or day care avoid conflict
  - Consistent mid-week residence each week
  - Five days separation acceptable for most children age 5+
  - Each residence provides clothing, equipment
  - Both parents fully involved in school, activities, play
  - Most children satisfied with shared arrangements
  - May not work for children with disabilities, difficult temperament
  - 2–2–5–5 pattern is 50% time-share

Parenting plan options: Shared physical custody
- Every other week (14/28)
  - Monday after school to next Monday a.m.
  - 7-day separation stresses younger children (< 6–7)
  - Minimum number of transitions per month
  - Parent and children can settle into routine
  - Lessons and activities may be a problem
  - Adolescents may want two-week or monthly rotation
  - Eliminates face-to-face parent conflict
Resources for parents and professionals

**Divorce education programs**
CODIP—www.childrensinstitute.net
Kids’ Turn, 1242 Market Street, 4th Fl., San Francisco, CA 94102–4802, 415–437–0700
Lemons2lemonade—www.lemons2lemonade.com
Children in the Middle—www.divorce-education.com

**Co-parenting software and guides**
Info@ourfamilywizard.com
www.sharedground.com

**Relevant Kelly publications**

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December 2005
Resources for separating parents

Dr Paul Murphy, Family Court of Western Australia

Transcribed address

I am in the unique position of being a postdoctoral research fellow at Edith Cowan University, but have been able to work primarily in the Family Court of Western Australia (FCWA) as a full-time researcher. I am also a group facilitator in the Contact Orders Program (COP) with Anglicare (WA). I helped to develop that program in Perth and want to start this brief discussion of resources for separating parents with that, because that is my practice base. Before I consider resources for separating parents—primarily the concept of parenting plans that are central to the proposed reforms—I wish to contextualise and ground my thinking on this issue.

I have been facilitating the eight-week group work program for separated parents since the start of the program. The best session in the program is Week 3, which deals with grief and loss. That is the session when people walk past the room and say, ‘What the hell’s going on in there? People are laughing?’ I say, ‘Oh, we’re talking about grief and loss’.

In this session, we explain to parents who are very angry that, in any separation or divorce, one of the parties (usually the woman) may be up to three years ahead of the other in terms of coming to grips with the situation from an emotional, and sometimes from a practical, perspective. It is more likely the woman who is in this situation, because in about 70 per cent of cases, women initiate the separation. Thus, by the time a partner announces that they want to end the relationship, it is common that they have done a lot of grieving and are more ready to start doing something else. Typically, they will be somewhere down the track in organising things like income support, accommodation and some legal issues. The partner (most often the man) may be in an early stage of grief—for example, shock, disbelief or anger—even though he too might have been unhappy in the relationship.

Often, by this stage in the session, women are nodding in agreement, while the men are saying, ‘Gee, I didn’t know that’. This can be one of the most profound insights for participants in the program. It can help former partners to better appreciate why each is behaving in certain ways. It permits differing explanations for otherwise incomprehensible behaviours.

In cases of separation, various levels of angst and grief go with the territory. An important question is how this links to our notions of early intervention. What is it that we are intervening in? Can we help parents to focus on his or her parenting responsibilities whilst they are still in an early state of coming to terms with grief?

There is another aspect to the question of early intervention when we consider court-based programs. Two major projects in the FCWA show that it takes almost two years from the time parents separate for the lodgement of a child-related application with a court. Of course, it takes even longer to reach a judicial determination. This finding may indicate that the concept of Family Relationship Centres (FRCs) is on the right track in terms of timing. In other words, it may be that the majority of separating couples try other ways of resolving parenting issues before they approach
a court, and that high-quality services at this stage will result in fewer parents needing to begin litigation proceedings. On the other hand, the services provided by the Centres will need to be sensitive to the fact that the parents may be quite distant from each other from an emotional perspective.

Another issue that has become apparent in the COP groups is the number of times that one parent appeals to specialised knowledge with respect to a child in a way that undermines the confidence of the other. The knowledge might be of a medical nature, such as, ‘You would have no idea what to do if he got an asthma attack!’ or it may focus on another safety related issue, such as, ‘You can’t take them to sailing lessons. You can’t even swim!’ These dynamics are evident in about half of the fifty or so groups that I have run over the past six years.

I thought, therefore, that the issue of children’s health and safety might provide a potential starting point for looking at a parenting plan. How much do some dads know about their children’s allergies—whether they are allergic to penicillin, what happens if they hurt themselves, when did they get their last tetanus injection? To me, parenting plans are much more than a contact regime. They are all of the things that we would do in an intact family, without necessarily feeling the need to articulate them. Hopefully, they are about both parents knowing what is going on with their kids.

For this reason, we developed a research proposal in collaboration with Anglicare (WA) and submitted it to the Department of Families, Community Services and Indigenous Affairs (FaCSIA) for consideration. The project was approved and funded by both FaCSIA and the Federal Attorney-General’s Department within the Contact Orders Program.

We began with the research and child development literature. However, we then took a different tack and went back to the UK-designed Looking After Children documentation system that has been developed for managing children taken into state care—the parenting plan when the state becomes the corporate parent. This system is now used in about twenty countries and is based on twenty-five years of solid research. It comprises a series of booklets divided up into age groups (similar to the materials that Dr Joan Kelly has just shown).

We thought that if we could sit mum and dad down face-to-face with a mediator and talk about medical, health and safety issues (such as allergies, managing food types, who is going to sort out the next doctor’s visit, who is the doctor that we go to, how do we contact them, and so on), then the parents might start talking to each other, doing so in a child-focused way. In the situations in which fathers have spent more time in the workforce and less time with their children, they might feel as if they can become more involved. Mothers, too, might become more confident in the father’s ability to manage the children in situations in which they have not, to date, played a role. It might also be possible that the parents might find that they can communicate about other matters too.

We have completed the first set of six age-related documents (0 to 1 years, 1 to 2, 3 to 4, 5 to 9, 10 to 14, 15 and over) that can be used as mediation tools. The different age groups are colour-coded so that, if there are three children, you have got three different-coloured documents on the table. This moves things away from a ‘one-size-fits-all’ model (that is, the children are not a ‘job lot’).
We tried to field trial the materials with mediators. However, many current mediation practices do not allow the time that you need to sit with a couple to work through things in this amount of detail. It takes about an hour and a half to work through the health care needs of a two-year-old and discuss the issues (When was the last time each child was given a health check? When did they have meningitis injections? and so on).

It was interesting that during the developmental phase that a number of mothers questioned why the fathers might have to know these details when the mothers had most of the care. It was pointed out that if the children were with him and something happened and the mother could not be contacted, what then? What if something goes wrong? I argued that the father needs to know. This places a new responsibility on fathers to learn how to take care of these matters and a new responsibility on mothers to make sure that the fathers know the required details.

The booklets that we have developed also have a photograph on the front of them. In the Contact Orders Pilot groups, parents do not talk about themselves; they talk about their children. They bring photographs of their children along to each meeting and we put them in the middle of the room in every session so that we can continually focus the parents on the needs of their children. Parents will talk about their kids very easily. They will not necessarily talk to each other about what is going on for them, but they will certainly talk about their kids.

We are currently working on the next phase of the project to develop separate plans for children at different developmental stages, in the hope that these additional materials will be useful tools for use in the Family Relationship Centres. These materials cover things like managing education, religious upbringing and self-identity in terms of relationships with grandparents and wider kinship networks (often, in a separated situation, children can lose contact with grandparents and other kin). A third phase of the project is to ask some focus groups of children for their views on the plans.

These types of parenting plans need considerable time, thought and input to negotiate and discuss. For this reason, they are designed to be used outside of the court system—possibly in Family Relationship Centres. The use and development of parenting plans is likely to require significant community education as, often, the information about children can be used as a power-base in attempts to control post-separation parenting relationships.

And, of course, parenting plans are not static things. They need to reflect and accommodate change as the children develop. A critical part of parenting plans is an agreement to review the plan, how it will be reviewed and who might assist in such a review process. Can the parents manage this discussion themselves, or might this be a role for parenting advisors or mediators within the Centres? I would like to suggest that parenting plans of this nature should play an important role in the new family law system, and that the materials that we have developed might be one way of helping parents to negotiate their continuing responsibilities for their children. This approach might also assist separated parents to realise that their parenting responsibilities continue, regardless of their separation, and that the concept of ‘final orders’ about parenting has significant inbuilt limitations.
What we did not develop was a formal summary of the parenting plan materials that will be required as the parenting order that can be endorsed by the Family Court and accepted by various authorities such as Centrelink, the Child Support Agency, the Australian Taxation Office, schools and pre-schools, sporting clubs, medical practitioners and other professions as the authority to provide services. This is a legal issue that is yet to be addressed.
Connecting clients: CSA products and services to support separated parents

Mr Trevor Sutton, Child Support Agency

Today, I would like to give you a whirlwind tour of some of the products and services that the Child Support Agency has developed over the past four or five years, often in partnership with other members of the family law system, and with the support of those agencies, such as the Department of Families, Community Services and Indigenous Affairs, the Attorney-General’s Department, the Family Court, and a range of community organisations who have helped support the process of developing those products and services to help separated parents.

It’s about helping—from our perspective—helping support separated parents from the point of view of engendering voluntary compliance. I guess you could ask the obvious question, ‘Why is voluntary compliance such an important objective for the Child Support Agency?’ It’s really important because it has a number of key factors or key characteristics. First of all, what we’ve found is that voluntary compliance engenders sustainable payments. It really shouldn’t come as any surprise, but at the very least it’s very important in terms of financial support for children. Furthermore, it is also associated with high levels of customer satisfaction and that’s very important. For me, however, probably one of the most important characteristics of voluntary compliance is that it is associated with much higher quality of relationships between both the parents and the children. Last, but not least, it actually engenders lower costs—lower costs to the community and lower costs of administration—and again that’s something that is part of that important mix.

Armed with this knowledge of why voluntary compliance is so important, the Child Support Agency has sought to identify the factors that might be involved in leveraging voluntary compliance and improving it. To this end, we embarked upon our own research, reviewed the literature and came up with four key areas that we believed if we could leverage. We could actually grow that voluntary compliance market and, indeed, deliver a whole range of other benefits for parents.

Just briefly, to touch on those, procedural justice is really about the extent to which parents believe they’re receiving a ‘fair’ service and they’re being given an understanding of what their rights, responsibilities and obligations are all about, and that that’s being done with a level of empathy. Perceived affordability of child support came up as another important factor. Involvement with the children, and quality of the relationship with the other parent—the last two factors—are obviously very much interconnected.

I would now like to focus on the first factor, procedural justice, which is really about making it easy for parents to understand their rights, obligations and options, and doing that hopefully with a great deal of empathy, particularly given the situation that parents find themselves in after separation.

Some of the things that we invested in to help leverage, if you like, that particular factor occurred in the early days of the agency. We redesigned our business some five or six years ago to segment parents into a group which we call ‘new clients’ (or ‘new parents’) and this is pretty much the way the name describes it: those parents who
are in the first nine months of their time as clients of the CSA. We then allocate 22 per cent of our resources to about 8 per cent of this particular client group in the first nine months of their experience with the Child Support Agency. This means that we are spending a lot of time trying to individually case-manage those parents when they first come to us, and that’s why we invested that level of resourcing.

We also invested in channel management—that is, what we call a ‘phone-first culture’—some years ago, and that was really about trying to deal with clients in a much more personalised way over the phone, as opposed to, say, in correspondence, which we had traditionally done in years gone by. This shift meant we were able to reduce the amount of inbound mail coming from parents—from about 15 per cent of our transactions with parents, down to less than 2 or 3 per cent.

We also dramatically improved our service standards around the phone side of our channel; from, to be quite honest, answering our phone, if we were lucky, within about three or four minutes of a parent ringing, to now less than twenty seconds. So there were some really important service standard improvements that we made in that area.

We also ramped up our face-to-face interaction with clients through increasing our community information sessions, and we are trying to help parents who wish to self-serve through an improvement in our web service. So, in the guise of a quick overview, I have tried to describe a couple of elements aimed at improving procedural justice. Clearly there’s a lot more that we need to do in those areas, but that was, if you like, just the start of that journey, and some of the improvements that we have made.

If we look at perceived affordability, I guess it was one of those areas which we actually found quite interesting, because we found there was really very little relationship between the extent to which a parent perceived the child support was or wasn’t affordable, and their level of income. This told us that it was really more around how parents managed their income rather than how much they actually had—although there was one exception to that, which I’ll mention in a moment. So what we embarked upon was the development of a range of products, one of which was called Me and My Money. We then provided some other products to back that up, such as a CD-ROM which allowed people to interactively work out their finances, hopefully in a useful way. It was developed in cooperation with various financial planning organisations and, indeed, we still have links to those organisations through the product.

The exception that I mentioned just a moment ago was unemployed newly separated parents, who really were facing major economic constraints and were having great difficulty engaging in voluntary compliance. We approached government and sought extra resources, and developed a program called the Newly Separated Unemployed Parents Program. This program is about trying to engage those parents, help them with their emotional and social needs, particularly around parenting and relationship management and, through a series of interventions, actually try to get them back to work earlier than otherwise. So this initiative was really about capacity-building. We’ve been running that program for about two years and the early results highlight the multiple issues faced by this group; in particular, the challenge to find them and then get them into the intervention. For those who have participated, results are encouraging.
We developed a range of products covering the other areas. *Me and My Kids*, for example, focuses on helping dads who don’t live in the same house or with their children anymore. The booklet aims to give them some strategies to enable them to parent across households more effectively.

The Staying Connected program is about targeting those parents (that is, non-resident parents) particularly at the workplace, and we’ve been running that workplace program for quite a number of years now. According to the parents themselves, this program has improved their ability to deal with their ex-partners and to have a better relationship with their children in a very significant way. These initiatives are more practical than academic.

We also have a product which helps parents with their relationships: *Me and My Kids* and *Me and my Ex*; the latter is a new product that will be launched shortly. It will also be promoted through the *Women’s Weekly* magazine over Christmas.¹

We’ve developed a range of products which touch on the emotional wellbeing of our clients, because one of the things we realised was that there was no point sending people off to counselling and various other things, or in fact even doing parenting plans, if you didn’t actually address the emotional and psychological issues that parents might have after separation. One of the products that we developed is *What about me? Taking care of yourself*. We also offer a telephone counselling support service. If we detect that parents might benefit from some counselling and discussions around their personal issues, they can be transferred to a dedicated telephone counselling service during conversations with us. This service has been running for quite a few years and is highly successful. Coming soon is *Me and My New Family*, which recognises the importance of re-partnering and trying to help parents understand some strategies they might find useful should they re-partner.

I would like to encourage those who are not familiar with these initiatives to visit our website (www.csa.gov.au) to find out more about them. I hope my brief overview has provided you with some of the flavour of what we’ve been doing. As the new family law system unfolds, I would like to think that these initiatives will also help foster cooperative post-separation parenting arrangements.

¹ This product has now been released and is available at www.csa.gov.au.
Better outcomes in family disputes for New Zealanders

Principal Family Court Judge Peter Boshier, New Zealand

Peter Boshier is the Principal Family Court Judge of New Zealand and was appointed to that role on 12 March 2004. Judge Boshier was born and educated in Gisborne and then attended Victoria University, where he graduated in 1975 with the degree of LLB (Hons). He practised law in Wellington, mainly in the areas of criminal, civil and family law and was appointed a District Court Judge specialising in Family Court work in April 1988.

In 1993, Judge Boshier completed a review of the Family Court as a result of a request for an overview of the operation of the Court by Principal Family Court Judge Patrick Mahony. That report has formed the basis of a number of reforms and it features in recommendations for change made by the Law Commission in its report 'Dispute resolution in the Family Court', Report 82, March 2003.

Judge Boshier is also a Youth Court Judge, and sees an important place for both courts to work together where there are young people at risk. Recently, he spent 18 months in the Pacific training judicial officers in Micronesia, Melanesia and Polynesia and so he has a good appreciation of specific cultural issues. Judge Boshier’s term as Principal Family Court Judge is for eight years.

In the twelve-month period between July 2004 and June 2005, 66,499 substantive applications were filed in the Family Court. The breakdown of those applications is as shown in Table 1 (on page 176).

The vast majority of this work involved children. Cases under the Guardianship Act 1968 alone constituted 37.5 per cent of all applications and protection cases under the Children, Young Persons and their Families Act 1989 constituted 16.6 per cent. Domestic violence cases, which most often involve the protection of children who are the victims of violence, accounted for 12.2 per cent.

When there are family disputes and when arrangements need to be made for children, or protection obtained from the Court, what most New Zealanders seek is speedy and user-friendly access to justice.

We know that the majority of cases coming into the Family Court involving children do not require a formal defended hearing from the Court. For instance, of cases brought under the Guardianship Act 1968, those actually requiring an order of the court were around 6 per cent. The number of orders made as a result of defended hearings in which a determination was sought from the Court was even less.
Table 1  Breakdown of applications to the Family Court, July 2004 to June 2005

<table>
<thead>
<tr>
<th>Area of application</th>
<th>Number</th>
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<tbody>
<tr>
<td>Alcohol and drugs</td>
<td>97</td>
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<tr>
<td>Adoption</td>
<td>600</td>
</tr>
<tr>
<td>Child support</td>
<td>368</td>
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<tr>
<td>Children, Young Persons and their Families Act 1989</td>
<td>11,036</td>
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<tr>
<td>Dissolution/marriage</td>
<td>10,598</td>
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<td>Domestic violence</td>
<td>8,119</td>
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<td>Estates</td>
<td>208</td>
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<tr>
<td>Family proceedings</td>
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<tr>
<td>Guardianship</td>
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<tr>
<td>Hague</td>
<td>75</td>
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<td>Mental health</td>
<td>5,304</td>
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<tr>
<td>Miscellaneous</td>
<td>23</td>
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<tr>
<td>Protection of Personal and Property Rights (PPPR) Act 1988</td>
<td>2,196</td>
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<td>Property</td>
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</tbody>
</table>

Delay is always an issue for those using the Family Court, and it is corrosive and injurious to the welfare of children. In its report to Parliament on the Second Reading of the Care of Children Bill last year, the Justice and Electoral Select Committee reported on the question of delay:

We note the need for urgency in matters involving children was mentioned by a number of submitters, and this informed our proposed reference to time frames ‘appropriate to the child’s sense of time’.1

In its far-reaching report on dispute resolution in the Family Court,2 of the need for access to justice, the Law Commission said:

The Family Court should be the place where family legal disputes are resolved as quickly [as] possible, in a way that meets the needs of families—especially children.3

There is an important emphasis on reduction of delay in the Care of Children Act 2004 and in the Government’s recent commitment to parent information programs.4

I believe it is therefore timely to look at how further reforms to our Family Court processes may reduce delay, make access to justice easier for most litigants who will not require a defended hearing, and give better access to justice to those who are most vulnerable and who most need the protection of the Court.

The historical position

The Family Court was created in 1980 as a result of the 1978 Royal Commission on the Courts. The Family Court was seen by the Royal Commission as primarily a conciliation service, with the Family Court attached as a last resort. The Royal Commission described it like this:

1 Justice and Electoral Committee Report, Care of Children Bill, p. 2.
3 Law Commission, supra note 2, para 4.
The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication.\(^5\)

The Law Commission also discussed this duality required in family dispute resolution in its report number 82 and said:

The Royal Commission on the Courts recognised the conflict between the functions of a court and those of a social agency. It nevertheless considered that the Family Court should undertake conciliation, and aim, where possible, to resolve disputes before embarking on an adversarial process.\(^6\)

To give effect to the Royal Commission’s recommendations, the Family Courts Act and Family Proceedings Act:

- established the ability to refer parties applying to the Family Court to counselling\(^7\)
- provided for judges to mediate where disputes did not settle with counselling and before a hearing\(^8\)
- created a Family Court which was informal and with relaxed rules of evidence.\(^9\)

The Guardianship Act 1968 enabled those applying to the Court for orders in relation to the care of children to be referred to counselling under s10 and 19 of the Family Proceedings Act. The purpose of counselling was strictly circumscribed, as was the ability of a counsellor to report on the outcome of counselling. The relevant provisions are:

**Family Proceedings Act s12: Duty on counsellors**

A counsellor to whom a matter is referred under section 9 or section 10 of this Act

(a) Shall explore the possibility of reconciliation between the spouses, civil union partners, or de facto partners; and

(b) If reconciliation does not appear to be possible, shall attempt to promote conciliation between the spouses, civil union partners, or de facto partners.

**Family Proceedings Act s18: Privilege**

(1) No evidence shall be admissible in any Court, or before any person acting judicially, of any information, statement, or admission disclosed or made

(a) To a counsellor exercising his functions under this Part of this Act; or

(b) In the course of a mediation conference.

In a wide-ranging review of the Family Court undertaken for the then Principal Family Court Judge (Judge P. D. Mahony) in April 1993, a committee found that there were conceptual difficulties with the counselling provided by the Family Court, and suggested establishing a separate conciliation service. The essential recommendations in that respect from the committee were:

- to establish a separate and distinct Family Conciliation Service

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6 Law Commission, supra note 2, para 30.
7 Family Proceedings Act, ss10 and 19.
8 Family Proceedings Act, ss13–17.
9 Family Proceedings Act, s164; Family Courts Act, s10.
that the dispute resolution method employed by the Family Conciliation Service should be mediation, carried out by trained and accredited mediators

that counselling coordinators should have a key role in the Family Conciliation Service, being responsible for early classification and referral of cases, and public education

that judges should not be involved in mediation, as currently occurs, but rather explore settlement options at a settlement conference

that there should be clear delineation that the counselling service is an alternative to an adversarial court hearing, rather than being merely a preliminary.

The Law Commission, in its report number 82, referred to the reasons why it had received a reference, and included in those reasons the comment that:

matters generally take too long to resolve; children suffer because of these delays; and, not all Family Court professionals are properly trained and skilled.

The Law Commission suggested setting up a new expanded conciliation service which should operate out of the Family Court. Specifically, the Commission recommended that:

- a new, expanded conciliation service should operate out of the Family Court. Legislation will have to be amended so services such as counselling and mediation are available for a wider range of matters than they are now
- the conciliation service should include information sessions for guardianship disputes, and referrals for counselling, mediation and specialist counselling
- the conciliation service should be managed by the Family Court Coordinator or Conciliation Service Coordinator
- information sessions and counselling, mediation and specialist counselling referrals will be contracted to groups and individuals but managed by the Family Court, which, along with the Department for Courts, will oversee quality control.

Importantly, the Commission also suggested that:

- conciliation services should be available to all parties who apply, or by court direction
- intake interviews should be available through the Conciliation Service Coordinator, who will facilitate the most appropriate referral to the parties concerned.

The Law Commission suggested that the present Family Court Coordinators should be doubled in number and should undertake the intake interviews and references to conciliation.

Like the 1993 review report, the Law Commission stressed the difference between counselling (essentially therapeutic) and conciliation (essentially agreement forming), something that the Family Proceedings Act 1980 had failed to do properly.

However, the present position remains that parties who enter the Family Court in a range of disputes may seek counselling, but no more. The purpose and extent

11 ibid, para 5.1.1.
12 Law Commission, supra note 2, para 1.
14 Law Commission, supra note 2, p. 16.
of counselling continues to be strictly circumscribed. The Care of Children Act provides:

**Care of Children Act s44: Disputes between guardians**

(1) If 2 or more guardians of a child are unable to agree on a matter concerning the exercise of their guardianship, any of them may
(a) request counselling in respect of their dispute under section 65(2); or
(b) apply to the Court for its direction.

**Care of Children Act s45: Family Proceedings Act 1980 dispute resolution provisions apply to certain proceedings**

(1) This subsection applies to proceedings resulting from a spouse, civil union partner, or de facto partner applying for an order under this Act relating to the role of providing day-to-day care for a child of the marriage, civil union, or de facto relationship, or contact with a child of that kind, or both of those matters.

(2) The following sections of the Family Proceedings Act 1980 apply to proceedings to which subsection (1) applies:
(a) section 10(4) and (5) (under which a Family Court Judge may refer the matter to a counsellor, in which case a Family Court hearing generally does not proceed unless either spouse, civil union partner, or de facto partner, not less than 28 days after the date of the reference, requests that the hearing should proceed); and
(b) section 19(1) (which, among other things, requires the Court to consider the possibility of a reconciliation between the spouses, civil union partners, or de facto partners, or of conciliation between them on any matter in issue).

While the Care of Children Act has strengthened children’s right to participation at the hearing, the Act has not extended any ability to involve children in the conciliation process. This is particularly significant when considering that only a small minority of cases require judicial determination. Only a small minority of children will thus receive any benefit.

While a number of important reforms have occurred in family law, those have not included better access to conciliation and the involvement of children. It is time that these outstanding issues are now addressed.

**Recent reforms**

A number of other suggestions made by the Law Commission in its report have been addressed. In particular:

- The views of children and the need to have children better represented in the Family Court have been addressed by the Care of Children Act 2004. In particular, the Care of Children Act states a principle of the Act is to respect children’s views and that children must be given a reasonable opportunity to express their views. The role of the lawyer for the child is enhanced, by specifying that a key aspect of their job is to ascertain the child’s views and put them to the Court. The Act also aims to improve the communication between the lawyer and child, thereby giving the child greater involvement and better representation. The following provisions illustrate the point:
Care of Children Act s6: Child’s views

(1) This subsection applies to proceedings involving
   (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
   (b) the administration of property belonging to, or held in trust for, a child; or
   (c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies,
   (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
   (b) any views the child expresses (either directly or through a representative) must be taken into account.

Care of Children Act s7: Lawyer to act for child

(1) A Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

(2) However, unless it is satisfied the appointment would serve no useful purpose, the Court must make an appointment under subsection (1) if the proceedings
   (a) involve the role of providing day-to-day care for the child, or contact with the child; and
   (b) appear likely to proceed to a hearing.

(3) To facilitate performance of the lawyer’s duties and compliance with section 6 (child’s views), the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child.

Care of Children Act s55: Content and explanation of parenting orders...

(4) A lawyer acting for, or other person representing, a child, must take all reasonable steps to ensure that the effect of an order under section 48(1) is explained to the child, to an extent and in a manner and in language that the child understands.

A parent information program, strongly recommended by the Commission, has been trialled in Auckland and, as a result of a budget directive, parent information programs will be rolled out nationally within the next year.15

Delays have been partly addressed by mandatory provisions in the Care of Children Act requiring that orders made without notice be returned to promptly. S57 sets out prescriptive time limits for dealing with certain cases.

A family mediation pilot has commenced in four courts to trial the recommendations of the Law Commission that judge-led mediation conferences should cease and that the Family Court should contract mediation services from approved mediators.16 The Law Commission had recommended:

We believe that necessary professional expertise is better accessed by contract than by attempting to employ fulltime mediators. We foresee a grave risk that the qualifications and training of fulltime mediators

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15 *Children in the Middle*, supra note 4.
16 Law Commission, supra note 2, pp. 76 and 88.
would be of a lower standard than that of professionals contracted from the wider community.\textsuperscript{17}

- The availability of information was partly addressed by the launch of a Family Court website in July 2004. The website contains information for those who may use the Family Court, including how to use the process, forms, decisions and statements of principle. The website is constantly being added to.

### Reforms in Australia

The basis of Australian family law is set out in the \textit{Family Law Act 1975}. Much change has occurred since the initial legislation was enacted.

Very recently, the government released an abstract signalling legislative reform, in which the essential proposals are:\textsuperscript{18}

- to set up sixty-five Family Relationship Centres (FRCs) throughout Australia. These are to be separate from the Family Court and offer a community-based disputes resolution service
- that all those wishing to enter the Family Court of Australia will be required, in the first instance, to attend a Family Relationship Centre
- that four hundred million dollars be allocated to set up this service
- that the Centres will be contracted out to existing providers, such as Relationships Australia, and the Centres will provide a variety of services, including an initial free three hours of mediation, some legal advice and the ability to refer on to specialist services
- that where the Centres do not exist, parties wishing to resolve family disputes must attend an alternative agency
- that an exemption may be obtained if a case involves sexual abuse, violence or contravention of a court order. Once evidence of that has been filed in the Family Court, direct use of the Family Court may be made.

The purpose of the setting up of Family Relationship Centres is to divert people away from litigation, emphasise the importance of using community resources, and endeavour to resolve disputes quickly and without the expense of entering the court process.

### The Australian court conciliation model

The Family Court of Australia has always had an in-house mediation/specialist service. Each court has attached to it a number of specialist mediators who undertake a dual function of counselling and mediation, as well as preparing specialist family reports for the Family Court.

Most cases entering the Family Court are required to enter a resolution phase, which is undertaken by registrars and the mediators to whom I have just referred. A case assessment conference is the first event, at which both a legally qualified registrar and court mediator sit with the parties and their legal advisors to define the issues and decide on the way forward. The next event is a conciliation conference, where again the registrar and mediator endeavour to assist the parties to come to an agreement.

\textsuperscript{17} Law Commission, supra note 2, para S2.
If this resolution phase does not settle a case, it enters the determination phase and then awaits the allocation of a trial notice, filing of affidavits, and subsequent trial. There are significant delays between the end of the resolution phase and trial. Presently, these stand at about twelve to sixteen months. Family Court litigants are also encouraged to use, at their own expense, non-court counselling and conciliation services. The ability of Family Court mediators to assist in therapeutic counselling and conciliation is, of course, limited by their numbers and the number of cases coming into the court.

**Further Australian reforms**

In a paper entitled *Integrated model for child dispute services*, Dianne Gibson, the Principal Mediator of the Family Court of Australia, is proposing a revamp of the structure of the conciliation process of the Family Court (see also her paper in these proceedings). This is, of course, in part driven by the government’s wish to create Family Relationship Centres and to move the emphasis of conciliation to outside the Court. The aim of this restructuring is to synchronise the Family Relationship Centre process with that of the Family Court:

To ensure a logical progression of services for families from the community sector to Family Courts, the new child disputes model would be non-privileged and include expert assessment and opinion to families, legal practitioners and the Courts, in a way that is not available in the community models. The principal mediator proposes the structure shown in Figure 1.

**The Children’s Cases Program**

Largely because of delays in reaching determination once cases enter the determination phase, and because issues were not being defined early enough, the Australians are trialling a non-adversarial method of resolving disputes in children’s cases, called the Children’s Cases Program (CCP). The pilot is running in the Family Courts at Sydney and Parramatta and is shortly to receive an interim evaluation. A preliminary look at the results available so far shows the CCP has decreased the costs to the parties, achieved a more efficient and productive use of judicial time, and reduced the number of appeals in children’s cases. The final evaluation will occur in March 2006. However, the government has already signalled in the discussion abstract that it intends to legislate to facilitate formal recognition of the non-adversarial method of dispute resolution. The essential nature of the program is set out in a practice note issued by the former Chief Justice, the Honourable Alistair Nicholson, in *Children’s Cases Program*, Practice Direction, No. 2 of 2004, 1 March 2004. The steps involved in this process are:

- Case enters the Family Court and receives an intake hearing before a judge within six weeks.
- Questionnaire filled out by parties stating positions and defining issues. Consent to process given.

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Case is called in court and presided over by a judge, with a Family Court mediator also present. Child representative appointed and present.

Parties are sworn and advised that everything said thereafter will be regarded as evidence.

Parties are asked to state their positions simply to the judge. The judge hears the facilitator of the case and defines the issues and suggests possible outcomes.

At any time a judge may make a decision on a particular issue.

If evidence is required to be tested, a hearing is allocated for that purpose and questions are asked of witnesses. However the judge defines the evidence to be called and the method of testing it.

At the end of the process, when final determination is given, the decision or other decisions already given may be appealed.
The purpose of the program is to:
- reduce delay
- remove the filing of irrelevant evidence
- ensure that the issues litigated are relevant and important to the children
- provide due process and fairness, but primarily by enquiry and only through testing the evidence by traditional means, if actually required.

I mention these reforms occurring within Australia for two reasons. The first is to identify that the issues they are facing are very similar to those that we face here. The second is to describe the processes that the Australian Government has decided to adopt to deal with changes that it wishes to see in the family law structure. It is useful to have regard to what is occurring in Australia as we look at what is happening in our country and how we might do things better.

**Refining the New Zealand process**

Better processes could be created for New Zealanders using our Family Court. These can occur in both an improved conciliation service and in a better use of the Family Court itself.

I do not believe that these should be the same models as the Australians are adopting. Our needs and experiences are quite different. We are both trying to achieve similar objects in making dispute resolution more accessible and reducing delays both before and in the course of the court process. But I think we should do it differently.

Our ‘counselling service’ is out-of-date, in both name and approach. Speedier and more enduring resolution can occur with a refined service, which incorporates the soon-to-be set up parent information programs and the piloting of the non-judge led family mediation service.

**A new conciliation service**

It may not matter whether a conciliation service is a standalone structure, as recommended in the 1993 review report, or remains a part of the Family Court. The important thing is that it is enhanced and is distinctly different from the Family Court itself. The Law Commission recognised that it is crucial for the two processes to be distinct, to ensure they each provide the resolution method they are intended to—being conciliation or adjudication—and that the parties have a realistic perception of the differences. The Law Commission put it in this way:

> We believe conciliation must be clearly delineated from processes leading to adjudication. One process must not bleed into the other.\(^\text{22}\)

For purely pragmatic reasons, it may well be best to run the service from court precincts and to build upon the expertise and experience of Family Court Coordinators.

The process might look like that shown in Figure 2.

**Court management**

Cases that enter the Family Court, either because of demonstrable risk, or unsuccessful resolution in the conciliation service, should be not only managed by members of the Family Court staff (called Case Officers), but also by legally qualified registrars.

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\(^{22}\) Law Commission, supra note 2, para 41.
who have experience in family law and who have the confidence and ability to attend to a range of more demanding administrative tasks.

Registrars in Australia have long had the ability to undertake the following types of tasks:

- make a parenting order in an undefended case
- make an order for child maintenance, or vary or discharge a child maintenance order
- make an order for the recovery of arrears due under a child maintenance order
- make a location order
- make an order to deliver up a passport to a registrar until further order
- make an order that a child be made available for psychiatric or psychological examination
- make an order in relation to the parentage of a child
make, vary or discharge a spousal maintenance order or approve a maintenance agreement.\textsuperscript{23}

At present, Family Court judges in New Zealand routinely undertake administrative ‘box work’ which includes an enormous variety of sometimes menial tasks. I refer to permitting summonses to be issued, making references to counselling and signing off interlocutory applications, such as abridgement of time. Although Family Court staff have the ability to undertake many of these tasks, most do not do so because of other calls on their time and a perception that their pay structure does not promote the exercise of this responsibility. Some examples of existing powers that are not fully utilised are based on the following provisions:

**Family Court Rule 12: Powers of Registrars under rules**

(1) A Registrar has all the powers of a Judge to do any of the following if, and to the extent that, these rules authorise the Registrar to do any of the following:

(a) hear and determine any proceedings:
(b) make any direction or order.

(2) Nothing in this rule

(a) authorises a Registrar to commit a person to a penal institution or to enforce an order by committal:
(b) limits any right of review by a Judge of a decision of a Registrar.

(3) An order made by a Registrar under these rules has the same effect, and is enforceable in the same manner, as if it were an order of a Judge.

(4) An order made by a Judge may be signed by a Registrar in his or her own name and description.

**Family Court Rule 50: Witness summons**

(1) A party to proceedings may ask a Registrar to issue a witness summons in form G 18 for a person if the party wants the person to attend any hearing of the application and

(a) give oral evidence in accordance with a Judge’s direction under rule 48:
(b) produce any document relating to a matter in question in the proceedings in the person’s possession or power.

(2) On receiving a request under subclause (1), the Registrar must issue to the party the witness summons and a copy of it.

**Family Proceedings Act s9: Requests for counselling**

(1) Either party to a marriage may request a Registrar of a Family Court to arrange counselling in respect of the marriage...

The Law Commission favoured registrars being used to a greater extent, both in terms of exercising those powers they already have, and taking on further responsibilities to better make use of judicial time. The Law Commission said: ‘Registrars are not currently exercising their jurisdiction to the full’\textsuperscript{24} and ‘If registrars could undertake some of the tasks performed currently by judges it would make more time for judicial task that cannot be delegated’.\textsuperscript{25}

The Commission also stated that if registrars are to be given greater responsibility and workload, this must be recognised. The expanded role cannot simply be incorporated into the existing structure. More experienced people would be required, and they would need to be paid more. The Law Commission put it:

\textsuperscript{24} Law Commission, supra note 2, para 459.
\textsuperscript{25} Law Commission supra note 2, para 458.
If demands on judicial time are to be reduced by expanding registrar’s powers and alternative dispute resolution, the heavier work load that this will place on other Court staff must be recognised.  

Adding in this further ingredient into the Family Court process, and better utilising those powers already available, is an essential part of achieving better access to the Family Court for New Zealanders.

The creation of legally qualified registrars to process a number of interim and procedural steps will speed up the process and relieve judges of enormous administrative work. This would enable better concentration on the core business of high-risk cases.

The judicial process

Where allegations of sexual abuse are made, rights of both children and parents can be affected forever and it is important that these cases are resolved speedily. The same applies where allegations of violence are made or where one of the parties is interrupting good parenting. Delay is the single greatest injurious factor in such cases.

Only children’s cases involving risk to welfare of children should enter the Family Court directly and be closely managed and determined by Judges.

Just as the Australians are trialing a Children’s Cases Program, so also ought we to trial a Care of Children Programme, the essential steps of which will be as show in Figure 3.

Adding to public information and access

Many New Zealanders who have family disputes will learn more about the Family Court as a result of parent information programs and accessing the Family Court website. Many others will, of course, continue to use Family Court lawyers and consult Citizens Advice Bureaus, as they have in the past.

However, a characteristic of many Family Court litigants is anxiety and preoccupation with the crisis that they are in. Many calls are made directly to the Family Court seeking advice or information. It is very difficult for Family Court registries to address this, in view of the primary requirement to run the courts and to attend to the management of files.

A further essential ingredient in a successful new Family Court model will involve setting up a call centre. The Law Commission made this recommendation in its paper, *Dispute resolution in the Family Court*:

> Consideration should be given to an 0800 telephone number for information, advice and referrals to community services and lawyers.  

A call centre can provide easy access to information for the public, while making more efficient use of existing court resources. If the conciliation service is to remain a part of the overall Family Court structure, it will be necessary to create better access to information for those wanting initial advice. In short, enquiries need to be answered from those seeking a reference or guidance on what to do next.

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27 Law Commission, supra note 2, p. 195.
Other government departments have acknowledged this and run successful call centres. The Ministry of Justice Collections Service, Department of Inland Revenue, Department of Child, Youth and Family Services, and Accident Compensation Corporation are examples.

The Family Court of Australia has also recognised this and begins a call centre on a trial basis, for New South Wales, early in 2006. It is appropriate that we too give real consideration to the provision of such a service.

Another modern and important way of communicating with the public is through a user-friendly and comprehensive website. Many government departments in New
Zealand use this facility well. We have commended the building of a Family Court website in New Zealand, but it is well short of what is required to:

- convey information easily
- provide forms and information that enable people to use the court system effectively
- give regular updates on developments of interest
- give access to cases which can be easily searched in order to provide guidance on issues.

Our Family Court website was based on the initial website developed by the Family Court of Australia. Their website continues to be improved and has now left ours well behind (see their website at www.familycourt.gov.au). A commitment to maintaining a truly effective website is now required.

**Conclusions**

The Family Court of New Zealand model has been successful, so much so that the jurisdiction of the Court has grown enormously. Most originating work initially undertaken by the then Supreme Court and now High Court involving family law is now done by the Family Court.

If good access to justice—so fundamental to a democracy—is to continue, refinements must be made to the Family Court process, to maintain confidence and to give effect to Parliament’s wish that delays be reduced.

By refining and expanding the conciliation service, and by providing enhanced resources to the Family Court by introducing a more deliberate method of resolving Family Court cases that require judicial determination, better outcomes can be achieved for New Zealanders with family disputes.

I think it will be apparent to you that some of the changes I am suggesting are a refinement of the court process and can be introduced through judge leadership and cooperation with the Family Court Bar.

However, some other reforms that we might introduce, and I talk in particular of an expanded conciliation service and more comprehensive access by children to counselling, will require legislative amendment.

It is, of course, not my function to suggest that change should occur and give rise to an expectation that that will follow. That is clearly a legislative function, not mine. However, I do think it is my responsibility to highlight the themes that are now so common amongst us, and that is that the way we do things can be done better and that we should be all trying to achieve that. Legislative endorsement is vital to this process.
Panel: Perspectives from East Asia

Chairs

Ms Annabelle Cassells, International Branch, Department of Families, Community Services and Indigenous Affairs

Annabelle Cassells is currently in the International Branch of the Department of Families, Community Services and Indigenous Affairs (FaCSIA), where she has worked since 1999. Annabelle facilitates government-to-government relationships with East Asian countries, concentrating on avenues of exchanges in research, policies and programs affecting families, such as with ministries in Vietnam, Singapore and Indonesia. In this context, she plays an important role in implementing and facilitating social policy exchanges, and in developing and maintaining close, strategic relationships with each of those ministries. Prior to commencing work at FaCSIA, Ms Cassells worked in the education and training sectors of Commonwealth and state governments. She holds a Bachelor of Education, University of Canberra; Postgraduate Diploma (IT), University of Canberra; and Master of Education (International Policy), Monash University.

Ms Ruth Weston, General Manager—Research, Australian Institute of Family Studies

Ruth Weston is one of the two General Managers (Research) and a Principal Research Fellow at the Australian Institute of Family Studies. In this capacity, she plays an active role in the Institute’s research on family trends, couple and family formation, family law and work–family issues. She is also involved in the design and management of the Household, Income and Labour Dynamics in Australia (HILDA) Survey and the Longitudinal Study of Australian Children (LSAC), both of which are funded by the Australian Government through the Department of Families, Community Services and Indigenous Affairs. Ms Weston has undertaken research on contract for a number of Australian and state government departments. She is sole or joint author of thirteen books or reports, twenty-two chapters and more than sixty journal articles.
**Presenters**

**Ms Ni Chunxia, Ministry of Civil Affairs, People’s Republic of China**

Ni Chunxia received her Masters degree from the Beijing Institute of Technology in higher education management. Ms Ni joined the Department of Basic Level Governance and Community Construction of the Chinese Ministry of Civil Affairs in 2001. She is now primarily involved in policy-making on marriage management.

**Dr Suliastiati, Ministry of Social Affairs, Republic of Indonesia**

Dr Suliastiati is the Head of the Sub-Directorate of Family Empowerment, Ministry of Social Affairs, in the Republic of Indonesia.

**Mme Aminah Abdul Rahman, Ministry of Family, Women and Community Development, Malaysia**

Aminah Abdul Rahman is currently the Deputy Director-General (Policy) and also the Director of the Corporate Planning Division of the National Population and Family Development Board, under the purview of the Ministry of Women, Family and Community Development, Malaysia. Mme Aminah began her career with the board in 1979 as a researcher, has experience in implementing programs at the state level and has spent some ten years in administration. She received her first degree in social science (sociology) from the Universiti Sains Malaysia in 1977, and subsequently a Master of Arts degree in demography from the Australian National University in 1984. She is happily married and has four children.

**Ms Corinne Koh, Ministry of Community Development, Youth and Sports, Republic of Singapore**

Corinne Koh graduated with a Master of Social Science in Social Work at the National University of Singapore. She is currently the Deputy Director of the Family and Child Protection and Welfare Branch, Ministry of Community Development, Youth and Sports, Singapore. Ms Koh’s key responsibilities include overseeing the management of family violence and the operations of the Child Protection Service in Singapore.

**Mr Le Do Ngoc, Vietnam Commission for Population, Family and Children**

Le Do Ngoc has served his country in both a military and civilian capacity. In the past decade he has held key government positions, including Director for International Cooperation, Vietnam Committee for Protection and Care for Children (1996–2002). Mr Ngoc is currently the Director of the Family Department in the Commission for Population, Family and Children, and is a key person in drafting the National Strategy in Building the Family 2005–2010, the Party Secretariat’s directive for building the family in national industrialisation and modernisation, and National Survey of the Family. He has trained internationally, at Oslo University and the Academy of Social Science, Moscow.
Opening remarks

Ms Annabelle Cassells, International Branch, Department of Families, Community Services and Indigenous Affairs

Thank you very much Professor Hayes for your introduction.

First of all, I would like to acknowledge the Indigenous communities of Australia, in particular the Ngunnawal people and also the Indigenous communities belonging to those countries who are participating from East Asia.

Professor Hayes, I want to thank you for the opportunity to co-chair this panel on the East Asian perspective. I will talk about what I perceive is the importance of the involvement of the officials from countries in East Asia, and I wish to thank you for your insight in facilitating such a gathering of our colleagues from our near neighbouring countries. It’s an exciting panel to be chairing and I feel privileged to be involved. Thank you.

I speak from the International Branch of the Department of Families, Community Services and Indigenous Affairs, and some people may wonder why or how this has come about, but it is from a couple of perspectives. One is that the Department of Families, Community Services and Indigenous Affairs is responsible for developing policy for families, children and youth, but it also involves itself in international matters, such as social security agreements with other countries concerning retirement incomes and international policy (such as income support for people in Australia); also, importantly, in collaborative activities with its counterpart ministries in the East Asia region, such as sharing policies and programs and on multilateral forums such as those of the United Nations. In this regard, it’s very pleasing to be able to contribute to the agenda of this unique Forum.

Testimony to the strength of the relationships that have been developed in sharing policies in the area of families, children and social security between the Family and Community Services portfolio and its counterparts is the participation of officials from ministries in these countries over the past two days.

Some of the flavour to this international cooperation is the knowledge that in doing so as legislators, policy makers and implementers, we get to know each other’s context for developing and implementing social policies and programs in an holistic way, and I have gained a great deal myself in knowledge and understanding from listening to the presentations over the past two days. We do this alongside each other, increasingly aware of the commonality of issues for families with children, and I believe Ruth Weston will tease out a little bit more on this area when I hand over to her shortly. There is no doubt that each of our governments recognises the family as the basis of our societies and is increasingly aware of the imperative to share ideas, learnings and mistakes.

The sorts of ways we share our understandings include those such as this Forum, where Indonesia, Singapore, Vietnam, China, Malaysia, and, of course, all the other participating countries here, can relate to Australia’s ongoing desire to strengthen the base of its society—the family. We welcome the participation of our friends from East Asia on this panel, just as we welcome you sharing your ideas with us. This is not a ‘one-off’ experience for us, but part of an increasing awareness of other ways that we can share and speak with each other. One example is my involvement
over the past two weeks with the commission from Vietnam, showing its officials Australia’s approach to juvenile justice. This involved speaking with the Victorian Government, the Queensland Government and the ACT Government on their respective approaches to juvenile justice. This is one example of the way in which we can facilitate cross-national dialogue on such matters.

I am most grateful to you, the panellists, for accepting the invitation to play a role, particularly when there is great work pressure in your ministries at this time of year. I also wish to acknowledge the other members of your delegation who are present, who are not here as panellists, but are participating in the audience. There are nine people from the Vietnam Commission for Population, Family and Children in Vietnam; two people from the Ministry of Community Development, Youth and Sports in Singapore; five people from the Ministry of Social Affairs in Indonesia; two people from the Ministry of Civil Affairs in China; and three people from the Ministry of Women, Family and Community Development in Malaysia, which also includes the National Population and Family Development Board.

I would like now to hand over to Ruth Weston. I have developed a wonderful working relationship with Ruth over the past three years, and that’s been because of the ‘open-door’ approach the Australian Institute of Family Studies has to any requests it may have from the Department of Families, Community Services and Indigenous Affairs regarding its international engagement and the work of the Institute of Family Studies. It has been a pleasure to work with Ruth and to get to know her and the Institute. Thank you.
Opening remarks

Ms Ruth Weston, General Manager—Research, Australian Institute of Family Studies

Thank you very much Annabelle. I’d like to express my gratitude to Annabelle Cassells and to Leon Trainor for their help and their assistance, friendship and general support of our work. I hope very much that this continues.

The key purpose of the Australian Institute of Family Studies is to increase understanding of factors affecting family stability and wellbeing in Australia. This includes, of course, the wellbeing and functioning of families undergoing very difficult transitions, such as separation and divorce. To understand the factors affecting the wellbeing of families, we need to understand their cultural backgrounds and early experiences. So it’s very important that we look beyond our borders. East Asia is extremely important in this regard. By 2000 Australia had around 1 000 000 Asian-born Australians. Our Asian-born population is itself very diverse and has contributed greatly to the diversity of family life in Australia today. Five of the ten most common countries in which our Asian Australians were born are the focus of attention in this session.

We also look beyond our borders to compare trends in Australian families with those in other countries in order to seek explanations for similarities and differences in trends. These answers help us understand factors affecting Australian families. Clearly, by looking beyond our borders we come to understand what factors affecting wellbeing are intrinsic factors, as opposed to contextual and cultural factors. I was delighted to see this demonstrated yesterday in the ‘Hearing children’ session, when Mr Ngoc outlined the concerns of a young child whose parents had separated. I was sitting at the back and could see all the heads nodding in agreement when he said how much this child just longed for her two parents to get back together again. And then, in the same session, Dr Jenn MacIntosh, in the video that Dr Lawrie Moloney presented, indicated that 90 per cent of Australian children want to see this happen. This seems to be a basic desire of children, regardless of their cultural backgrounds. How can we soften this blow for them and enable children to have a close, warm, caring, consistent and very enjoyable relationship with each of their parents, whether they live together or apart? This represents a problem that all countries are facing, and we are going to hear more about this today.

Thank you.
Brief introduction to the legislation on marriage and family in China

Ms Ni Chunxia, Ministry of Civil Affairs, People’s Republic of China

Abstract

As the basic law that regulates the marriage and family relations, the marriage law of China stipulates that a marriage system based on freedom, monogamy and equality between man and woman shall be implemented; the lawful rights and interests of women, children and old people shall be protected; and a family planning program should be carried out. According to China’s law, the relationship of husband and wife should be established through administrative registration. Without marriage registration, the relationship of husband and wife can’t be legally recognised, even if a particular religious or unreligious wedding has been held. The man and woman who apply for marriage registration should meet the requirements of law. In China, there are two legal approaches for divorce. One approach is through administrative registration. If both husband and wife are indeed willing to divorce and have made proper arrangements for their children and have properly disposed of their property, they can apply to the Marriage Registration Authority for divorce. The other approach is through lawsuit. Either husband or wife can file a suit at the court for divorce; the court will make judgement whether to end the marriage relationship according to the marriage law after the hearing. The marriage law also provides some provisions that regulate the equal familial status of husband and wife, the property rights of husband and wife, and the relationships between family members.

Family, as the basic unit of society, has many functions (such as bearing, bringing up and educating children, and providing social security) and therefore plays an important role in the society. China has a tradition of valuing marriage and family relationships and has developed many laws in this area in the long history of its civilisation. After the foundation of the new China, the first law enacted by the national legislative body was the Marriage Law of 1950. In 1980, a new Marriage Law was promulgated and some amendments were made to it in 2001. The Regulation of Marriage Registration, promulgated by the State Council in 2003, was enacted according to the Marriage Law, which stipulates the rules of the marriage registration in detail.

Part 1: The general principles of China’s marriage and family laws

Traditionally in China, the husband’s authority was very strong. Women had no real social and family status. Polygamy and marriages arranged by others were universal. Freedom of marriage and women’s interests could not be guaranteed. After the foundation of the new China, overwhelming changes occurred in the field of marriage and family. As the basic law that regulates marriage and family relationships, the Marriage Law of China stipulates that a marriage system based on freedom, monogamy and equality between men and women shall be implemented; the lawful rights and interests of women, children and old people shall be protected; and a family planning program should be carried out. The law also stipulates that marriages arranged by a third party, mercenary marriages and interference by others in the freedom of marriage should be prohibited; no one has a spouse who may
cohabit with any other people; bigamy, familial violence, maltreatment or desertion of any family member should be prohibited; husband and wife shall be truthful to and respect each other; and family members shall respect the old, take good care of the underage, and help each other so as to maintain an equal, harmonious and cultured matrimonial and familial relationship.

Part 2: Marriage registration system

2.1 The requirements of marriage registration

In China, the relationship of husband and wife is established through administrative registration; otherwise the relationship couldn’t be legally recognised, even if a particular religious or civil wedding has been held.

According to the Marriage Law and the Regulation of Marriage Registration, men and women who apply for marriage should meet the following requirements: the marriage shall be based on the complete willingness of both the man and the woman; and the man shall not be younger than 22 years old and the woman shall not be younger than 20. Marriage is prohibited in any of the following circumstances: a) if the man and the woman are lineal relatives by blood or collateral relatives by blood up to the third degree of kinship; and b) if either the man or the woman is suffering from any disease that is regarded by medical science as rending a person unfit for marriage. Couples who apply for marriage are also required to go to the Marriage Registration Authority in person to get registered.

If they meet the requirements of this law, they can be registered and given a certificate of marriage on the spot. The obtaining of a certificate of marriage confirms the establishment of the relationship of husband and wife. Those who live as husband and wife without registration shall go through remedial registration procedures. Having gone through the registration procedures, the woman may become a member of the man’s family and the man may also become a member of the woman’s family, whatever is agreed upon by both parties.

2.2 Invalid marriage and cancellable marriage

When the Marriage Law was amended in 2001, invalid marriage and cancellable marriage were introduced into the new law. According to the law, if any of the following circumstances occur, the marriage shall be invalid: a) if either party is a bigamist; b) if the parties are related in a way that forbids them from getting married by law; c) if any party has suffered from any disease that is held by medical science as rending a person unfit for getting married and the disease has not been cured after marriage; or d) if any party is not the legal minimum age for marriage. Cancellable marriage refers to a marriage that was against the will of the man or woman, but arranged or forced by others. In the case of arranged marriages, the unwilling party may apply to the Marriage Registration Authority or the court to cancel the marriage. The unwilling party shall make the application within one year since the day of marriage registration.

If a marriage is deemed to be invalid or cancelled, it is invalid ab initio, and the parties concerned do not have the rights and obligations of the husband and wife. Both parties will agree to dispose of the property acquired during the term of cohabitation. Where no agreement is achieved, the court will make a judgement according to the principle of favouring the innocent party. The property rights of a party of a lawful marriage shall not be infringed upon in the disposal of the
property, where a marriage was invalidated by bigamy. The relevant provisions of the Marriage Law concerning parents and children shall apply to the children borne by both the parties concerned.

2.3 Reforms in the Regulation of Marriage Registration of 2003

Compared to the old regulation, the Regulation of Marriage Registration of 2003 has brought significant reform, in that health certificates from the designated hospitals and marital status documents approved by statutory bodies are no longer required when applying for marriage registration. The Regulation of Marriage Registration of 2003 requires the man and woman to declare that their health status and marital status do not contravene legal requirements. These changes are based on the idea that one should be responsible for his or her private affairs.

Part 3: The familial relations system

3.1 Equal familial status of husband and wife

Both husband and wife are considered to be equal in familial status: husband and wife are entitled to have his or her own name; to have freedom to participate in production, work, study and social activities; and to inherit the property of each other. Either party may not confine or interfere with the activities of the other party. Husband and wife are under the obligation of supporting each other. Where either party fails to perform the obligation of supporting the other party, the party that needs support is entitled to ask the other party to pay aliments.

3.2 The property rights of husband and wife

The Marriage Law of 2001 stipulates that the following assets incurred during the marriage shall be jointly owned by husband and wife: a) wages and bonuses; b) any income incurred from production or management; c) any income incurred from intellectual property; and d) any property inherited or bestowed. Both husband and wife shall have equal rights in the disposal of jointly owned property.

The husband and wife may come to an agreement as to whether property incurred during the existence of marriage or prior to marriage is to be individually owned by one party, jointly owned or partially owned by each party. The agreement is required to be made in written form. The agreement concerning the property obtained during the existence of marriage and pre-marital property is binding upon either party. Where husband and wife agree to individually own their property, the debt of either the husband or the wife shall be cleared off by the individual property of the debtor if the creditor has the knowledge of the agreement.

According to the Marriage Law, some specific properties should be owned only by either the husband or the wife: a) the pre-marital property that is owned by one party; b) the payment for medical treatment or living subsidies for the disabled arising from bodily injury on either party; c) the property specified to husband or wife by a testament or a bestowal contract; d) the articles of living specially used by either party; and e) other property that is be used by either party.
3.3 Rights and obligations between parents and children

Parents are under obligation to raise and educate their children, and the children are under obligation to support their parents. Where parents fail to perform their obligations, underage children and children without the ability to live an independent life are entitled to ask their parents to pay aliments. Where any child fails to perform his or her obligations, parents who are unable to work or are living a difficult life are entitled to ask their child to pay aliments. It is forbidden to drown or desert infants or commit any kind of infanticide. A child may take the surname of either the father or mother. Parents have obligations to protect and educate their children. Where the underage child causes any damage to the state, collective or other people, the parents are civilly liable. Both parent and child are entitled to inherit the property of each other.

An illegitimate child shall have equal rights to that of a legitimate child, and shall not be harmed or discriminated against by any person. A father or mother who does not directly bring up his or her natural child shall provide for the expenses for the upbringing and education of the child until the child reaches independence. The state defends lawful adoptions. The obligations of parents is applicable to foster parents and foster children. Legal adoption eliminates the rights and obligations between foster children and natural parents. The stepparent and the stepchild shall not maltreat one another.

Children are required to respect the matrimonial rights of their parents and not interfere with the parent’s second marriage after the death or divorce of a previous spouse. The obligation of children to support their parents does not terminate as a result of the change of matrimonial relationship of their parents.

3.4 Rights and obligations between other people in the family

Capable grandparents and maternal grandparents have the obligation to raise their grandchildren whose parents have deceased or are incapable of bringing up their underage children. Capable grandchildren are required to support their grandparents whose children have deceased or whose children are incapable of supporting them. Capable elder brothers and sisters are required to support their younger brothers and sisters whose parents have deceased or whose parents are incapable of supporting them. Likewise, younger brothers and sisters who have been brought up by the elder brothers and sisters are under the obligation to support their elder brothers and sisters who are without labour capabilities and without income.

Part 4: Divorce system

In China, there are two legal approaches to divorce, namely, divorce through administrative registration and divorce through lawsuit.

4.1 Divorce through administrative registration

Divorce through administrative registration, also called divorce through agreement, is a legal process where the Marriage Registration Authority makes a judgement to end the marriage relationship upon the application of both husband and wife. According to the Marriage Law, the Marriage Registration Authority issues a certificate of divorce after confirming that both parties are willing to divorce and
have made proper arrangements for their children and have properly disposed of their property.

4.2 Divorce through lawsuit

Divorce through lawsuit is a legal process where the court conducts a hearing of a divorce suit following the application of the husband or wife, from which there is a judgement to end the marriage relationship. Where either the husband or wife applies to get divorced, he or she may file a suit at the court for divorce. The court attempts mediation in the process of hearing a divorce suit. Divorce is granted if mediation fails because mutual affection no longer exists. According to the law, divorce shall be granted if any of the following circumstances occurs: a) either party is a bigamist or a person who has a spouse but co-habits with another person; b) there is family violence or maltreatment or desertion of any family member; c) either party indulges in gambling, drug abuse or has other antisocial habits and refuses to mend his or her ways, despite repeated admonition; d) both parties have lived separately due to lack of mutual affection for up to two years; and e) other circumstances that have led to the non-existence of mutual affection as husband and wife. If either party has been declared by court to be missing and the other party applies to be divorced, divorce shall be granted.

The Marriage Law also provides provisions to protect soldiers and women in some specific circumstances. The application of the spouse of a soldier in active service for divorce shall not be granted by the soldier unless the soldier is in grave fault. The husband may not apply for divorce when his wife is pregnant, within one year after giving birth, or within six months after terminating pregnancy. This restriction does not apply to cases where the wife applies for divorce or the court deems it necessary to accept the application of the husband for divorce.

4.3 The principles of disposal of property in divorce cases through lawsuit

At the time of divorce, both husband and wife are required to agree upon the disposal of jointly owned property. If they fail to come to any agreement, the court shall decide its disposal, taking into consideration the actual circumstances of the property and following the principle of favouring the children and the wife. The law protects the rights and interests of both husband and wife in the contracted management of land.

In cases where husband or wife have spent considerably more effort on supporting children, taking care of the old or assisting the other party in work, and so on, but both parties agree to separately own the property they respectively obtained during their marriage, the party that undertook more domestic responsibilities is entitled to demand the other party make compensations at the time of divorce. If, at the time of divorce, either party has difficulties in life, the other party is required to provide appropriate assistance from his or her personal property (for example, the house). Both parties are required to agree upon specific arrangements. Where no agreement is agreed upon, the court makes a decision.

At the time of divorce, the debts jointly incurred by both husband and wife during the marriage shall be paid out of the jointly owned property. If the jointly owned property is not enough to pay the debts or if the property is individually owned, both parties are required to agree upon the payment of the debts. If both parties fail to reach any agreement, the court decides on the payment of the debts.
4.4 The relationship between parents and children after divorce

The relationship between parents and children does not terminate due to the divorce of parents. After the divorce of the parents, the children remain the children of both parties, whether they are supported directly by either the father or mother. Both father and mother, after divorce, have the right and obligation to raise their children. It is a principle that children during lactation are to be brought up by their mother after the divorce of the parents. If any dispute arises concerning which party shall bring up the children beyond lactation, this dispute is settled by the court according to the specific conditions of both parties and in light of protecting the rights and interests of the children.

If custody is awarded to an individual party, the other party is required to provide for a part or all of the necessary living and education expenses. The amount and term of payment is to be agreed upon by both parties. If no agreement is achieved, the court decides the amount and term. An agreement or judgement concerning the living and education expenses of children may in no way prevent the children from making reasonable requests, where necessary, to either parent for an amount beyond the amount as determined in the agreement or judgement.

After divorce, the parent who does not directly raise the children has the right of visitation and the other party has the obligation to give assistance. Parents are required to agree upon the arrangements for visitation. In case where no agreement is achieved, the court decides on arrangements. If visitation is harmful to the soundness of the body and mind of the children, the court will terminate the agreement. When the reasons for terminating visitation are no longer apparent, the right shall be resumed.
Family empowerment in Indonesia

Dr Sulistiati, Ministry of Social Affairs, Republic of Indonesia

A Overview

Indonesia is a large country consisting of many islands. Its population of more than 215 million people is spread unevenly across the country. This undoubtedly brings about massive, multifaceted social problems that impact on society, and particularly on family welfare.

There is tremendous variation in the level of wealth and social resources. The current number of poor people is about 15 million and rising, due to diverse factors such as the decreasing value of the rupiah and rising oil prices. The unstable economic conditions have negative effects on family life, due to the inability of families to meet the needs of its members, particularly in education, clothing and food. There is much hardship for people in general, which creates poverty, neglect, malnutrition, poor health and increased crime.

In order to make services available to families and poor people, the government and the private sector have made great efforts, through the policies and programs of the National Plan of Middle Range Development, to promote family and social empowerment. To provide services to families and the wider society, there has been much law reform, as well as policy and program implementation, to create better social and living conditions.

Despite these reforms, there continues to be a series of complicated problems faced by Indonesia, including high oil prices and various natural disasters, such as earthquakes and tsunamis. There is a need to address complicated social problems, such as poverty, drugs, social disability, neglect and violence, as well as family stressors, such as conflict, dispute, violence, divorce and crime.

This situation is exacerbated by the geographic position of Indonesia between Australia and Asia that makes it susceptible to international influences and global development that directly impacts on the life of society. Globalisation is unavoidable, but its impact on families is obvious. For example, lifestyle choices that were considered taboo, such as divorce and free sex, are increasingly considered normal.

Data on family problems collected in 2004 by the Directorate for Family Role Empowerment of the Directorate General for Social Empowerment indicated that of an overall population of 218,373,996, 12,065,879 people (5.5 per cent) are categorised as poor and 4.8 million (2.2 per cent) are considered as vulnerable. In addition, 2,686,494 people (2.2 per cent) are estimated to have social–psychological problems. The number of poor people has increased from 12,065,879 in 2004 to 15.5 million people in 2005 (BPS data, 2005).

These conditions required the Government of Indonesia to implement a new strategic direction termed ‘People Centered Development’. This entailed designing comprehensive, integrated, sustainable and pro-family programs which are underpinned by an awareness of the importance of the family in the development of individuals.
Various efforts have been made by government, university and corporate/private sectors to overcome social problems through family empowerment, with varying results. A number of government institutions (such as the Ministry of Social Affairs, Ministry of Domestic Affairs, Ministry of Health, Ministry of National Education, Ministry of Fishery and Ocean, Ministry of Trade, Ministry of Industry, State Ministry of Cooperation and Small and Middle Scale Business, Coordinating Agency for National Family Planning, State Ministry for Women Empowerment) have developed family empowerment programs. These respective units within government have developed programs that are mutually complementary and integrated with one another.

B Legislation, policy and program responses

1 Legislative responses

a Law No. 1/1974 on Marriage

The Law on Marriage concentrates on a number of essential things, such as: prerequisites for marriage; the rights and obligations of husband and wife; property in marriage; rights and obligations of the parent and child, including unified marriage. In this law, there are several crucial factors such as:

- Marriage is a physical and psychological tie between a man and a woman as husband and wife, with the purpose of developing a happy and lasting household in the eyes of God.
- In principle, in marriage a man is allowed to have one wife and, conversely, a woman only one husband.
- There are complex requirements for a husband to have more than one wife.
- Marriage is permitted for a man aged 19 years or more and a woman aged 16 years or more.
- Legal marriage exists when it is registered in accordance with existing laws.
- This law also permits marriage outside Indonesian territory between two Indonesian citizens or an Indonesian citizen and a foreigner, providing it is in accordance with existing rules of that foreign country. If the husband and wife return to Indonesia, they have to register in the Government Marriage Office. Indonesia does not recognise inter-religion marriage.
- A legal child is the child born in, or as a result of, legal marriage. Both parents have obligations to properly nurture and educate their child.

b Law No. 7/1984 on Ratification of the Convention on the Elimination of all Forms of Discrimination against Women

On 29 July 1980, the Government of the Republic of Indonesia ratified the Convention on the Elimination of all Forms of Discrimination against Women at the Copenhagen World Conference on the UN Declaration of Women. Ratification of such a convention represents Indonesia's position, which was declared on 18 December 1979, and is in line with the UN General Assembly resolution.

Indonesia’s willingness to ratify the convention reflected the convention’s consistency with the Five Principles (Pancasila) of the Republic of Indonesia and the 1945 constitution, which affirmed that every citizen shall have equal rights in law and governance.
c Law No. 23/2002 on Child Protection

The Law on Child Protection stipulates:
- the obligation and responsibility of government, society, family and parents for child protection
- various provisions in the areas of childrearing and adoption
- that children are the future of the nation. They will ensure the sustainability and existence of the nation and the state in the future
- the content of this law is to protect children from any forms of discrimination, economic and sexual exploitation, neglect, cruelty and torture, injustice, and other maltreatment
- the rights of children, such as the right to: grow up and participate in society, self-identity, worship in accordance with their religion, nurturing and rearing, access health services, access education, form opinions and live in peace
- government is obliged and responsible for providing special protection to: children in emergency situations; children from minority groups, economically and/or sexually exploited children, including those subjected to trafficking and kidnap; children who are victims of narcotics, alcohol, psychotropic and other substances; neglected or physically and emotionally abused children; and disabled children
- the establishment of the Indonesia Commission for Child Protection to promote the effectiveness of operations to protect children
- there are to be sufficiently severe sanctions to offenders of this law.

This law is currently undergoing nationwide consultation regarding its operational rules, regulations and implementation.

d Law No. 23/2004 on Elimination of Domestic Violence

The Law on Elimination of Domestic Violence focuses on the:
- prohibition of domestic violence
- obligations of government and society
- protection of victims of domestic violence
- investigation and sanction provisions.

Moreover, this law is based on the following principles:
- that all forms of violence, particularly domestic violence, are violations of human rights and are crimes against human dignity and therefore must be eliminated
- most victims of domestic violence are women in need of protection by the state and society
- domestic violence comprises all actions directed at individuals, particularly women, that result in physical, sexual, psychological suffering and/or household neglect, including threats to perpetrate action forcefully, or to take away the independence of the household/family.

The law aims to protect everyone who experiences domestic violence in the form of: physical abuse; psychological abuse; sexual abuse or household negligence resulting in pain, sickness or adverse injury.

The law also spells out the protection of the victim’s rights and stipulates optimal punishment to perpetrators.

This law is currently undergoing nationwide consultation regarding its operational rules, regulations and implementation.
Law No 13/1988 on Welfare of the Elderly

The Law on Welfare of the Elderly is essential to family life. It emphasises:
- government and society are responsible for older people
- empowerment efforts for older people
- coordination and sanction provisions.

Moreover, this law identifies the rights of the elderly in promoting their social welfare including:
- religious services
- health services
- working opportunities for older people
- education and training services
- access to public facilities
- access to legal services
- social protection and assistance.

The law makes provision for the assistance and protection of the potential elderly to improve their level of access to social welfare.


The Law on Population Development and Family Welfare focuses on:
- the right and obligation of society to establish family welfare
- population mobility
- the quality of family life
- family planning.

The law furthermore specifies that:
- to make the population compatible and balanced, it is necessary to regulate the quantity and quality of population groups within their supporting environment
- population independence will occur as a result of people utilising their capacity and potential.

2 Policy and strategy for family empowerment

Government policy supports the family to develop characteristics such as independence and social resilience, in their role as users and caretakers of the environment and in pursuing sustainable development in harmony with the natural environment. This policy is implemented and achieved through a program emphasising the role of the family and empowering it. The main target of the program is the family. Several family empowerment programs conducted by the Ministry of Social Affairs target the following beneficiaries:
- the vulnerable family: a family that is vulnerable to problems and in need of empowerment efforts. Such a family is susceptible to conditions that marginalise it, and is in a situation where it is not meeting minimum physical needs
- the family with social–psychological problems: a family in which there is disturbing behaviour and social maladjustment of one or more family members, which negatively impacts on the whole family performing its social role. Indicators are: stress, severe conflict resulting in breakdown and divorce, family disharmony, family residing in an area of conflict, family of which one or more members suffers a disability, chronic disease, drugs/narcotics, and other factors that impede its social roles
the family with social or cultural problems: a family which, because of specific reasons, is unable to adapt, integrate and maintain its life pattern within the local culture. These include: internal migrant families suffering anomie, families isolated from the social environment, displaced families, families isolated from its members and families in conflict with other family members

the wealthy family: a family, either extended or nuclear, that is capable of being a resource for solving problems and providing support for the implementation of programs for social responsibility in its local environment.

Technical policy for the role of families in empowerment programs is based on:

- building the capacity of the family and its resources in its environment in order to strengthen family social resilience
- promoting professionalism and quality in family empowerment programs, particularly families with problems and vulnerable families
- raising the social awareness of the family
- strengthening the family institution and its networks.

The strategy utilised in implementing family empowerment is:

- increasing the commitment of government and society to provide, extend and diversify family empowerment efforts
- promoting a social campaign and advocacy for the best interests of the family
- preparing and empowering society to address and cope with various family problems to prevent them continuing
- building capacity to promote the family and society in enforcing family social resilience
- establishing social networks and partnerships that build, increase, stabilize, develop and empower various linkages in order to strengthen family functions and roles
- mobilising and using internal and external resources useful for supporting family roles
- strengthening family institutions and supporting social values for family welfare
- local initiative is strategically directed at strengthening local wisdom to support the social resilience of the family.

3 Program responses

Family empowerment programs undertaken by either government or society are generally formulated and based on an analysis of real family needs. The program formulation process is initiated with field research and study to ensure the program is focused and beneficial to the family.

The Ministry of Social Affairs administers the following programs for family empowerment:

- Social Guidance for the Family
  The program consists of a number of activities aimed at promoting social relationships amongst families and strengthening the motivation, capacity, function and role of the family. The targets of this program are social actors that strengthen society (such as wealthy families, caring families, community figures, social worker, community worker), the vulnerable family and the family with social problems. The social guidance provided for vulnerable families and families with social problems can entail selection and referral to other parties for follow-up services. The program covers such activities as social campaigns,
social awareness raising, preliminary guidance, basic social guidance, social welfare provision, community work, further social guidance and development, the National Day of the Family, appreciation of model families, and monitoring and evaluation of the program.

**National Day of the Family**
The National Day of the Family is celebrated on 29 June each year. It is held solely in the best interests of the family to raise the awareness of society and its participation in promoting quality and coverage of family empowerment. Its target is families in general, social organisations, NGOs, universities and related agencies. The National Day of the Family encourages society to prevent and reduce the number of family problems. It includes activities such as social campaigns, publications, and social assistance.

**Income Generating Group for Young and Independent Families**
The Income Generating Group aims at empowering young families. The program integrates development, social welfare guidance and business productivity to stimulate aid. Its objective is to build the capacity and potential of young families to enhance their welfare and achieve independence. It targets potential young families (such as adolescents, single adults, adult couples without children), as well as groups such as vulnerable families, families that have five years of marriage, and families that have small-scale businesses of which the optimum age of the key family member is forty-five years. The program is conducted in groups that comprise five to ten or more persons/families.

**Social Assistance for Families**
This program, comprising activities aimed at empowering the family though social welfare and social guidance, is used in promoting social welfare for mature families to enable them to reach independence. Its target is mature families (of more than five years of marriage) that are vulnerable and have small-scale businesses, particularly those families that reside in areas of poverty. The program is implemented individually or collectively.

**Family Consultation and Protection**
This program comprises a number of activities directed at providing family consultation services and referral to competent social institutions, to help families solve their problems. The target of this program is families in trouble. Family Consultation and Protection consists of providing information, consultation, protection and referral to the parties that are relevant to the problems of particular families. Family Consultation and Protection is carried out by diverse professions, such as social workers, psychologists, religious preachers, teachers, legal practitioners and doctors, through social organisations, NGOs, universities and other caring social institutions, including the Family Consultation Institution.

**Family Institution Empowerment**
This program consists of activities aimed at utilising and strengthening family roles and functions, promoting the institution of the family, as well as institutionalising family values. The target of the program is, amongst others, the family with social problems as a result of the sudden change of family roles, such as death, loss of job, separation and divorce. The program is conducted in the form of family institution guidance at the local group level, drawing on local wisdom, family associations, technical and skill guidance, capital assistance, social guidance, and monitoring and evaluating. Program activities include institution empowerment, family guidance, family empowerment, social security and cross-cultural guidance.
Social Empowerment

This program includes activities directed at utilising the potential of the family and the environment to improve family functioning and family social responsibility. In this way, mutually beneficial social interactions between families and the community exist to strengthen family social resilience. The target of the program is families residing in poverty areas, areas in crisis, slum areas and areas in which prostitution is practised. Program activities include family empowerment, network development, child and family guidance, and business integration.

All of the above programs have been developed in consultation with the community and implemented in thirty-two provinces in Indonesia, with varying results and problems. Some provinces have successfully and creatively developed the programs to increase family welfare. Others have not fully understood the processes for best implementing the programs in their particular context.

Despite current interventions, there is still a significant number of families with economic, social and psychological problems. The following is an analysis of some weaknesses of the programs:

- The planning of family programs is not completely based on a needs analysis. This is a crucial factor, because planners tend to adopt a top-down planning approach, rather than a bottom-up planning process.
- The programs provide more cash assistance rather than more effort aimed at empowering families.
- There is a lack of coordination and communication between sectors.
- There is a lack of awareness of the nature of the family as a system related to its environment. Planning of family programs should also empower other sub-systems of the social environment, such as employment, education, housing and health.
- There is a lack of program sustainability.
- There is a lack of suitable networks.

C Conclusions and recommendations

1 Conclusions

The family maintains a highly strategic position in the development of the nation. The quality of the nation is influenced by the quality of its families. Because globalisation and social change have affected the values of the family, actions need to be taken to empower all family members, through a variety of programs, including economic, education, religion and culture.

Government and society realise that complex social problems such as poverty, neglect, social disability, unemployment and violence are rooted in the family. Action is required to provide timely, integrated, accurate, professional and sustainable solutions. Given the interrelated nature of social problems, poverty may impact on other problem areas such as education, health, environment, housing and so on. Therefore, programs designed to deal with family problems are based on the results of real assessment and intersector integrated program design.

A number of existing laws in Indonesia reflect the state’s responsibility for protecting its citizens from various forms of violence and the loss of rights of family members. The existing laws and regulations are Law No. 1/1974 on Marriage, Law No. 7/1984 on the Ratification of the Convention on the Elimination of all Forms of

The government has made great efforts to apply the laws. Continued effort to implement the supremacy of the laws at every level is crucial. Relevant programs conducted by various parties, including government, society, social organisations, NGOs and universities, have been of benefit to families and society in enhancing their welfare.

2 Recommendations

- Since family problems are complex, family empowerment should be implemented in a comprehensive manner to include both the family and its environment.
- There should be clear targeting of families to be empowered, such as families with social-economic problems, families with social–psychological problems, families with social-cultural problems, families affected by violence and disasters, young families, and potential families (adolescents and adult people).
- Every family empowerment program should refer to the vision of social empowerment, such as ‘Society is a resource and partner of social welfare development’. This vision is based on government and society roles in social welfare development (1945 Constitution and Law No. 6/1974 on Major Provisions of Social Welfare).
- Family empowerment efforts require participation of diverse parties, such as the family, society, government, social organisations and NGOs, corporations and universities. However, the family has the primary role according to the principle of ‘Working with People’.
- The mission of family empowerment is directed at accomplishing the following objectives:
  - to increase the capacity of all elements in society, including individuals, families, groups, organisations and communities
  - to establish supportive social and cultural values, such as the spirit of solidarity, social awareness and responsibility, and social commitment and participation
  - to institutionalise the provision of professional and broad social services by the community
  - to applying equitable law and pro-family programs
  - to execute family empowerment programs underpinned by principles such as individualisation, participation, needs orientation, community-based, and supported by professional social workers.
The Malaysian experience

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Introduction

In life, the most rewarding and fulfilling feeling and the most profound inner peace all come from being a member of a loving family. One’s personal success, moments of glory, somehow remain incomplete if they are not combined with happiness or harmonious family life. The family is where relationships begin. For most of us, our first meaningful communication is with our mother, father or siblings. Our deepest feelings, such as love, warmth and security, are nurtured in the family. Family members may also develop other feelings that are less than positive where spouses, children, siblings and relatives have disagreements and even disputes. But in the past, relationships never really broke down. There were in-built support systems and mechanisms that were strong enough to provide the social control and equilibrium so that families managed to cope with living and growing. The same cannot be said of the family scenario today.

Nonetheless, the family has long been recognised as the basic unit of society and the building block of a nation and, as affirmed in Section 16(3) of the Universal Declaration of Human Rights, is entitled to protection by society and the state. In this regard, Malaysia’s Vision 2020 has placed the family institution as integral for the provision of the basic needs of the individual but, equally important, as the agent laying the foundation for healthy communities and societies. In Malaysia, to support the family institution there is a focus on the development of family development programs and, in the event of family breakdown, mediation within the civil and Syariah systems.

Approximately 52 per cent of Malaysia’s population is Muslims (Islam is the official state religion), 17 per cent are Buddhists, 12 per cent Taoists, 6 per cent Christians, and the rest Hindus or Sikhs. Therefore, in Malaysia, family law matters are governed by a combination of civil, Syariah (Islamic Laws) and Adat laws (the local customary laws of the non-Muslim natives). Under the Federal Constitution, Islam falls under the state’s lists and thus, the power to enact legislation pertaining to Islam and Muslim wellbeing fall under the state authority. Each state, therefore, has its own set of Islamic laws as well as its own Islamic court system.

In terms of family law for Muslims, basic principles are almost the same between states within the Federation, and there are only slight differences in the wording and practices as well as implementation. Therefore, the Islamic Family Law (Federal Territories) Act 1984 (IFLA) will be mentioned specifically in this paper wherever there is a reference to such legal provisions.

With regard to non-Muslims, the Law Reform (Marriage and Divorce) Act (LRA) 1976 is applied. The LRA was passed following a proposal made by a Royal Commission that was set up in 1970 to review and propose reforms on the various laws governing non-Muslim marriage and divorce in Malaysia. Since the LRA came into force in 1982, there has been more certainty regarding laws on non-Muslim marriage and divorce. With this new law, only marriages that are registered under the LRA are officially
recognised. However, marriages that were solemnised under any law, religion or custom before the LRA came into effect (1 March 1982) are still considered valid and are deemed to be registered under the LRA.

**Demography and family scenario in Malaysia**

With a population of 26.128 million (2005), Malaysia is a relatively youthful country, with around one-third of the population under the age of 15. This implies that much of the development resources will have to cater for the needs of young people, particularly in the areas of child care, education, health and other social services. Population growth declined from 2.6 per cent for the period 1991–2000 to 2.1 per cent during 2001–2005, enabling the GDP per capita to grow to RM16 987 (US$4470) by 2005. Lifespan also grew as a result of improved health and quality of life—70.9 years among males and 75.5 years among females (2004). A significant decline in fertility has also been evident, from a high of 3.4 children per woman in 2000 to 2.9 in 2004, partly the consequence of increasing age at first marriage. By 2020, total fertility rate (TFR) is estimated to be 2.6.

In recent years, we have also seen a gradual shift in long-held attitudes towards relationships, marriage and family. More Malaysians are remaining single (18.8 per cent of those aged 30 to 34 years old are still single—Census 2000), and women delaying marriage to 25 years and having fewer children. Youths are adopting increasingly liberal views towards sexual intimacy, marriage commitment and childbearing.

A socio-demographic analysis of Malaysian families indicates some major emerging trends that are profoundly altering the pattern of contact, sharing and relationships in families, as shown below:

<table>
<thead>
<tr>
<th></th>
<th>Current</th>
<th>Previous</th>
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<tbody>
<tr>
<td>Mean age of first marriage</td>
<td>Males—29.9</td>
<td>28.6</td>
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<tr>
<td></td>
<td>Females—25.3</td>
<td>25.1</td>
</tr>
<tr>
<td>Total fertility rate</td>
<td>2.9 children (2004)</td>
<td>3.4</td>
</tr>
<tr>
<td></td>
<td>(2000, Census)</td>
<td></td>
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<tr>
<td>Average household size</td>
<td>Peninsular Malaysia—4.5</td>
<td>4.6 (2000)</td>
</tr>
<tr>
<td></td>
<td>Sabah—5.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sarawak—4.5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(MPFS, 2004)</td>
<td></td>
</tr>
<tr>
<td>Nuclear families</td>
<td>Peninsular Malaysia—70.3%</td>
<td>68.0% (1994)</td>
</tr>
<tr>
<td></td>
<td>Sabah—65.9%</td>
<td></td>
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<tr>
<td></td>
<td>Sarawak—61.6%</td>
<td></td>
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<tr>
<td></td>
<td>(MPFS, 2004)</td>
<td></td>
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<tr>
<td>Women labour force participation rate</td>
<td>50.8% (MPFS, 2004)</td>
<td>47.7% (2003)</td>
</tr>
<tr>
<td>Female-headed households</td>
<td>13.7% (2000, Census)</td>
<td>18.5% (1991)</td>
</tr>
</tbody>
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Source: Department of Statistics; Mid Term Review, Economy Planning Unit (EPU); NPFDB, Malaysian Population and Family Survey 4, (MPFS 4)
Policies and programs for healthy families and communities

Vision 2020

Basically, the family institution in Malaysia is held sacred, but it is fast changing as a result of modernisation and urbanisation of the population. To gear the nation towards making Malaysia an industrialised nation by the year 2020, one of the nine strategic challenges identified in Vision 2020 requires active participation of the family institution, as follows:

The seventh challenge is the challenge of establishing a fully caring society and a caring culture, a social system in which society will come before self, in which the welfare of the people will revolve not around the state or the individual but around a strong and resilient family system.

National Vision Policy/National Development Plan

The National Vision Policy (NVP), with national unity as its overriding objective, is aimed at establishing a progressive and prosperous Malaysian nation that lives in harmony and engages in full and fair partnership. One of the key thrusts of the NVP is the building of a resilient nation through the cultivating of a tolerant and more caring society. In this regard, the family unit, school, workplace, religious and social organisations bear the responsibility of instilling and constantly reinforcing values that make the individual more caring, love the young and look after the welfare of the elderly and the disabled.

Recognising that the family forms a fundamental unit towards the development of a progressive and caring society, emphasis was given in the National Development Plan to strengthen the family unit (currently Malaysia is at the end of its 8th Plan, 2001–2005). The plan places the family unit at the pivot for the inculcation of positive values and its position to be reinforced and complemented by non-government organisations, community-based organisations, schools and training institutions.

National Social Policy

To ensure the effective implementation of social development programs, the National Social Policy was launched in 2003 with the Ministry of Women, Family and Community Development acting as its secretariat. The policy provides the framework for the planning and implementation of social development programs involving the public and private sectors, together with NGOs. The objective of the policy is to ensure that every individual, family and community, regardless of ethnic group, religion, culture and location, is able to participate and contribute towards the development of the nation as well as enjoy a self-sustaining quality of life.

To ensure the successful implementation of the strategies under this policy, a National Social Council chaired by the Deputy Prime Minister was formed, involving fourteen ministries and several agencies.

National Integrity Plan

To further operationalise the fourth challenge, as embodied in Vision 2020 (the establishment of a fully moral and ethical society), the National Integrity Plan (NIP) was launched by the Prime Minister in April 2004. Of significance was the recognition of the role of the family institution in the government’s efforts to bring back values in society. Five targets to be achieved between 2004–2008 are to:
- strengthen the family institution
- reduce corruption, wastage and abuse of power
- improve the public delivery system and reduce red tape
- enhance corporate administration and business ethics
- raise the quality of life and prosperity of the people.

The Ministry of Women, Family and Community Development is responsible for monitoring, implementing and evaluating three core target groups of families, civil society and NGOs.

**National Policy for Women**

Women, as the backbone for family stability, have been given recognition since the late 1980s when the National Policy for Women was formulated in 1989. Policies and programs affecting women in the country have been implemented, reviewed and amended, especially in mainstreaming women in development. Malaysia has also acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), especially in ensuring gender equity, eliminating violence in the family and increasing male responsibility.

One of the greatest challenges for the Ministry of Women, Family and Community Development is to identify effective strategies to assist married women balance work and family life. Although measures have been taken to encourage employers to provide greater flexibility at the workplace, flexible working hours and the general upgrading of skills of women employees and bringing the workplace to homes, responses to this arrangement have not been fully optimised.

**National Family Policy**

The Malaysian Government has taken the initiative to draft a National Family Policy and a Plan of Action on Family to bring the importance of the family to public consciousness. In the final stages of its formulation, it aims to galvanise commitment and the support of all stakeholders and beneficiaries in promoting a family-first concept as a means to develop and enhance the family institution. Specifically, it hopes to incorporate family wellbeing, based on universal values, in all development programs for nation-building, so that the family institution can be strengthened.

**Family development programs**

The National Population and Family Development Board (NPFDB) under the Ministry of Women, Family and Community Development has been recognised as the lead agency in the goal of achieving healthy families and communities.

As a long-term strategy, the NPFDB has drawn up a Key Plan of Action for Family Development (Figure 1). With the goal of developing a strong and resilient family inbuilt with good character, five action areas have been identified:
- Strong Marriage
- Effective Parenting
- Smart Singles/Young People
- Families with Special Needs
- Family Support.
To operationalise the Plan of Action, existing activities have been enhanced, while new initiatives have been developed to meet current and emerging needs of families as follows:

- **Training and education**
  Educational modules on family development were developed by the NPFDB in the Seventh Malaysia Plan (1996–2000), with emphasis on parenting. These modules were further extended in the Eighth Malaysia Plan (2001–2005), where it was widely disseminated through training of trainers (TOT) workshops, talks, courses and seminars for target groups from all sectors. Some 1284 trainers from government, NGOs and the private sector have been trained through twenty-seven workshops between 2001–2005. A total of 1781 activities were conducted at the grassroots level, including talks, courses, seminars and programs based on these modules, with the attendance of 243,173 participants from various government agencies, NGOs, private sector organisations and members of the society during the same period.

- **Parenting@Work**
  This program is a new initiative that is an expansion of the existing parenting program. It aims at providing knowledge and parenting skills to parents at the workplace, especially to fathers, on work–family life balance, and their roles and responsibilities in the context of family life, mainly in instilling positive values through experiential learning. This program is scheduled to start in 2006.

- **Pre-marital course**
  To further strengthen the marriage institution, a guide for newlyweds called SMARTSTART was developed in 2003 in response to the government’s commitment to strengthen marital relationships among newlyweds as a foundation for a strong and resilient family institution. Among the topics covered are roles, responsibilities of husband/wife, health, parenting, managing family resources, managing stress and conflicts, and legal rights. This package has since been developed into the SMARTSTART Module, to be utilised in the implementation of the pre-marital courses for non-Muslim couples throughout
the country. In 2005, an initial group of 183 master trainers and facilitators from different ethnic groups were trained and more will soon be trained before the full implementation of the course in 2006 by the NPFDB, religious bodies and NGOs.

- Promotional and advocacy activities
  National Family Day is celebrated on 15 May, with different themes every year in conjunction with the United Nations International Family Day celebrations. Various family-related programs and activities are organised at the national and state levels to inculcate family cohesiveness, good ethics, family quality time and values, and productivity among family members. Government agencies, the private sector, NGOs and resident associations commonly hold family days in order to promote family togetherness and enhance family relationships. The introduction of rebates for employers who conduct family-related activities for their employees in 2003 further encouraged employers in the private sector to organise family day or family-related activities in their organisations.

- Nation of Character Program
  Malaysia is also making great efforts to defend and preserve family values for the sake of future generations. In 2006, a nationwide campaign will be launched, with emphasis on the inculcation of values through a multi-ministry/agency approach. Under the program, good characteristics that naturally and traditionally exist in Malaysian society will be promoted through various media at all levels of society. This nationwide campaign will, among others, consist of the following:

- Family counselling services
  Counselling services on family, marriage and adolescent issues are provided by the NPFDB throughout the country. This intervention program will help individuals, couples and families who are experiencing distress to seek counselling or assistance from trained counsellors at the centre. Other agencies, such as the Department of Social Welfare, and the Department of Women’s Development, also provide such services to help their target groups draw upon their inner strengths and allow them opportunities to get their lives back on track.

- Family Community Centre
  The Family Community Centre (FCC) is a new initiative of the Ministry of Women, Family and Community Development and will provide programs and services across five focus groups at the community level. Primarily targeted
to children, teenagers, families and the community, the FCC hopes to build a society where all individuals have opportunities to participate and enhance their quality of life through group counselling and life-skills training. FCC also seeks to assist the community in overcoming barriers to participation by:

- providing quality services and programs which respond directly to community needs
- actively engaging in community development
- advocating on behalf of individuals and groups
- providing counselling sessions for parents and children.

The centre is expected to be operational by early 2006.

**Family laws**

The Civil High Courts (which is under the Federal Lists) have jurisdiction over family matters relating to non-Muslims in Malaysia, whereas the respective state’s Syariah courts would have jurisdiction over family matters relating to Muslims in the respective states.

**Marriage laws for Muslims**

- Age at marriage
  
  Under the Syariah law, the age limit for marriage for woman is 16 and for men 18. However, there are some states in Malaysia where the age limit is not specifically fixed in terms of age, but is based on the consideration of whether such person is eligible to enter into marriage (a’qil ba’ligh). Consent of the wali (marriage guardian) is necessary before a marriage can be solemnised.

- Divorce
  
  Despite the usual practice in Muslim traditions that divorce (talaq) may be pronounced by husband at any time, this practice is an offence under the Islamic Family Law. All divorce proceedings must be heard in court. However, if the talaq is pronounced outside the court, the parties may still refer the matter to court for verification of the termination of the marriage and hence the rights of each parties for maintenance, custody and jointly acquired property will be protected. In Malaysia, likewise in any other Muslim nation, a Muslim wife can divorce her husband on grounds based on the prescribed ta’lik (that is, a breach of promise that was expressed by the husband after solemnisation of marriage) or on other grounds that are considered to cause harm (dha’r syarie) to the wife, such as failure to provide for the wife, violence and desertion.

  A women may also petition to court for fasakh or khuluq, which has the effect of dissolving the marriage. The court, after hearing the application, may order the husband to pronounce talaq. Under the IFLA, if the husband wishes to ruju (resume conjugal relationships) with his divorced wife, the re-cohabitation must take place by mutual consent and without force.

- Maintenance/child support
  
  Under the Syariah laws, a man is responsible for the provision of maintenance for the wife and his family. Failure to provide such maintenance would entitle the wife or child the right to apply to Syariah Court for an order that requires the husband/father to provide for such maintenance. Maintenance for a divorced wife is payable only during the period of the iddah (period in which the husband and wife are considering ruju, that is, resuming the conjugal relationship, which is approximately a period of three months); and her entitlement ends if she lives in adultery with another man. Despite that, child support would
remain until the child reaches the age of 18 or, if the child is pursuing his or her tertiary education, until he or she has graduated. If the wife is given custody of the children of the marriage, the wife would also be entitled to the benefit of having accommodation, and such right will be preserved until the child attained the age of 18 or upon graduation of the said child.

Further, under the Syariah law, a man is required to pay maintenance during marriage or after the dissolution of the marriage for his children, irrespective of whether the child is:

- in his custody
- in the custody of another person, including the mother and her relations or
- under the guardianship of any other person as directed by the court.

In determining the amount of maintenance money to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court bases its assessment primarily on the means and needs of the parties, regardless of the proportion the payment bears to the income of the husband or wife, as the case may be.

- **Child custody**
  The Syariah law views the mother as the person best entitled to the custody of children up to seven years of age for a male and up to nine years of age for a female. After such age, each party has the right to apply to the court for review of custody, and during this, the child is given the right to choose. The court will generally consider the welfare of the child as the paramount consideration before deciding on the issues of custody. The custody of illegitimate children, however, remains exclusively to the mother and her relations.

**The Law Reform (Marriage and Divorce) Act 1976**

The Law Reform (Marriage and Divorce) Act 1976, which came into force in March 1982, provides for monogamous marriages and consolidates the various laws on marriage and divorce pertaining to non-Muslims.

The Act brought about an important social change for non-Muslims in Malaysia. The Act prohibits polygamy and, under the Penal Code, this is an offence punishable with an imprisonment up to seven years and shall also be liable to a fine. The Act also provides punishment for the unauthorised solemnisation of marriages.

- **Age at marriage**
  The minimum age for marriage for non-Muslims is set at 16 for females and 18 for males. However, for marriage under the age of 18, the consent of the Chief Minister of the respective state is required, and for marriage between the age of 18 to 21, the consent of parents is required. An application may be made to the High Court in cases where parties are denied with such consents.

- **Divorce**
  The LRA requires that all divorces be registered, and recognises the irretrievable breakdown of a marriage as the sole grounds for divorce. Reconciliatory bodies have been set up to resolve difficulties in marriages referred to them by couples wishing to petition for divorce. Before presenting a petition for divorce, couples are required to appear before a marriage tribunal of a minimum of three persons who may counsel and advice the couple. The court shall also have regard to the recommendations and suggestions made by the reconciliatory body.

- **Maintenance**
The LRA allows the court to order a man to make maintenance payments to his wife or former wife during the course of any matrimonial proceedings, when granting or subsequent to the granting of a decree of divorce or judicial separation, and if, after a decree declaring her presumed to be dead, she is found alive. The corresponding power to order a wife to pay maintenance to her husband or former husband arises only in very limited circumstances (that is, if he is wholly or partially incapacitated from earning a livelihood by reason of mental or physical injury or ill health, and the court is satisfied that it is reasonable to order the wife to maintain him).

In determining the amount of maintenance money to be paid by a man to his wife or former wife, or by a woman to her husband or former husband, the court bases its assessment primarily on the means and needs of the parties, regardless of the proportion the payment bears to the income of the husband or wife, as the case may be.

- **Child custody/guardianship**

The Civil Family Court also adopts the Syariah principles that the custody of young children (especially below 7 years), where the parents are no longer living together, would be given to the mother, all other things being equal. Thus, many mothers have legal custody of their children, but the fathers remain their guardians, as provided by the LRA. In the children’s upbringing, the consent or participation of their legal guardians is often necessary. The welfare of the child is the most important factor, the parents will be consulted, and if the child is old enough, he/she will be consulted. If there is more than one child, it is not necessary that one parent keeps all the children, but as far as possible the children are together.

**New initiatives in family legislation**

- **Mediation**

Reconciliation of disputes pertaining to marriage that may lead to divorce is handled through a mediation process. Mediation, especially those related to custody, jointly acquired property, maintenance and *mutaah* (consolatory gift) has overtaken the usual practice of filing papers in court to resolve marital problems in the Syariah Court. In mediation, the rules have a ‘compelling’ section that states that the absence of parties shall be regarded as contempt of court, which carries a custodial sentence, that is not present in the Civil Court, where such practice is based on the concept of voluntary attendance.

- **Family Court**

Recognising that family disputes are private matters, the government has agreed to the setting up of a Family Court (for the Civil Court, as the Syariah Court is basically a family court whenever it exercises its civil matters). The proposed Family Court would be exercising similar functions of the High Court in matrimonial matters, with the element of resorting to the mediation process as well as the ‘family-friendly’ look of the physical court. It is also hope that both the Civil and Syariah Family courts would be able to share the same characteristic as well as premises.

- **Child Support Agency**

Women and family-based NGOs have proposed to the Malaysian Government to set up a Child Support Agency (CSA) that will look into the maintenance of children of divorced parents. It is proposed that the CSA should have power to assess the amount to be paid by the parent who is not living with the children. Their proposal included the following suggestions:
the CSA should be able to instruct employers to deduct maintenance money from the (non-resident) parent’s wages
- if the non-resident parent is self-employed, it suggests court action against property or deposit accounts, or sending in bailiffs to take possession of properties
- child maintenance be changed from a judicial to an administrative process
- the government to stop the renewal of road tax, driving licenses, business licences and passports of those who did not pay alimony and maintenance of their children.

Such proposal is under the study of the Ministry of Women, Family and Community Development, before the government will make any decision.

Conclusion

Changes in the societal context in which families function have brought about tremendous changes and challenges for Malaysian families. Whilst families continue to be based on religious, civil or traditional marriage, the process of rapid demographic and socioeconomic changes have influenced patterns of family formations and family life and generated considerable change in family composition and structure. Despite their inherent resilience and potential strength, families in Malaysia are under pressure and in need of social support from the government, NGOs and the civil society.
The management of family violence in Singapore

Ms Corinne Koh, Ministry of Community Development, Youth and Sports, Republic of Singapore

The Singapore Government does not tolerate family violence. Through the ‘Many Helping Hands’ approach, Singapore seeks to foster a violence-free environment for families through working closely with governmental and non-governmental agencies, and the community. This approach underlies the social service delivery mechanism and espouses the principle that the various agencies, including the government, the community and families, should work together in concert and partnership to tackle social issues in Singapore.

Legislative response

The Women’s Charter, passed in 1961, provides the legal basis for marriages and protection of family members from family violence. In 1996, amendments were made to the Women’s Charter to give greater protection to family members against violence. The amendments include the expansion of the definition of family members, as well as the definition of family violence to include emotional and psychological harm. Other significant amendments include the ability of the court to issue a protection order on the principle of ‘balance of probability’, rather than ‘beyond reasonable doubt’, that violence has occurred or is likely to occur. This has encouraged victims to come forward for protection.

Any person who wilfully contravenes a protection order or an expedited order is liable to a conviction to a fine not exceeding S$2000, or to imprisonment for a term not exceeding 6 months, or to both, and, in the case of a second or subsequent conviction, to a fine not exceeding S$5000, or to imprisonment for a term not exceeding 12 months, or to both. In cases where the perpetrator has caused substantial physical hurt to the victim, charges may be brought against him under the Penal Code.

Mandatory Counselling Programme for family violence cases

Under the Women’s Charter, when making a protection order, the court can order the perpetrator, victim and/or family members of a victim to attend counselling. The aim of the Mandatory Counselling Programme is to rehabilitate the perpetrators and give support to victims and their children to ensure their safety and protection. Counselling sessions cover topics such as anger and conflict management, communication skills and understanding the cycle of violence. With mandatory counselling, victims are also empowered, as they learn how to formulate safety plans for themselves and their children. The Ministry of Community Development, Youth and Sports (MCYS) administers and funds the program. Under the program, families are referred to social service agencies for counselling. Attendance is compulsory and non-compliance can constitute a contempt of court.

In March 2002, the Institute of Mental Health, together with the Family Court and MCYS, launched Project SAVE (Substance Abuse and Violence Elimination) as an extension of the Mandatory Counselling Programme. This counselling program
targeted perpetrators who had alcohol issues. By 2004, Project SAVE extended its reach to perpetrators with drug and gambling addictions.

In June 2005, MCYS, with the support of Singapore Prisons Service, Family Court and Pasir Ris Family Service Centre, piloted the extension of the program to offenders in penal institutions. Offenders can hence receive mandatory counselling whilst serving their sentence. This has enabled offenders to receive early rehabilitation, and it also prepares them for their return to the community.

Policy response

A multisectoral response underlies the family violence management system in Singapore. The MCYS plays a key role in setting the policy and service delivery frameworks for the management of family violence. It coordinates and works in partnership with key ministries, the police, healthcare professionals and social service providers to provide comprehensive and effective services for those affected by violence. This multisectoral response is established at various levels.

At the policy level, a key platform for the management of family violence in Singapore is the Family Violence Dialogue Group, established in 2001. The group is headed jointly by MCYS and the Singapore Police Force. The Dialogue Group comprises the courts, the prisons, Ministry of Health, Ministry of Education, chairpersons of Regional Family Violence Working groups, the National Council of Social Service (NCSS)\(^1\), and social service agencies. The Dialogue Group is a strategic development and planning policy group to enhance provisions and services for families affected by violence through facilitating work processes amongst the agencies, coordinating public education efforts and developing new areas for collaboration on family violence.

At the operational level, the National Family Violence Networking System was established in 1996 to put a tight network of support and assistance into place. The island-wide networking system provides multiple access points for victims to obtain help. This system links the police, prisons, hospitals, Family Service Centres, the courts and MCYS. Family Service Centres are neighbourhood-based social service agencies that act as focal points of family resources. They provide a spectrum of services that address a wide range of family needs, including family protection and rehabilitation, casework and financial assistance. Victims and perpetrators of violence are encouraged to seek help early at these centres.

Multi-agency approach

The Singapore Police Force conducts regular networking meetings with social workers based in social service agencies. These networking meetings are aimed at improving joint working processes and providing coordinated assistance to family violence victims. Such efforts have resulted in joint public education efforts in the community and increased rapport between police officers and social workers. The fruits of the growth of the police–social worker network can be seen in the increase in the police referrals of family violence victims to social service agencies, from 171 referrals in 2001 to 943 referrals in 2004, resulting in timely interventions to provide support and care to victims, who are largely women and children.

\(^1\) The National Council of Social Service is an umbrella body for social service agencies in Singapore.
Regional Family Violence Working Groups were set up in all regions in 2003–2004, with the objective of harnessing community energy to spearhead and plan joint regional activities to raise awareness of family violence, examine new trends at the grassroots level, enhance service delivery to families affected by violence and act as a conduit to provide feedback to the Family Violence Dialogue Group. The working groups include agencies from hospitals, the Police Force, crisis shelters, elderly care services, and Family Service Centres. Since their formation, the working groups have been prolific in their efforts in raising awareness, providing inter-agency training and initiating projects to better serve their clients and community.

Another platform for the multi-pronged approach to family violence is in providing updates in the field through regular issues of a newsletter for agencies in the field of family violence and child protection. This was launched in October 2003. Entitled *Networkz—Agencies uniting against family violence*, it aims to provide agencies with updates on family protection events, programs, training and resources available locally, as well as to share the challenges and successes in the field. The newsletter serves to facilitate sharing of current and best practices to spur the agencies to seek new ways to serve the families affected by violence.

**Manual on Integrated Management of Family Violence**

A common understanding of how to assist family violence cases was established through a manual, coordinated by MCYS in 1999. Updated in February 2003, the manual spells out the protocol, procedures, roles, and responsibilities of each partner agency in the networking system. The manual reflects the government and non-government sectors’ shared goal of working in partnership to develop a seamless approach in serving families in violent relationships and in preventing family violence.

**Programs and services**

**Police management of family violence cases**

The police regularly review and improve their management of family violence cases. In March 2003, a new guideline required investigation officers to give notice to victims or social workers on the release of a family violence perpetrator from police custody, prior to the perpetrator’s actual release. The rationale for this guideline is to prevent a recurrence of violence against the victim by giving the victim or social worker more time to better protect the victim, including making alternative accommodation arrangements, where necessary.

In November 2004, the police collaborated with the Centre for Promoting Alternatives to Violence (PAVe) on a Joint House Visit Programme. The objective of the program is to minimise re-offending by breach of protection orders offenders by providing social services and conveying the message that the state remains interested in preventing relapses via paying home visits by police officers and social workers to recently released offenders and victims.

**Role of the Subordinate Courts**

The Family and Juvenile Justice Centre of the Subordinate Courts of Singapore also plays a significant role in the systemic approach in handling family violence cases in Singapore. There is an intake section at the Family Court to serve applicants of protection orders, who would receive an assessment on their safety needs once the
application is filed. In some cases, the victims are given free medical and legal help, and referred to crisis shelters. At the hearing of the family violence case, the victims can also choose to testify via videoconferencing if he or she fears confronting the perpetrators directly. The Family Court also runs a Volunteer Support Person Programme to offer assistance to victims of family violence to help them through the emotionally trying court process, by accompanying them during court hearings and giving them emotional (as opposed to legal) support.

KIDS-Line (Kids In Difficult Situation), an interactive CD-ROM, has been developed by the court to help children explore the issues of family violence and divorce, and to give them information on how to get help and understand the feelings that surface in such situations. It is used during group work sessions conducted by teacher-counsellors for primary school children. A video called *Shattered lives—Broken dreams* explains the services available in the court process to assist the victim by walking through the court procedures. The court has also partnered the police and MCYS in many public awareness events aimed to increase awareness of the availability of protection orders, thereby enhancing access to the Singapore judicial system.

**Specialised services**

At the community level, MCYS has supported the development of specialist agencies dealing with family protection work. These agencies provide a continuum of remedial, preventive and developmental services. They provide facilities for the application of personal protection orders (PPOs) through videoconferencing, medical services, legal advice, casework management and counselling services.

**Crisis shelters**

For victims requiring temporary accommodation, crisis shelters offer protection, practical assistance, and emotional support to help them overcome feelings of isolation, develop self-confidence, make decisions and take control of their lives. Crisis shelters also help victims to work out plans for their future and assist them to obtain alternative accommodation and employment where necessary.

A Programme Evaluation System was developed in January 2004 to evaluate the services of crisis shelters together with the NCSS. NCSS oversees the development and enhancement of service standards to safeguard the interests and welfare of service users. The standards also ensure professionalism and accountability in meeting social service needs. The development of the system is part of the Ministry’s strategy to include a check and balance to identify service gaps and areas for improvement.

**Training for professionals**

The Ministry funds training for social service professionals to maintain a professional standard in service delivery. The training allows professionals to acquire competency in knowledge and skills in working with family violence clients. Our partners from social services agencies also run annual training for frontline police officers to help them deal more effectively with victims and perpetrators.

**Public education efforts**

To educate the public on the sources of help, MCYS together with our partners promote public awareness on family violence. The focus of the public education
initiatives has largely been preventive in nature, emphasising strengthening families, the identification of signs of family violence and seeking help early.

MCYS works with the media and magazines to educate the public on family violence through articles and advertisements. Information on help on interpersonal violence is also available on the eCitizen website (www.family.gov.sg/stopfamilyviolence). The website explains the different forms of abuse and provides tips and advice on where victims and perpetrators can obtain help.

Public education materials like pamphlets, posters and collaterals have been distributed to inform victims and perpetrators of the availability of community resources. Efforts have also been made to educate adolescents on healthy dating relationships. To reach out to young people, a skit on dating violence was shown to over 27,500 students in secondary schools, junior colleges and institutes of technical education. The play aimed to help teenagers spot and deal with dating violence. By addressing the issue of violence in relationships from a young age, the skit seeks to prevent young persons from going down the path of family violence in the future.

MCYS also provides funding to partners to increase awareness of family violence through community events. The co-funding scheme has supported social service agencies in organising forums and programs to educate their community. Some projects that have been carried out this year include a video on intra-familial elder abuse, a campaign to educate the elderly on elder abuse, and production of pamphlets and collaterals in preparation for the White Ribbon Campaign.

Challenges

With the system well in place, one of the area’s key challenges is in changing public perception and attitudes towards violence. A study on family violence conducted in 2003 indicated that more could be done in educating the public, especially in the areas of psychological and emotional abuse. The study indicated that most people did not consider some forms of emotional abuse (such as frequent and prolonged criticism) as family violence. Respondents were most likely to associate family violence with physical violence. Many still viewed family violence as a ‘private affair’ that should be resolved within the family. This perception might lead to victims being reluctant to seek help, or deter concerned family and friends from reporting violence or abuse. The challenge for public education would be to change these perception and mindsets.

Conclusion

In the last eight years, Singapore has transformed the way it has managed family violence. Today, there is a comprehensive and holistic network of services where trained professionals intervene in family violence cases sensitively. The Singapore Government is committed to eradicate family violence and to continually examine and enhance our service delivery in the management of family violence, with the strong support and partnership from across the sectors.
The Vietnamese experience

Mr Le Do Ngoc, Director, Family Department, Vietnam Commission for Population, Family and Children

Transcribed address

Distinguished delegates, ladies and gentlemen. First of all, on behalf of the Vietnamese delegation, I would like to thank the Australian Institute of Family Studies for inviting and assisting the Vietnam Commission for Population, Family and Children to participate in this very important International Forum on Family Relationships in Transition. I’d like also to convey my warmest greetings to all participants of the Forum. Ladies and gentlemen, I will try to be brief.

For the Vietnamese people, families are the cell of society where the human race is maintained. The family is the important environment that formulates and educates the human personality, to preserve and promote fine traditional values and provide the human resources for national defence and construction. Our late President Ho Chi Minh said, ‘Families make society. Good families make good societies and good societies enable the strengthening of good families. The cell of the society is the family’. Therefore, we strongly share Prime Minister Howard’s idea in his message to our Forum: ‘Strong families are central to a healthy society’.

Ladies and gentlemen, over many generations the Vietnamese family has been formed and developed with standards of fine values, thus contributing to the development of unique national cultural collectives. Through many periods of development, the structure and relationship of the family has changed. However, the basic functions of the Vietnamese family still exist, and the family plays a significant role in national socioeconomic development.

After nearly twenty years of doi moi innovation, Vietnam has recorded important achievements in socioeconomic development, thus contributing to the improvement of material and spiritual life for all families of Vietnam. Among these achievements, new values, such as gender equality and child rights, are accepted and enhanced in family and society. Vietnam is now continuing to diversify through this period of modernisation and industrialisation of the country. The processes of this period, together with organisational and international integration, create both opportunities and challenges to the family, especially family relationships, in this transitional period of time.

We are facing a high tempo of divorce and couple separation, cohabitation, generational conflict, domestic violence and social evils. All these are affecting the resilience of the Vietnamese family. These challenges require effective solutions from the government in a comprehensive strategy and we know that, if we do not adequately support the family, it will not be able to cope with fast social and economic changes.

Ladies and gentlemen, you may know that in May 2005, the Prime Minister of the Government of Vietnam ratified the first ever National Family Strategy for developing the family as part of national industrialisation and modernisation, which contains objectives, solutions and projects. I am not going to discuss this today. You may know that, when we talk about family relationships in transition in Vietnam, in this
fast-changing period of modernisation and industrialisation, it implies changes in family leadership due to separation.

In implementing the National Family Strategy we are now preparing to conduct a national survey on the family. Ruth Weston of the Australian Institute of Family Studies has informed you earlier about this. In this national survey, family relationships and family values are two main areas of focus. We hope that when we finish this survey we may share the outcome with all our colleagues. We will try to measure the latitudinal relationship in the family, the husband and wife relationship, and the longitudinal relationship, in other words the relationship between generations in the family. This is the first time we have prepared a set of questionnaires to evaluate the views of children regarding the family.

We now pay more attention to the strengthening of family relationships and wish to ensure the sustainability of family life, and to enable the family to be healthy in itself in society, with a warm safety net for each person. After finishing this survey, we will develop a set of family indicators to help the government monitor and evaluate the situation of the family in Vietnam.

Taking this opportunity, on behalf of the delegation, we would like to express our heartfelt thanks to the Australian Department of Families, Community Services and Indigenous Affairs and the Australian Institute of Family Studies for sending experienced experts to support the preparation of the massive survey and also to thank the National Statistics Office in Vietnam for supporting us.

Ladies and gentlemen, in Vietnam we have several laws pertaining to relationships: the law on marriage and family, and the law on protection, care and education of children. Currently, the Vietnam National Congress has a plan to develop a law on domestic violence. All these laws stipulate the rights and obligations of husband and wife in family life, up to divorce.

I would like to discuss two initiatives that we are implementing in our country. The first is the reconciliation group or team in the community. This group, selected from highly respected members of community, not only provides reconciliation for the conflicted couple during the court process, but also in the community, before the court receives the divorce application. Under our law, the court only gives a decision for divorce after reconciliation fails. The team in the community contributes a lot towards the reconciliation of the couple. Where the reconciliation team works very well, the divorce rate is very low, but where the team does not work well, the divorce rate is higher. This means that we can concentrate on strengthening this type of model to reduce the divorce rate in the country.

The second initiative is a model to organise civil society, which we call the Family Club. We organise Family Clubs within small communities in the villages and hamlets of Vietnam. A Family Club consists of thirty or thirty-five couples or families joining the club. They organise themselves with their own regulations and statutes. An example of an activity could be to mark the wedding day of each couple. All the club members organise a simple event, such as a single rose being presented to the couple during the meeting of the club. This benefits not only that couple but other couples in the club, supporting them to maintain and strengthen family relationships.

Ladies and gentlemen, I would take this opportunity in the presence of my colleagues from the Vietnam Commission for Population, Family and Children, who have been visiting Australia to study the Family Court and the children’s justice system,
to state that we are in learning mode. We value all the ideas we have gained from you, not only the lessons of success, but also the lessons of failure. Hopefully, we can avoid similar mistakes in our learning process.

We highly appreciate the organisation of this important international Forum and hope we can continue to learn from the experiences of other countries regarding the legislative and political processes for family relationships in transition.

Thank you very much for your attention.
Panel: Safety issues, mental health issues and the family law system

Chair
Associate Professor Judy Cashmore, University of Sydney

Judy Cashmore has a PhD in developmental psychology and considerable research experience in relation to children’s involvement in legal proceedings and other processes in which decisions are made about children’s care and protection, and guardianship. The special focus of this research has been on children’s perceptions of the process and the implications for social policy. This research and her role on various government committees and advisory boards has covered a range of areas affecting children, including child protection, children’s rights and participation, family group conferencing and family law. Dr Cashmore is an Associate Professor in the Faculty of Law at the University of Sydney and is working on several family law research projects in collaboration with Professor Patrick Parkinson. She has published widely on child protection issues.

Presenters
Dr Juliet Behrens, Australian National University

Juliet Behrens is a Reader in the Law Faculty, Australian National University. Her main research and teaching interests are in the area of family law, with a particular focus on the treatment of domestic violence in the family law system. She is co-author of Australia’s leading family law teaching text and a member of the editorial board of the Australian Journal of Family Law. She and Bruce Smyth (Australian Institute of Family Studies) have recently been awarded an ARC Discovery Grant to explore the experiences of parents and children after the making of relocation orders.

Principal Registrar David Monaghan, Family Court of Western Australia

David Monaghan is the Principal Registrar of the Family Court of Western Australia. He was admitted to practice in 1989, becoming a family law specialist and partner at Ilbery Barblett before joining the Family Court of WA as a Magistrate and Registrar in 1995. He has lectured and examined at the family law unit at University of Western Australia for two years and has sat on the Federal Family Law Rules Committee for nine years. He is currently a member of the Family Law Council.
Professor Bryan Rodgers, Australian National University

Bryan Rodgers is a Professor at the National Centre for Epidemiology and Population Health and a NHMRC Research Fellow. His research interests include the interrelationship between mental health and family life, and the long-term outcomes for separated families. He co-authored *Children in changing families: Life after parental separation* (Blackwell) with Dr Jan Pryor.

Dr Rajen Prasad, Chief Commissioner, Families Commission, New Zealand

Rajen Prasad is the Chief Commissioner of the newly established New Zealand Families Commission. He was the Race Relations Conciliator and a Human Rights Commissioner from 1996 to 2001. He has spent his professional life in social policy and the social services, and was an Associate Professor at Massey University. His last position was as a full-time member of the Residence Review Board. Dr Prasad has extensive professional practice experience with families as a family and social worker. He has conducted substantive research into alternate family care of children and other family-related matters. He also has a strong background in the governance and management of public and educational organisations. Dr Prasad was born in Fiji and came to New Zealand in 1964, and maintains close and significant relationships with the leaders of many cultures.
Opening remarks

Associate Professor Judy Cashmore, University of Sydney

This session focuses on some of the most difficult issues that the family law system has to grapple with: family violence (including allegations of abuse and neglect, and violence between the parents) and mental health problems (including mental illness and disorders, and substance abuse). Cases involving allegations of violence and abuse, and concerns about the mental health of one of the parties are common and place considerable strain on the resources of courts and other services—apart, of course, from the ‘emotional costs’ for those involved. Domestic violence, child abuse and neglect, and mental health problems are often related, as Professor Bryan Rodgers’ and David Monaghan’s papers show. It is not uncommon in family law, as in child protection, that the most troubling cases involve various combinations of parental substance abuse, domestic violence, mental health problems and allegations of child abuse and neglect. Both the state-based child protection and the Commonwealth-based family law systems continue to struggle to deal with these cases. The heartening aspect is that there is increased recognition of the need to do so and these papers highlight the issues and the challenges, particularly in the context of the forthcoming changes in legislation and service provision.

One of the threads that has run through many of the papers in this international forum is the concern about how cases involving allegations of family violence will be dealt with under the raft of family law reforms and new proposed services for families undergoing separation and divorce. Some of those concerns, including concern about the likely impact of the ‘friendly parent rule’ and the pro-contact ethos, are expanded upon in Dr Juliet Behrens’ paper. As Professor Bala reminded us from the Canadian experience, there are more false denials of family violence than false allegations, and sorting these issues out in the context of disputes about children in family law matters can be very difficult; and the costs of getting it wrong, very high. Dr Behrens outlines a case for differentiating different forms of family violence, attending to ‘justice considerations’ and providing a ‘genuinely separate pathway for cases involving “controlling” domestic violence’. David Monaghan, the Principal Registrar at the WA Family Court, provides us with the benefit of his experience and the lessons from the Columbus project, particularly as they might apply in relation to the Shared Parenting Responsibility Bill.

While there has been increasing recognition of family violence and attempts such as the Magellan and Columbus projects and the Family Court’s Family Violence Strategy to deal with allegations of family violence in family law matters, the focus on and resources to deal with mental health issues, often underlying family violence and intractable disputes, are less obvious or available, as Bryan Rodgers’ paper makes clear. Mental health problems can be both a cause and consequence of separation and family breakdown, but many people, and men in particular, often do not seek help, and may not get effective treatment even if they do seek help.

The need for interdisciplinary input, for a good evidence base and learning from experience, here and elsewhere, is clear, and the presenters in this session cover all these bases. Each of the presenters brings a different perspective on these issues, partly from their different disciplinary backgrounds and experiences in family law, epidemiology, clinical psychology, research and practice, and partly as a result
of their different interests and focus on domestic violence, mental health, child protection and governance. Dr Prasad, the NZ Families Commissioner, also provides a New Zealand perspective, and as the various contributions from NZ speakers, including the presentation by the Chief Judge of the Family Court in New Zealand, Peter Boshier, made clear, New Zealand is in the forefront of many developments in relation to family violence and the importance of children’s participation or voice.

A stronger evidence base in Australia is clearly needed, and again it is heartening to hear the announcement by the Attorney-General that the government has funded the Australian Institute of Family Studies ‘to conduct independent research on how allegations of family violence and child abuse are raised and addressed in the family law system’, and that this research is one piece in the government’s recently announced Family Law Violence Strategy.¹

Barriers to meeting the needs of victims of domestic violence in the family law system

Dr Juliet Behrens, Australian National University

Transcribed address

Evidence, in Australia and elsewhere, shows that women and children who are victims of domestic violence continue to be abused through the family law system (Humphreys & Thiara, 2003; Kaye, Stubbs, & Tolmie, 2003; Kaspiew, 2005). This is despite Australian common law developments and legislative reforms in the 1990s which heeded calls that such violence should be taken into account, particularly in children’s matters.

This abuse can occur in a range of ways: through repeated court applications for enforcement of contact, or in relation to parenting decisions; through strategic applications for residence and contact orders; through the use of court-ordered or privately negotiated contact as an occasion to continue abuse and/or to undermine parenting; by actual or threatened abduction, or non-return of children; and applications to prevent relocation away from the area where the perpetrator lives.

These strategies, of course, are not always successful, and a UK study by Humphreys and Thiara (2003, p. 196) suggests that experiences do differ, and that ‘there exists testimony to the effectiveness of the law and practice in this area alongside its abject failure to either prosecute violence or secure safety’.

These problems are well recognised within the Family Court and within government and, as Dr Judy Cashmore said in her introduction, it has been heartening to hear government representatives and other speakers talking about the importance of the issue at this conference. And it has not just been talk. There has been a lot of work going on to reform and develop practice. Conference attendees from Australia will be familiar with the projects Magellan and Columbus, for example, and the Family Court has developed its Family Violence Strategy, although some of the more difficult issues to be dealt with under that strategy (for example, in relation to Key Area 5—Making the Decision) have been referred to working groups to report on.

In the UK, a new Form C1A requires early disclosure of allegations of domestic violence in children’s proceedings. The use of this form and general approach to screening for domestic violence is currently being evaluated by the Department of Constitutional Affairs. In the UK there are also Guidelines for Good Practice on Parental Contact in Cases of Domestic Violence, which provide a great deal more to decision makers than does the Family Court of Australia’s Family Violence Strategy. The Court’s strategy indicates that a working group will be exploring the desirability of developing such guidelines for Australia.

So there is certainly recognition of, and concern about, the problems, and considerable work to address them in a systemic way. It may be that developments like these will start to have their effects and that studies in the future will show some real change in the way that allegations of domestic violence are treated, and improvement in outcomes for victims of domestic violence who have family law issues.
But I want to suggest that real improvement will require grappling with some very difficult fundamental issues or barriers. So in the very brief time that I have, I would like just to map what I think some of these are.

First is that we need to better understand the knowledge of non-legal disciplines about domestic violence, and find better ways to translate that knowledge into legal decision-making, legal processes and legal instruments. I was really fascinated to hear Justice Boshier describing the very structured process in New Zealand for establishing whether there is violence and then what kind of violence it is, and what the implications are of that (including the ways in which the perpetrator has responded). That seems to me to be a very healthy and important process, and such a process was suggested by former Justice Chisholm in one of those very important decisions in the 1990s (JC and BC [1994] FLC 92–515). That was in the 1990s, and yet, in the reported decisions at least, you just don’t really see that process occurring in a systematic and detailed way.

There is what I think is a quite progressive definition of ‘family violence’ in the Family Law Act 1975 (s.60D)—it is a definition which is a basically subjective, fear-based definition of violence. And yet there is no reported Family Court decision of which I am aware where the question of whether this fear-based definition of violence is satisfied in the case explored. That seems to me somewhat surprising. So I think really what we need to think about are ways in which what is known about different kinds of violence can be translated into legal decision-making, and where decisions are really made in each case about what kind of violence this is. It is only with this kind of clear thinking that decisions can really be made which effectively take into account the violence in determining best interests. If a court is not equipped with the tools to think about those different forms of violence, then the tendency is not really to deal with the issues fully.

One of the frameworks which might be a useful starting point for thinking about this is the work of Michael Johnson (1995; see also 2000 and 2005). He draws the distinction between what he calls ‘intimate terrorism’ and ‘common couple violence’, and I think that is a really useful way to think about violence. Of course, as a dichotomised view of violence, it has its limitations. It doesn’t, for example, explore the difficult area of any mental health context of domestic violence. Other typologies are also useful and not so dichotomised (Johnston & Campbell, 1993). The former Justice Chisholm talked about the distinction between ‘controlling violence’ and other forms of violence: again, that is a useful distinction. It seems to me that the issue is both understanding that literature, but also finding ways of translating its complex messages into legislation and decision-making.

Secondly—and this is a very controversial point to raise in such a brief fashion—I would argue that lack of attention to considerations of justice (in the sense of accounting for wrongdoing), at least in cases involving domestic violence, is a fundamental barrier to effective change. I argue that the pre-occupation with ‘no-fault’ rhetoric has resulted in no attention being paid to accounting for wrongdoing. I argue that this is problematic and disempowering for victims of domestic violence in the family law context and is inappropriate (Behrens, 2005).

I’ve started to write about the possibilities in the use of restorative justice in this context (Behrens, 2005). Restorative justice is talked about largely as an alternative to the criminal justice system, but I have started to think about it as a possible way of ensuring that there is accounting for wrongdoing in family law proceedings.
It would change the frame around the issues from one of a dispute between two parties, to one in which there has been abuse by one or other. A restorative justice framework would require acknowledging and accounting for the wrongdoing, and then working out processes for the future into which that acknowledgement and accounting are built. I’m sure many of you will have very strong views about whether that kind of idea of justice should play a role in family law.

The third fundamental barrier which has been referred to many times over the last two days is the fragmentation of the legal system as experienced by victims of domestic violence. As one Canadian report opened, ‘women don’t make the distinction between criminal and family and the system doesn’t make the connection’ (Lund & Dodd, 2003, p. 2). And again, I think it is heartening that people are starting to talk about how this fragmentation might be reduced. Dr Richard Ingelby has pointed out that there is always going to be fragmentation in a system where you have a constitutional division of powers and different institutions and so on (Ingleby, 1993, pp. 94–5), but fragmentation is particularly a problem for very vulnerable players in the legal system. Women escaping violence certainly are that and so moves towards more integrated courts and processes in this area are very important.

And then, finally, another fundamental barrier is that we need to think more carefully about the impact on those who are abused or abusers of including messages in the Family Law Act designed for those who are not. So, although in the Exposure Draft of the new Family Law Bill there are proposals to make greater reference to family violence, particularly in the Principles and, I understand now, in the Objects section, we know from empirical research that these messages are always in danger of being countered by other kinds of messages (Dewar & Parker, 1999; Rhoades, Graycar, & Harrison, 2000). So if you’ve got conflicting messages in the legislation—for example ‘take violence seriously’ and ‘favour the friendly parent’—then the latter message is likely to efface the former.

So I would agree with the National Network of Women’s Legal Services that we need a genuinely separate pathway for cases involving what we might call ‘controlling domestic violence’. I would argue we need a separate pathway for those cases, and that such a separate pathway is not yet embodied in the Exposure Draft of the Family Law Bill. Under the current draft, where a court is satisfied that there has been violence and so the case doesn’t go to the Family Relationship Centres but to court, it remains relevant to consider the ‘friendly parent’ principle, and the need to have contact.

A separate pathway should be one where the ‘pro-contact ethos’ has no place; where the ‘friendly parent rule’ has no place, and where women’s and children’s safety is given the highest priority, and that’s not what we have under the Bill. Indeed, I have argued (Behrens, 2005) for a presumption against contact in cases of controlling violence and I think experience in New Zealand shows that this can work.

If we are going to have separate pathways, then we need to work very carefully on appropriate screening processes. As I have indicated, we are awaiting the evaluation of the Form C1A process in the UK. The process, at least as minimally fleshed out in the Exposure Draft of the Family Law Amendment Bill, has been subjected to a significant critique from twelve highly respected family law researchers. Their submission to government was published in the latest edition of the *Australian Journal of Family Law* (Banks et al., 2005). From what I have heard so far at this conference, I would say that the message that a lot more thought needs to go into
how the screening processes are carried out and what the legislation should say about those processes has been heard by government.

So I have some optimism, because there does seem to be genuine concern and recognition about the importance of improving outcomes for victims of domestic violence with family law issues. There are also examples from places like New Zealand of things that can be done. But I do have real concerns that unless we grapple with some of the fundamental issues I have referred briefly to today, the reforms will not make the position of victims of domestic violence any better, and indeed they may make it worse.

References


I want to talk about the lessons that we learned from the Columbus program, and how those lessons can be used and perhaps thought about in terms of the current Shared Parental Responsibility Bill. I must caveat what I say by noting—without criticism whatsoever because I understand that our political masters are putting an extremely tight timeframe on the Bill, and I know that it is being reworked daily at the Attorney General’s Department—that I can only talk about what I know is in the Bill at the present time.

One of the many lessons we learned from Columbus was that the cases that involve allegations of family violence and child abuse are never single-issue cases. In the interim report that was prepared by Dr Murphy and Dr Pike, there were forty cases of family violence (eighty parents). In those cases, there were forty-four allegations of substance abuse against the other, there were sixteen allegations of alcohol abuse, and there were seventeen allegations of mental illness.

In the child sexual abuse cases at the time these statistics were taken, there were thirteen cases in the pilot program; five of those also involved allegations of substance abuse, three of those alcohol abuse allegations, and six of those mental illness allegations.

Yesterday we heard from the Chief Justice of the Family Court of Australia in respect of the relatively static number now of matters that go to trial, and the Chief Justice described that as ‘core business’. Now there is no doubt in the Family Court that it is cases such as these that represent the core business of the Court insofar as final determination is concerned, and if we recognise that, then we need to recognise the great importance of those cases and getting the policy right, insofar as the manner in which those cases are dealt with.

There were a number of other important lessons that I will state now and then apply to what is, I understand, proposed in the Bill. First, there is immense power in the fusing of the social science and legal/judicial approaches to individual cases. Working with the court counsellors was an amazing experience and it was incredibly powerful insofar as the direction that was taken with each case on an individual basis. That augurs well, in my view, for the policy and for the proposal for there to be Family Consultants working directly with the Court on a reportable basis.

The second important lesson that we learned was that it is an absolute necessity for there to be a breakdown of the ‘information silos’ within the family law sector. What I mean by this is that Columbus could not have worked—and I don’t think that you can deal with these sorts of cases effectively—unless you have workable protocols of information sharing and feedback amongst all of the stakeholders in the family law sector; that is, the Court, the Statutory Protection Authority, DCD Family and Children’s Services, the police, and non-government organisations (such as Relationships Australia, Centrecare and Anglicare). It is absolutely essential that those bodies are able to talk to each other about cases that are common between those organisations.

Now, following on from what has been said by Dr Juliet Behrens, it appears to me that it is beyond doubt that silence is the soil in which violence and child abuse...
is perpetuated, and what we have (and have had) was basically institutionalised silence, and that is a matter that I would like to now bring some concern about in respect of the current proposals.

The current proposals, as I understand it, would have the Court working with Family Consultants, who are currently the Court Counsellors, in a reportable context. So everything is reportable, and with that, as I’ve indicated, I have absolutely no concern and I think it’s a very, very positive step forward. What else I understand, though, is that the non-court-based services will be comprised—I mean the centrepiece obviously is the Family Relationship Centres—but will be comprised in the Act of family counsellors and family dispute resolution practitioners. It is in the context of that community-based sector that all of the therapeutic work will take place. So the model is that parties go through the new Centres, therapy is undertaken, mediation, whatever is appropriate in the case, and then, if there’s no agreement, the matter comes through to the Court. If at any stage the Court considers, and it must as I understand it under the Bill, referring the parties back out to therapy courses or mediation, it must take the advice of the Family Consultant before so doing. If there’s no agreement reached, then it comes back to the Court.

The great difficulty I have, and the issue that I’d like to put out to the Forum, is that both in relation to family counsellors and family dispute resolution practitioners, not only does the equivalent of Section 19N apply to them, which renders completely inadmissible anything that occurs, it goes further and says that, in fact, the family counsellors and the family dispute resolution practitioners are not able to disclose any communications. There is a list of exceptions, including child representatives protecting a child, reducing the risk of the commission of an offence and so on, but there is nothing in the Bill that would allow them to talk to us. There is no feedback loop whatsoever; in fact it is statutorily barred.

Now that is, and I put this to the Forum, contrary to a very important lesson that we learned in the Columbus program, and given the people that are here, I’d like to pose perhaps a further issue. Is there any room in family law today for s19N to continue in child cases? Where did s19N come from? Where did the philosophy come from that when parties go to counselling to discuss matters relating to their children in the context of a family law dispute, any evidence arising from that counselling is inadmissible—save the abuse exceptions that were recently put into the Act?

Now, my limited understanding of evidence is that, at common law, there are only two relationships that are actually protected by law in terms of admissibility. One is lawyer–client (in certain circumstances), and the second is priest–confessor. There are no other legal relationships where it is non-admissible. I stand to be corrected by the lawyers and academics. Now, if you and I go to our psychiatrist—sorry if I go to my psychiatrist—ethically, I understand that he or she must not disclose anything without my consent, but he or she is a compellable witness. If I go to my psychologist, he or she is a compellable witness in Family Court proceedings. Why is it that when parties go and try to sort out their child welfare disputes before a counsellor, that anything said is statutorily inadmissible?

Through the Columbus program, I felt very strongly that working as a Registrar in the Columbus program, but also sitting as a Magistrate making decisions, that there was so much information that I knew as a Registrar from dealing with this individual case-managing, that I would love to be the decision maker, because I actually knew what the case was about and I knew the people. I had engaged
with them. It wasn’t just a one-off. When cases come into my court, I look at the papers, I make a decision, or I put the parties and their witnesses in the witness box and make a decision. I know nothing else of the parties. In Columbus cases, I knew these people and certainly knew information that, to me, would have been crucial for the decision maker to know. And it was a matter of great consternation for the counsellors and, I think, remains (certainly in the Family Court of WA and I’d be surprised if it was otherwise in the Family Court of Australia) a great source of concern that counsellors are not able to tell the Court matters that are incredibly relevant to the decision makers’ decision-making process.

My concern then is in relation to the statutory ‘sil’ that is being proposed, as I understand it, in the Shared Parental Responsibility Bill. The phrase ‘inadvertent injustice’ arising from policy initiatives comes to mind. I’d like people to think about whether or not this is potentially one of those situations—but as I say, I’d like to put it to the Forum whether in the context of modern family law there is, in fact, any place for non-admissibility of communications in the context of counselling or mediation in a family law child dispute?
Mental health and the family law system

Professor Bryan Rodgers, Australian National University

Transcribed address

I would like to suggest that in this melting pot of the family law system, not just with the new Family Relationship Centres but with developments in the Family Relationship Services Program and with other providers in the sector, that mental health should be a fundamental part of that service provision.

The structure of my paper is as follows: first, I will talk about the high prevalence of mental health problems in the general population—especially around family separation; I will then talk about the low rates of use of services for mental health problems, and inappropriate self-help strategies that people use when they have such problems; somewhat provocatively, I’m going to talk about difficulties with loss and grief models; and finally, I’m going to talk about possible benefits to parents, children and the family law system itself and its operation by addressing mental health problems during and following separation.

I want to start with work that Dr Jan Pryor and I did reviewing various blocks of child outcome literature. Initially, we looked at Australia, but then expanded to the United Kingdom, and finally a sort of worldwide tour of the research literature. We came to the conclusion that the factors that influence children’s long-term outcomes after parental separation can be pretty much grouped into six broad categories: family conflict, inter-parental violence, quality of parent–child relationships, abuse and neglect of children, parental mental health and substance use, and family socioeconomic circumstances.

And these things obviously come into play both before separation as well as after separation. Part of the reason for putting that list up now was just to invite you to scan down that list and say which of these things currently within the family law system are addressed through various programs and strategies. For example, family conflict is dealt with in the Children in Focus Program; socioeconomic circumstances, we have the Child Support Scheme, and we have other welfare systems in place to deal with that, too; abuse and neglect in children has been dealt with through the Magellan and Columbus programs. I’m not saying ‘solved’, I’m just saying it’s addressed in various systems. My sense about it is, if you look down the list, that parental mental health and substance use categories stick out. These are not really being addressed in the current system, with some emerging exceptions.

And I think that’s unfortunate, and part of my case is to say that mental health actually has a pivotal role in the system for the following reasons: firstly, parents’ mental health can act as a bridge between external factors and relationships within families. So, for example, if financial difficulties are impinging on a family, this can become entrenched within the family relationships through being mediated by mental health difficulties.

Secondly, parent mental health can translate from acute stressful experiences into long-term difficulties. I was moved, as other people have been, by the Children in Focus video shown yesterday—that’s a powerful image of a child who gets upset by the conflict around handover. One thought I had when I first saw that was that it’s pretty upsetting for an acute event like that, but if it also impacts on a parent’s
mental health, that can stretch out the impact of the event on the child, say, for the following fortnight until the next conflict of handover.

And, thirdly, that mental health is potentially modifiable and is an appropriate target for intervention. So that’s part of my thesis—a final point that I’ll come to later.

Now, we do know something about mental health generally in Australia from the National Survey of Mental Health and Wellbeing. I’m not going to go into that in detail. That study found that about one in five people in any given year suffer from a diagnosable mental disorder and you can see some percentages up there. And, that study didn’t include a number of disorders, including severe disorders such as bipolar disorder, and it also missed out other things, such as anti-social personality disorder and eating disorders. So basically there are a lot of mental health problems around.

There is a special relationship between mental health and family separation, and several factors contribute to that. One is that circumstances leading to marital separation can also have a detrimental impact on mental health, so it can be things that happen before the separation itself that cause mental health problems. A second is that some mental health problems contribute to family separations. We know that people with severe mental disorders who’ve been admitted to psychiatric hospitals have very high rates of divorce, much higher than in the general population. Third, divorce is a severely stressful life event. It’s ranked alongside death of a partner or being imprisoned, in terms of its perceived stressfulness, so it has an acute impact. Fourth, separation can lead to further long-term adversity; financial difficulties in single mother families are the prime example of that.

The result of this is that divorced people have higher levels of a range of mental health problems compared with married people, and divorced people in Australia have three to four times the rate of suicide reported for married people.

Men may be more susceptible to the short-term acute impact of separation, whereas longer-term, chronic consequences may be greater for women. That’s seen in one Queensland study that identified separated men, as distinct from legally divorced men, and found that separated men had six times the rate of suicide compared with married men, and double the rate found in divorced men.

Now the bad news in this country, and other countries too, for mental health care is that we know that 28 per cent of people with anxiety disorder, just 14 per cent of those with substance use disorder, and about half of those with a depressive disorder, receive some form of professional help; the others don’t get professional help. And the really bad news, if we look at the best-case scenario for depression, is that of the half of people that do seek professional help, only a third of them (that is, only one in six of those experiencing depression) actually receive an efficacious form of treatment.

Studies of recently separated people show that a large proportion do not seek professional help for emotional distress. So, basically, there are a lot of mental health problems around and, typically, people don’t use services for them. If they do use services for them, the help they get doesn’t help them get better.

Now in spite of all that, there are actually things that work. They’re the things that we’ve reviewed in my former life at the Centre for Mental Health Research; treatments for depression and anxiety where there’s evidence—good evidence—that
they work. They include professional treatments, complementary treatments, and self-help treatments. And there are also things that don’t work.

Use of alcohol and analgesics are in the top three of what people actually do when they’re distressed. We surveyed thousands of people (actually in Albury–Wodonga) and screened for people who had very high anxiety or depression levels. We went back to them a few months later and said, ‘What did you do about it?’, and these two things were in the top three. There’s no evidence that these things work. So paracetamol is great for a headache, but it isn’t going to stop you being depressed. People usually ask me what the third thing was—it’s sex. We couldn’t find any randomised control trials of that, so I cannot comment on its efficacy.

How is emotional distress currently dealt with in the family law system? The two most common approaches to dealing with emotional distress in the system, which we often called ‘looking after yourself’, are the loss and grief model (that’s been mentioned earlier today, as the ‘jug’ or ‘bucket’ model). Grief models describe various stages of emotional reactions to marital separation and the jug models consider how individuals can replenish their own emotional reserves.

I’m going to give some examples of these models. First of all, the grief model. Here is an example. It actually comes from the *Family Law Book* (Family Court of Australia, 2004), and you can see the way stages of separation are described in the book.

I just want you to consider what the advantages and disadvantages of these models are. The advantages, to my mind, are that they emphasise the normality of distress. They don’t give people the impression that a mental health problem is an illness and that there’s something fundamentally wrong with them. They also offer hope for the future, which is good. The disadvantages, however, are that they suggest that recovery ought to be slow, and they do not recommend self-help strategies or seeking professional help—that’s not just in the *Family Law Book*, that’s throughout the literature in this area.

Here’s an example of the jug or bucket model. This comes from Marymead, here in the ACT, and is from their parenting course, Fathering After Separation, and it says, ‘You can’t give to children from an empty bucket. Parents are people too, look after your own self-esteem’. (Bruce Smyth once referred to that concept as the ‘oxygen mask’ model—that is, you can’t help your kids till you help yourself.)

What are the pros and cons of jug models? Well, one advantage is that they emphasise your own feelings; they also encourage reflection on what things empty your jug, and what things fill your jug—a sort of personal view. What are the disadvantages? Well they don’t make evidence-based suggestions; there’s nothing in there to say what works generally for people, and they don’t say what to do when your jug is exhausted.

There’s a recent paper in the *Journal of Family Studies*, where I, Bruce Smyth and Elly Robinson (who did a lot of work on looking at how mental health is dealt with in the family law system in an area of Melbourne) talk about these things in more detail. A few services are already using that framework, but I want to add to that the issue of infrastructure. For services to be able to do that, they need, obviously, funding, but I think also there are workforce issues in this sector. You need staff training, and I think you need, as well, to think about how you’re going to retain staff in this sector. Staff need training in the recognition of mental health problems and how people can deal with these. You also need materials that contain information on mental health problems and evidence-based treatments. At this point in the talk, I used to
say, ‘and Elly Robinson thinks there ought to be a clearinghouse in this area’, but it seems like this may be something that the new Australian Family Relationships Clearinghouse at the Australian Institute of Family Studies will be able to pursue.

In closing, it might be worth considering what the potential benefits might be if we do incorporate into the family law system some ways of addressing mental health issues. Firstly, they can help promote primary dispute resolution. Remember, a lot of the acute distress of separation happens around two years after the separation—it’s a rough period of time, but after that we’re dealing with issues that are chronic difficulties in a lot of cases. It’s interesting that that two-year period represents the time when we normally think that everything has to be resolved.

Secondly, support and self-help strategies for separating adults can improve their present and future wellbeing. A lot of the things that I’m suggesting that people can do to cope with their emotional distress are not just going to be useful for that short period of time; they’re strategies that they can keep for the rest of their lives and use for future adversity. And, finally, enhanced wellbeing of separated parents can improve outcomes for the children, and I think that’s where we came in.

Reference
Family violence: Policy and legislative framework

Dr Rajen Prasad, Chief Commissioner, Families Commission, New Zealand

Introduction

Family violence is currently receiving an unprecedented level of attention in New Zealand.

In 2004, family violence was listed as one of five government priorities for inter-agency action and coordination over the next three to five years. In 2005, a Ministerial Team on Family Violence and a Taskforce on Action on Violence within Families were established. The Families Commission is represented on this Taskforce. Preventing family violence is a key priority for the Families Commission.

In December 2003, the New Zealand Parliament passed the Families Commission Act, which came into force on 1 July 2004. This established the New Zealand Families Commission. The New Zealand Families Commission is a unique, independent government institution with a statutory mandate to advocate for all families. Its key functions of providing social policy advice and community education are based on research, consultation with families, and linkages with organisations, professions and institutions engaged with families.

Prevalence of violence within our communities

It may be useful to provide the context of violence within our communities in New Zealand. Some of the recent statistics on family violence are:

- In 2001, 45 per cent of reported violence occurred in private homes.¹
- In 2002/2003, police attended 49,682 incidents of family violence; approximately 55,000 children were present at these incidents.²
- In 2000, 52 per cent of the 53 murders in New Zealand were family violence-related; 33 per cent of the victims of family-violence-related murders were children.³
- 15 per cent of residents in women’s refuges had a permanent disability as the result of assault.⁴
- 33 per cent of women reported physical or sexual abuse from their male partner.⁵
- 35 per cent of men physically assaulted their partners.⁶
- In the year ended 30 June 2004, the Department of Child, Youth and Family Services (CYF) received a total of 43,314 notifications of possible abuse or neglect, representing a 33 per cent increase from the previous year.⁷

⁵ New Zealand 5th periodic report to CEDAW: *The status of women in New Zealand, 2002*.
⁶ Women’s Safety Survey, 1996.
- between 2 to 5 per cent of the older population are victims of elder abuse.\(^9\)
- in 2003, women’s refuges supported some 13,729 women and 10,053 children towards living free from domestic violence. In 2003, women’s refuges provided emergency safe-house accommodation to over 5,000 women and children and over 11,000 women and children accessed a women’s refuge community support worker.\(^10\)
- Maori women and children are more likely to be hospitalised as a result of non-stranger violence than non-Maori women and children.\(^11\)

**An overview of New Zealand’s legislative framework**

**Domestic Violence Act 1995**

The Domestic Violence Act 1995 broadened the scope of who can apply for legal protection from domestic violence, as well as the behaviour recognised as domestic violence.

The Act established one protection order to which non-violence and non-contact conditions may be attached.

It recognises that psychological abuse is committed against any child who witnesses abuse, and the protection of an order is automatically extended to any children of the applicant’s (victim’s) family. The Act also contains provisions for an application to be made on behalf of another person.

The Act has a rehabilitative focus, with respondents (perpetrators) required to attend programs to address their violence.

With the wider range of people who could apply for orders and the simplified processes for applicants, there has been a huge increase in the number of domestic violence cases under the Domestic Violence Act.\(^12\) An analysis of respondents under the Domestic Violence Act from July 1996 to June 2000 shows that respondents have been overwhelmingly male (89 percent).

In addition to law reform, other New Zealand state sector responses have included training police, court officials and lawyers, and providing special victim advisors to provide assistance through the criminal justice system. These approaches have been accompanied by programs for abusers, victims and their children.

Evaluations of the Domestic Violence Act 1995\(^13\) by the Ministry of Justice have shown that it is a progressive piece of legislation which is working well overall. However, some enduring criticisms of the Act\(^14\) include the legal costs and barriers for women seeking protection orders, and a view that it fails to always hold...
offenders accountable for their actions, that is, not all breaches of protection orders are prosecuted.

**Other relevant legislation**

*Care of Children Act 2004*

The Care of Children Act 2004 defines and regulates parents’ and guardians’ duties, powers, rights and responsibilities.

The welfare and best interests of the child are the first and paramount considerations, ensuring a stronger focus on children’s safety than had previously existed.

The Act contains provisions for supervised contact between children and parents/guardians where violence has been used (or alleged) against the child.

*Children, Young Persons and their Families Act 1989*

The Children, Young Persons and their Families Act 1989 is designed to promote the wellbeing of children and young persons, as well as their families, through services and facilities within the community.

The Act charges departmental social workers with responsibilities to receive, investigate and assess notifications of child abuse and neglect and to work with families and other agencies to develop appropriate intervention plans to ensure that children are kept safe.

*Children’s Commissioner Act 2003*

The Children’s Commissioner Act 2003 continues the position of the Children’s Commissioner and the Office of the Commissioner for Children, and strengthens the role of the Commissioner as an advocate for children.

The Act confers additional functions and powers on the Commissioner to give better effect in New Zealand to UNCROC, and requires the Commissioner to have regard to the Convention on the Rights of the Child when carrying out their role.

*Families Commission Act 2003*

This Act establishes the Commission, whose main function is to act as an advocate for the interests of families generally. In performing that function, the Commission must identify and have regard to factors that help to maintain or enhance families’ resilience and strengths.

*Section 59 of the Crimes Act 1961*

Section 59 of the Crimes Act 1961 states that every parent is justified in using force by way of correction towards a child, if the force used is reasonable in the circumstances. There is currently a private members bill before a Select Committee to repeal Section 59. The issue of Section 59 has prompted considerable debate and the expression of diverse views within New Zealand.

The Families Commission believes the existence of this section of the Act sends a signal to families that violence is tolerated. The Commission supports the repeal of Section 59 and believes that discussion needs to happen in New Zealand about what options, such a parenting education and support, should be introduced if Section 59 is repealed or amended in some way.
Policy framework and recent initiatives

Te Rito—New Zealand Family Violence Prevention Strategy

Te Rito—New Zealand Family Violence Prevention Strategy was launched in June 2002 as the government’s official response to, and framework for, implementing the family violence prevention plan of action released in September 2001.

The strategy’s vision is to create a society where families/whānau15 are living free from violence. It consists of nine guiding principles, five goals, and a framework for implementation comprising eighteen action areas.

Collaborative relationships between the government and non-government sectors were built during the development and implementation of Te Rito. The strategy ensured some initial investment in family violence prevention, but its implementation was hampered by the challenges of maintaining a high level of engagement and making a difference across the breadth of its action areas. Commitment to the strategy waned across the government sector, leaving many of the key stakeholders feeling frustrated at the lack of action.

In late 2004, it was agreed by all key stakeholders that the Te Rito action areas would be refocused into five priority theme areas:

- increasing awareness of family violence prevention over a sustained period of time in a range of settings
- systemic change across the justice and social service sectors and commitment to improved coordination and collaboration
- addressing service capacity and workforce capacity issues
- promoting best practice
- development of a strong research agenda that will inform the development of policy and the design and delivery of services.

In December 2004, a summary of government’s social policy and strategies for sustainable development was released and titled, Opportunity for All New Zealanders. Family violence, abuse and neglect of children and older persons were identified as one of five critical social issues for inter-agency action over the next three to five years.

The launch of Opportunity for All New Zealanders provided the chance to elevate the leadership of family violence policy and service delivery, and to ensure a coordinated cross-portfolio, cross-agency approach to addressing this issue.

Taskforce for Action on Violence within Families

In 2005, both a Taskforce for Action on Violence within Families and a Ministerial Team were established to provide leadership and highlight the government’s commitment to addressing family violence as a critical social issue.

The Taskforce was established to lead and coordinate inter-agency action to prevent family violence, and the abuse and neglect of children and older persons. Members of the Taskforce are the chief executives of the ministries of Social Development, Women’s Affairs, Health, Justice, and Child, Youth and Family; the Accident Compensation Corporation; the Commissioner for Police; the Children’s Commissioner; Chief Families Commissioner; Principal Family Court Judge; Chief

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15 Whānau is the Maori word for extended family. It encompasses a wider concept than immediate family and links people of one family to a common ancestor or tipuna.
District Court Judge; and five non-government representatives from two advisory groups: Family Services National Advisory Council and the Te Rito Advisory Committee.

The Taskforce was established with the recognition that a framework for policy action already exists, but that it needs re-energising and to be focused on action. The work of the Taskforce explicitly builds off Te Rito. The Taskforce will provide advice to government on where the government should invest to have the greatest impact on preventing violence within families. It aims to be bold and focus on long-term outcomes whilst also pragmatically identifying small and early successes in this complex field.

The Taskforce provides advice to a ministerial team comprising the Ministers of Social Development, Employment, Justice, Health, Police, Women’s Affairs, and Associate Social Development and Employment (CYF).

Open Hearing into the Prevention of Violence against Women and Children

On 7 March 2005, the New Zealand Parliamentarians Group on Population and Development (NZPPD) held an Open Hearing into the Prevention of Violence against Women and Children.

The overall purpose of the Open Hearing was to raise awareness amongst parliamentarians of the extent of the problem of violence against women and children, and to provide an opportunity to take stock of actions and issues.

Submissions to the Open Hearing were invited and received from a range of government agencies and non-government organisations (NGOs) working in the area of eliminating violence against women and children.

All present at the Open Hearing emphasised that New Zealand needs to do more if we are to stop violence. Strong and consistent messages were for:

- the government to build on the work that has already been carried out
- strong leadership at all levels to create a society where women and children are safe from violence
- collaboration and commitment across the government and non-government sectors.

A quick scan of the New Zealand scene

The work of the Taskforce builds on and learns from the significant effort that has already been expended across a number of sectors—health, justice, social services and some employers, to support victims and rehabilitate perpetrators.

The social services sector has recently started initiatives at the institutional level with the Family Violence Funding Circuit Breaker Programme,16 which seeks to improve coordination and alignment of government funding processes.

There is a growing emphasis in some sectors on the importance of training and engendering personal and organisational responsibility for the prevention of violence against women and children.

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16 The Family Violence Funding Circuit Breaker involves greater coordination and alignment of government funding processes and seeks to reduce compliance costs for the many organisations whose services are funded by more than one government agency. For more information, see: www.familyservices.govt.nz.
For example, the Ministry of Health has produced a clinical program to implement the *Family Violence Intervention Guidelines* in the health sector. This early intervention initiative recognises that health professionals are in an ideal situation to screen for people experiencing violence and provide them with assistance. Twelve District Health boards have established this program in their services, as well as other organisations such as the Plunket Society and Family Planning.

A further example is the roll-out of the Work and Income Family Violence Intervention Programme, designed to help case managers identify and respond appropriately to victims and perpetrators of family violence.

In the justice sector, a pilot initiative in four sites has been established which involves police and advocates for adult and child victims working together in Family Safety Teams to ensure that the full range of needs for a family experiencing family violence are addressed.

In the research area, a New Zealand Family Violence Clearinghouse (www.nzfvc.org.nz) has been set up to collect, collate and distribute family violence research and other information from a variety of sources, including academic researchers, government departments and non-government organisations.

There are some examples of successful collaborative government and community responses at a community level. For example, in 2001 the Hamilton Police joined with key Hamilton family violence NGOs to reduce the re-victimisation of battered women and their children. Every incident handled by the police is now tracked with the aim to reduce the isolation caused by family violence, and to reduce the risk to these victims. This is a partnership built on an agreed-upon structure to coordinate agencies’ responses.

### Key issues and future directions for family violence work in New Zealand

To make advances in preventing violence within families we need to effect change at the societal, community, family and individual levels in the domains of prevention, early identification, supporting victims and changing perpetrator behaviour. We need more coordinated and comprehensive responses from communities and society as a whole. This is the challenge faced by the Taskforce for Action on Violence within Families.

#### Societal attitudes

Earlier this year, the Families Commission commissioned an up-to-date review of the current understanding of family violence. This was undertaken by Dr Janet Fanslow, a well-respected researcher with over fifteen years experience in violence prevention research. In her report, Dr Fanslow highlighted the inherent tensions in what we are trying to achieve in New Zealand, where we are striving to create a culture of non-violence, but where the majority of our actions have focused on responding to perpetrators, victims and their children who are known/identified to the system. Our focus has been on secondary or tertiary prevention.

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17 Work and Income is a service of the Ministry of Social Development. Work and Income helps jobseekers and pays income support on behalf of the government.

The challenge for New Zealand is to start talking about what a ‘culture of non-violence’ would look like and then identifying the component skills, resources and institutional and cultural supports that will allow us to acquire and enact this. Some examples of this include: challenging the association of New Zealand masculinity with violence and aggression, cultivating positive attitudes around seeking assistance for children affected by violence and promoting what it ‘looks like’ to live in a society that prioritises non-violence.

The Families Commission supports work towards a sustained campaign which denounces violent attitudes and promotes the concept of strong, supportive relationships.

More services would also be needed to meet the increased demand that such a campaign is likely to lead to.

Leadership

There is a need for strong leadership and sustained political commitment at the political level, the head of agency and organisational level, at management level, and in the community. The Ministerial Team and Taskforce go some way towards addressing this by lifting the profile of preventing family violence as one of New Zealand’s most critical social issues.

Community-specific approaches

There is a need for more analysis on how family violence impacts on women and children of different ages, cultures, ethnicities, religions and other groupings in our society. There are some positive examples of Maori and Pacific communities leading the implementation of initiatives, but there is still insufficient involvement of local communities in problem analysis and in developing policy and programs.

Collaboration and coordination

Emphasis on collaboration and coordination is vital. This is an area with limited resources and it is important that activities are not duplicated. However, there must be recognition that truly collaborative approaches are time and energy consuming.

Capacity and capability

The capacity of organisations working in the family violence sector to meet demand was a strong focus of submissions to the Open Hearing into the Prevention of Violence against Women and Children. This is a key area of work.

We know that the capacity of service providers is severely stretched. It is imperative that these services are adequately supported for their present levels of service delivery, and that this support increases in anticipation of the inevitable increase in demand in response to raised public awareness around family violence.

This requires recognition that interventions need to be sufficiently resourced to be effective, and that new policies and programs need to be scoped according to their impact on service deliverers.

Information gathering and sharing

There is a lack of knowledge about what specifically works in New Zealand; for example, gaps around research undertaken by, and for, specific population groups,
such as Pacific Island peoples; more specific information about child maltreatment; and the specifics of public attitudes around violence—who tolerates violence and how we can work to change this tolerance.

There is a need for a well-supported collaborative research workforce and for information to be disseminated and shared.

**Concluding comments**

New Zealand is a nation that prides itself on innovative ideas and going where no one else has been before. The Domestic Violence Act was hailed internationally for its condemnation of violence in all shapes and forms. Our health sector’s new approach to dealing with family violence is also noteworthy, with hospitals, family medical practices, Plunket Society, and clinics all now taking action to raise awareness of family violence and encourage victims to seek advice, information and assistance.

A sustained campaign to change attitudes and behaviours to promote non-violence would give New Zealanders an incentive to invest more in building the attitudes, behaviour and relationships that give everyone the best available chance of a good and safe life.

The Commission, backed by Dr Fanslow’s report, is clear that New Zealand is at a point where changing attitudes could become a reality. There is strong government will, a stable economy, a sound legislative base, a health system that is starting to take family violence seriously, and a strong NGO voice.

**Appendix A**

**Domestic Violence Act (1995)**

Object—

(1) The object of this Act is to reduce and prevent violence in domestic relationships by—

(a) Recognising that domestic violence, in all its forms, is unacceptable behaviour; and

(b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

(2) This Act aims to achieve its object by—

(a) Empowering the Court to make certain orders to protect victims of domestic violence:

(b) Ensuring that access to the Court is as speedy, inexpensive, and simple as is consistent with justice:

(c) Providing, for persons who are victims of domestic violence, appropriate programmes:

(d) Requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence:

(e) Providing more effective sanctions and enforcement in the event that a protection order is breached.

(3) Any Court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1) of this section.
Meaning of ‘domestic violence’—

(1) In this Act, ‘domestic violence’, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.

(2) In this section, ‘violence’ means:
   (a) Physical abuse
   (b) Sexual abuse:
   (c) Psychological abuse, including, but not limited to,—
       (i) Intimidation
       (ii) Harassment:
       (iii) Damage to property
       (iv) Threats of physical abuse, sexual abuse, or psychological abuse
       (v) In relation to a child, abuse of the kind set out in subsection (3) of this section

(3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—
   (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
   (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—
       but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4) Without limiting subsection (2) of this section,—
   (a) A single act may amount to abuse for the purposes of that subsection:
   (b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

5) Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse.

Appendix B

Te Rito—New Zealand Family Violence Prevention Strategy

What is family violence?

Family violence covers a broad range of controlling behaviours, commonly of a physical, sexual, and/or psychological nature, which typically involve fear, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between partners, parents and children, siblings and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family. Common forms of violence in families/whānau include:

- spouse/partner abuse (violence among adult partners)
- child abuse/neglect (abuse/neglect of children by an adult)
- elder abuse/neglect (abuse/neglect of older people aged approximately 65 years and over, by a person with whom they have a relationship of trust)
- parental abuse (violence perpetrated by a child against their parent)
- sibling abuse (violence amongst siblings).
Appendix C

International human rights framework

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

New Zealand has ratified this convention and submitted our last national report to the CEDAW committee in 2002. In consideration of the New Zealand report, the CEDAW committee made several recommendations, including:

- That the government devise a means of systematically collecting data on all forms of violence against women
- That all evidence of violence against women be followed with prosecution
- That the number of shelters for women victims of violence be increased
- That public officials, especially law enforcement officials, the judiciary, health-care providers, social workers and teachers be educated about violence against women
- That the government raise public awareness that violence against women is a violation of women’s human rights and that this violation has grave costs for the whole community
- That the government ensure that targeted action to respond to the needs of Maori and Pacific Island women be introduced.

United Nations Convention on the Rights of the Child

New Zealand has ratified UNCROC and last reported to the UNCROC Committee in 2003 in a report entitled *Children in New Zealand*. The Committee on the Rights of the Child responded to the *Children in New Zealand* report with a number of recommendations, including:

- Establishing appropriate mechanisms, programs and services to ensure the physical and psychological recovery of children who have been abused and neglected
- Initiating a comprehensive review of all legislation affecting children and taking all necessary steps to harmonise legislation with the principles and provisions of the convention, including the prohibition of corporal punishment in the home
- Expanding services and programs aimed at assisting victims of abuse, and ensuring they are provided in a child-sensitive manner that respects the privacy of the victim
- Increasing programs and services aimed at the prevention of child abuse in the home, schools and in institutions
- Strengthening public education campaigns and activities aimed at promoting positive, non-violent forms of discipline, and respect for children's right to human dignity and physical integrity, while raising awareness about the negative consequences of corporal punishment.
Panel: Accessing the family law system

Chair

Associate Professor Tom Altobelli, University of Western Sydney

Tom Altobelli is Special Counsel, Watts McCray Lawyers and Associate Professor in the School of Law, University of Western Sydney.

Presenters

Ms Nicola Atwool, University of Otago, New Zealand

Nicola Atwool has a background in social work and child psychotherapy, working for Child, Youth and Family Services in New Zealand for nearly twenty years before moving into an academic position in 1994. She is currently a Senior Lecturer in the social work program at the University of Otago and has a particular interest in intervention with children, adolescents and families.

Ms Josephine Akee, Family Court of Australia

Josephine Akee is a Torres Strait Islander mother of five adult daughters and grandmother of seventeen grandchildren. She has a primary school teacher qualification. Her work background has mostly been in public-sector service delivery to Indigenous Australians, the last seven or so years of which have been in the Family Court of Australia. Indigenous community-level involvement has added to her awareness of issues that impact negatively on Indigenous people, but, she believes, none more so than the breakdown of how Indigenous families operate.
Opening remarks

Associate Professor Tom Altobelli, University of Western Sydney

This session explores some of the issues that surround accessing the new family law system. The government recognises that it cannot bring about meaningful change to the family law system without a simultaneous multi-pronged approach that tackles law, policy and practice.

Accessing law and legal systems, and accessing services for families going through separation, present problems that are, perhaps surprisingly, quite similar. These problems include very practical ones like physical access to law and services in geographically remote regions. But access problems also include more structural issues, including culture and language.

As the first born in Australia of my family—the son of Italian migrants—I can identify with issues of culture and language. Sydney was indeed an interesting place in which to grow up in the 1960s, especially when one’s first language and predominant culture was ‘new Australian’. But the experience of the new Australians was insignificant compared to the ‘old Australians’—our Indigenous siblings—who were, in reality, our hosts. They suffered—and continue to suffer—enormous problems of accessing law and accessing services. How will the new family law system be made more accessible to them and to all who need assistance at times of need? Both of our panellists are well placed to answer this question. Josephine Akee is a much-respected expert on Indigenous peoples and the problems they face in accessing a legal system that they often distrust and find difficult to access. She presents a unique insight from both ‘within’ and outside of the system. Nicola Atwool is another much-respected expert on culture and legal systems, and her observations from a New Zealand perspective enriches this discussion.

It seems to me that the challenge of providing a truly accessible legal system for families, with all of its necessary support services, is a substantial one. Families in Australia are diverse in culture, language, location, composition and socioeconomic circumstances. The experience of families going through the dramatic changes wrought by separation are equally diverse and, unfortunately, violence, abuse, neglect and intimidation permeate the system. When the legal system is in itself fragmented because of historical but archaic jurisdictional issues, access to it is even more difficult. Creating a truly accessible ‘new’ family law system requires a long-term and realistic commitment of resources for each part of the system. While new laws and new Family Relationship Centres are important, so too is the need to be mindful of accessibility of services within this new system.
Challenges to accessing the family law system

Ms Nicola Atwool, University of Otago

What are the some of the key challenges for accessing the family law system?

One of the major obstacles to accessing the family law system relates to our understanding of culture. New Zealand and Australia both have a colonial history. The dominant culture consists of those people descending from immigrants from the United Kingdom. As the dominant culture, we tend to think of our ways of doing things as ‘normal’, and we recognise ‘culture’ as belonging to groups who are different to ourselves. Culture impacts on all of us, providing a ‘road map’ that guides us in how we live our lives. In relation to the family law system, culture influences who we consider to be family, decision-making processes within families, and who is involved when decisions have to be made. There may be considerable variation but, traditionally, legal systems have targeted the nuclear family because that is what the dominant culture considers family to be.

Culture also influences our expectations of simple processes, including how we greet people, how we introduce ourselves, and the process of interviews or meetings. Western culture tends to be task-focused and linear. Our thinking is organised around binaries—seeing issues as black and white. We think of beginnings and endings as finite events. Our communication style tends to be direct and task-focused. Such an approach leads to fragmentation and compartmentalisation in the way we organise our systems and our lives. For example, we separate physical and mental health, spirituality is relegated to the private sphere and not widely acknowledged as part of everyday life, and separate systems are set up to manage these different aspects.

Other cultures take a circular and holistic approach. Different aspects of life are inextricably woven together and process is as important as task. Communication may be less direct, incorporating metaphor and storytelling. When individuals with different cultural maps meet, the potential for misunderstanding is huge, and any misunderstandings that occur at the beginning of an encounter compound if they are not acknowledged and addressed. When cultural difference is being negotiated at the level of systems, the problems increase exponentially.

The proposed Australian reforms reflect an acknowledgement of the need to take cultural difference into account. Aspects that increase accessibility for those not from the dominant culture include:

- acknowledgement of the role of a wider range of significant others, including grandparents and relationships arising from blended families
- the separation of Family Relationship Centres from the formality of court systems
- the explicit acknowledgement of kinship obligations and childrearing practices in relation to Aboriginal and Torres Strait Islander children
- inclusion of religious and cultural upbringing as one of the ‘major long-term issues’ requiring joint parental responsibility.

Areas that may require further attention are related to our understanding of what cultural difference means when families have to make decisions related to the ending
of relationships. Barriers may be created inadvertently, and ways in which this may happen include:

- assumptions made by those of the dominant culture working in the family law system may continue to constrain options for families; for example, assuming that only the parents need to be involved and inadvertently excluding others in the process
- communication may be structured in ways that do not allow for culturally appropriate processes to be implemented
- the tendency to assume that if people have a good command of English then there is no need for translators. People coming into contact with the family law system are dealing with very emotional situations, so if English is not your first language, it can be very difficult to express yourself. The opportunity to communicate in the language of choice is an important aspect influencing accessibility
- even though significant changes have been made, the new services may still be perceived as ‘official’ and alienating, especially for indigenous peoples, whose memories of negative experiences in their dealings with the dominant culture are still very much alive. Accessibility will be greatly increased if staff members reflect the diversity of the service users. I note that the key performance indicators for the Family Relationship Centres refer to the adjustment of service loadings related to the percentage of clients involving indigenous, culturally and linguistically diverse persons. This is laudable.

**What would help?**

Cultural diversity of staff is extremely important. (This is something that Josephine Akee will also mention.) Services become much more accessible when we have the choice to deal with someone we can identify with. Obviously, this will not cover all groups, and community outreach and networking will be crucial to the success of the new Family Relationship Centres. The community not only needs to know what services are available, they need to be able to approach people within their own networks who can facilitate access. It is important that people know they can bring support people with them.

Education and group sessions are more likely to be accessible if they are offered in comfortable and familiar environments. This serves two purposes—it increases the number of people reached and at the same time it continues the networking and bridging processes. This is a particular challenge when it comes to rural communities and thought needs to be given to the possibility of resources and training being provided to people already based within these communities so that they can provide services in a familiar and accessible setting (Hamilton, 2005).

All staff having face-to-face contact with users of family law systems need to have training that helps them to be aware of their own culture and the influence this has on the way they present themselves. Training is also needed to increase awareness of the diversity in their community and the issues that can arise for those who are not from the dominant culture. This is not about being ‘politically correct’; it is about reducing the risk of misunderstanding and miscommunication that can limit people’s access to systems.
What are some of the challenges to access in New Zealand?

New Zealand has come through a difficult time in terms of coming to an understanding of our colonial history and the impact this has had on our indigenous population. There is now a much greater awareness and increased provision for cultural input. Unfortunately, this has also brought with it a backlash and concerns about different standards for different groups. The process is ongoing.

Formal systems still feel unwelcoming for many people. For the Indigenous population, there is lack of trust, wariness and negative expectations. Western legal systems have been experienced as intrusive, contributing to the destruction of traditional social structures (Bradley, 1997; Pitama, 1997; Walker, 1997). There is a shortage of people with the expertise to provide cultural advice and support in formal settings. I have been involved in writing specialist reports for the Family Court and on occasions, Maori families have specifically requested that I undertake this work because I am known and have earned their respect for my knowledge of cultural issues. As a member of the dominant culture, however, I am aware that this is far from ideal.

Issues also arise in relation to the status of cultural advisors, especially when they lack formal qualifications. In Maori culture, the concept of mana incorporates status, but goes much wider, incorporating notions of respect and standing in the community. There have been many instances when those called upon to give cultural advice feel that their mana has been trampled on, causing considerable offence. Negotiating appropriate and respectful relationships with those called upon to give cultural advice and service users continues to be a challenge.

One area that warrants particular mention is the position of children of mixed cultural heritage. Although there is widespread acknowledgement of children’s right of access to their culture, ensuring this continues to present challenges, especially when a child lives with a parent of the dominant culture and the ending of the relationship has been acrimonious or the result of violence. Difficulties also arise when a non-resident parent (most often the father) loses contact with his children. Particular thought needs to be given to maintaining cultural links in these situations, and the role of paternal grandparents and other family members becomes crucial. (It would seem that several elements of the Australian reform are mindful of this.) There is a tendency to see culture as something young people can choose to take up when old enough to do so. Culture is not an ‘add-on’. It is fundamental to who we are. Young people growing up cannot escape messages about culture that have implications for them. For example, in New Zealand, Maori and Pacific Island people are over-represented in negative statistics and their ethnicity is highlighted in media reporting. If young people do not have access to cultural networks that encourage a strong and positive cultural identity, their path can be mapped out for them by such images. Culture is absorbed through daily experience. Without this, young people are cut adrift from a potential source of strength. Family law systems have a responsibility to ensure that such issues are addressed, and cultural advice may need to be accessed on the child’s behalf to ensure this.

If we are to improve access to family law systems, close attention to cultural issues is needed. This attention must be directed at the key points of entry into the system.

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1 These authors all address adoption legislation, but much of what they have to say is applicable to any legislation that impacts on family structure and decisions about where children are to live.
and all communication processes within the system. Those working within the system need to have a good understanding of the impact of culture on family life and experience and the flexibility to respond constructively to difference.

References


Indigenous Family Consultants at the Family Court of Australia

Ms Josephine Akee, Family Court of Australia

Transcribed address

I firstly wish to acknowledge my Aboriginal brothers and sisters, in particular the traditional owners of this particular area where we are holding this Forum—the Ngunnawal people. I also wish to thank the organisers of the Forum for inviting me to attend and present from an Indigenous Australian perspective.

Secondly, I’d like to say that I agree with what Nicola has shared about our indigenous brothers and sisters of the other waterway—New Zealand. Many of their issues are similar to those of our Indigenous Australian people.

Can I say that I am and identify as a Torres Strait Islander. My family background from my mother’s side is Torres Strait Islander, Timorese and Indonesian. From my father’s side, it is Torres Strait Islander, Filipino and Jamaican. Consequently, I don’t look like your traditional Torres Strait Islander—this is just by way of explanation.

Now the Aborigines of mainland Australia and the Torres Strait Islanders of the Torres Strait (which is the waterway between the far northern tip of Australia and the southern coast of Papua New Guinea) see ourselves as the two Indigenous peoples of this nation. As two peoples, we do have some things in common, but we are two culturally different peoples, and there is diversity among each of our peoples. For instance, Torres Strait Islanders are grouped according to our home islands that we originate from, our languages, our songs and dance and so on, and our customary practices. Now our Aboriginal brothers and sisters on the mainland are also grouped according to their country, although many have been dislocated from their country (through colonisation) and their languages, their customary practices and so on that determine the diversity among the Aboriginal people of mainland Australia.

As first peoples of this nation, our ancestors and their way of life have been impacted on since colonisation. For instance, some of you may not be aware that our peoples have gone through a time of having to live under the supposed protection of an Aboriginal Act and a Torres Islander Act. Our peoples’ lives were such that others (not our own people) thought, did, and made our own people do what was supposed to be best for us—and we are talking in this Forum about the ‘best interests’ of the children. I’d just like to highlight the fact that best interests of the children—according to what aspects? The right of thinking and doing for ourselves was significantly removed from our people.

Another important impact has been ‘the stolen generations’ issue, which, no doubt, most of you are aware of, and which I won’t go into. So not only were our adults treated like children, but their children were also taken away from them. This is very significant to how our people operate today. The purpose of my sharing this piece of information with you at the outset is so that it might help you gain some kind of an understanding as to the fact that we are different lots of people (the two Indigenous races of Australia), who operate differently and who, at times, need to be treated differently.
It is also not uncommon for our people to have a distrust (which was mentioned by our New Zealand brothers and sisters) in:

- the Australian system
- the government departments
- the courts
- the non-Indigenous agencies and service providers
- and programs and services.

More so, if there are none of our own people working in these particular places and services to:

- help us know about those service deliverers and their programs
- show our people how to access these programs
- enhance the possibility of our people coming to trust them

then this makes access difficult. Accessing services and programs without having any faith that we will be dealt with appropriately and with positive outcomes, as opposed to the negatives (which we won’t go into here), is hard.

I work in the family law courts (the Family Court of Australia) and I have been with the Court for some seven or eight years. I am one of the six Indigenous Family Consultants employed by the Family Court. There are two consultants placed in Darwin (a male and a female). They are both Aboriginal and that’s for gender balance. Similarly, another two are in Alice Springs. In Cairns, Queensland, there are also two of us: an Aboriginal brother and myself (the Torres Strait Islander Family Consultant). These positions are very limited—six for the whole of Australia (excluding WA, which has its own family law system—which I have come to understand is a pretty good one as well).

Our positions were established as a result of the Family Court consulting with Indigenous community members—first in the Northern Territory and then in north Queensland. Community people, as a result of those consultations, strongly recommended that if Indigenous people are to know about, access and receive appropriately delivered services from the Family Court, then the Court needed to employ Indigenous people to enhance the possibility of that happening. To my understanding, the Court has done that. Whilst the Court has needed to extend its number of Indigenous Family Consultants, its hands have been tied.

I am also a mediator in my own right, practising through the Queensland (because I hail from Queensland) Justice Department’s Cairns sector of its Dispute Resolution Centres.

During my time with the Family Court, I have been privileged to also have participated for a three-year term as a member of the Family Law Council, and am currently a member of the National Alternative Dispute Resolution Advisory Council (NADRAC). My knowledge and experience gained from these additional forums in which I have participated have vastly added to my understanding of family law matters, and conflict resolution situations and particularly issues that are relevant to my fellow Indigenous Australians, and more importantly, the ways of looking at how to constructively overcome these issues and problem areas.

I will now share with you some information about my work as an Indigenous Family Consultant. I work in the mediation part of the Family Court, and basically see myself as a link between my fellow Indigenous Australians and the Family Court. My job entails responding to Indigenous clients’ first contact with the Family Court. I take details about Indigenous clients’ instances, their concerns, their issues. In
doing so, I am then able to suggest to them which other services they might like to approach. For instance, I would suggest that they get legal advice. I would need to stress ‘free’ legal advice because, as most of you would know, Indigenous people often aren’t necessarily people who can afford the heavy costs of legal representation. So a significant part of my job is to make sure that my people are clear about the first instance of free legal advice about their status in a given situation, and also the difference between that and seeking legal representation.

Can I say here and now that I have had a good working relationship back home in Queensland with Legal Aid Queensland. It has recently seen it fit to employ fellow Indigenous people in their ranks of staff who, like me, work as the link between Indigenous people out in the communities and Legal Aid. So it’s not uncommon for me to pick up the phone whilst I am talking with a client and say, ‘Look, I have this sister in the Torres Strait’ (or wherever she might be) and, ‘May, can you help me?’ (May is my counterpart in Legal Aid.) So those sorts of conversations, and the very fact that I can say to my fellow Indigenous person on the other end of the phone or in the room with me, that, ‘I will now hand you over to another Indigenous person who will help you understand their system through Queensland Legal Aid’, are good things. It’s no good me saying, ‘Well look, they [Legal Aid] are down Spence Street, and you go down round the corner and four doors up’. That is not necessarily going to get our people there.

Originally, when I first started in the Family Court, I was not criticised but was asked, ‘Why are you hand-feeding and namby-pambying Indigenous people?’ I would respond, ‘Because our people need that at this stage. They need to be given and paid the courtesy of explaining where they have got to go, because our people might have English as a third language’. Even when I pick up the phone to take a client’s call, it’s interesting for me say in my nice English, ‘Hello, Family Court here. Josephine, Family Consultant, speaking’, and you can hear the person mumbling at the other end of the line. Then when I wouldn’t get a further response, I would then break into what we call Torres Strait creole, ‘It’s only me—Josephine talking’ and then you can almost feel the difference, and then they will open up. And I say, ‘You don’t have to speak good English when you speak to me, a fellow Islander’. We do things like that and it makes a difference.

As well as that, I refer people once I know what their issues are. It’s not uncommon if, for instance, once it’s known that there is an Indigenous person working in Family Court that they could say, ‘Can you help me? I don’t know where to turn to’. I would say, ‘OK, this is what Family Court can do for you, but you need to go and seek help from the women’s shelter, and I will steer you over there. I will link you up with the women’s shelter. I will even take you to the women’s shelter, and you need to also talk to that mob down the road’. I would say the ‘welfare mob down the road’, because they are the people about the child protection issues. Now it’s not uncommon for our people to back away and say, ‘No, I don’t want to go there’, and I would say, ‘No, they have got a bad track record of taking our kids, but they have got to smarten up their act. They don’t do that anymore—they are not supposed to’. These are the sorts of things that I have to encourage my people about.

I also have to explain the difference between ‘free legal advice at the first instance’ and ‘legal representation’—to the point where I say that, ‘You need to get legal representation if you can’t come and use our mediation service (which is privileged mediation service at the first instance), then hopefully we might be able to help you and your family members get yourselves sorted out. In the event that it doesn’t
happen, then you might have to get legal representation, so you have to fill in this form. You go down to May (at Legal Aid) and she will help you fill out the form, OK? Otherwise my people will say, ‘I don’t want to fill out any form’. That’s because we are not a writing people traditionally.

After that, I would also explain the mediation process—privileged mediation and the due full process. In both instances, I can participate. Therefore I can jointly mediate with a court counsellor/mediator, and that could be in the privileged mediations or the ones where the case goes ahead. I can also assist court counsellors/mediators as well as ‘Reg 8s’ (psychologists or social workers) which refers to outsiders brought in by the Court to do family reports. I assist them with setting up interviews and I link them up with the other players in a case. This is because we are an extended family mob, and you don’t just deal with the mother and the father. We do those sorts of things, and I, in fact, help with the interviews. I work with other registries, not just my registry in Cairns, because there is not enough of us (Indigenous Family Consultants).

I assist and support children’s representatives and client legal representatives in a similar way—provide information about the structure of the family and the significant players in a given case. I link them to appropriate cultural advisors and elders. These elders must have the relevant knowledge and the relevant authority to be able to provide the required information regarding protocols and so on.

One of the things that our people have been highly concerned about is that ‘wrong people’ are being brought in to give special or expert (cultural) advice. It has been brought to the Family Consultants’ notice that anthropologists have been brought in to talk about and throw light on our Indigenous culture. Our people are saying, ‘These are white fellows that have got some good education at some university, but they are not us. We have to have our own people’. It comes back again to what sister was saying that people (Indigenous) might not have the formal qualifications, but I would argue any time that what’s important is the formal qualifications according to your culture, and that’s something that definitely needs to be recognised.

I have also planned and delivered information sessions and workshops for Indigenous community members—be they in discrete Aboriginal or Torres Strait Islander communities or in urban areas. I have also jointly facilitated (with Family Court HR staff) cultural diversity training sessions for other staff within Family Court. I have worked together with the other Family Consultants on a module for ATSI or Indigenous Australian Culture Awareness for various registries of the Family Court. There, we have stressed the need for having participation by Indigenous people—be they elders or respected people who have the authority to throw light on the cultural traits of a given locality.

It is in these small and varied—yet important—ways that I try to make the family law system more accessible to my people. But there is still much more to be done.
Summary and key learnings

Professor Richard Chisholm, University of Sydney

Professor Richard Chisholm, BA, LLB (Sydney), BCL (Oxford), was a founding member of the University of New South Wales Law School in 1970, and worked as an academic there until 1993, when he was appointed a judge of the Family Court of Australia. Following his retirement from the bench in July 2004, he has been appointed an Honorary Professor of Law at the University of Sydney, a Visiting Professor of Law at Macquarie University, and a part-time commissioner of the New South Wales Law Reform Commission.

Professor Chisholm has been a member of various bodies associated with law and law reform, including the Family Law Council, the Australian Law Reform Commission, and the New South Wales Law Reform Commission (where he was the commissioner in charge of two major reports on adoption in the 1990s). While an academic, he was the founding president of a children’s rights group Action for Children, and a founding council member of the Aboriginal Legal Service in 1970. His research, teaching and publications have been mainly in the area of family and children’s law.

Since his retirement from the bench, Professor Chisholm has resumed academic work in the area of family law. He is a regular presenter at conferences on family law, and is co-author of the LexisNexis service Australian Family Law. In 2005, he completed work on the Law Reform Commission’s reference Expert Witnesses, and taught family law at Sydney Law School. He is the Chair of the Expert Advisory Committee to the NSW Children’s Commissioner. He has recently been a member of the boards of the Benevolent Society and of the National Children’s and Youth Law Centre, and a member of the NSW Law Society’s Family Law Specialist Accreditation Committee, but resigned from these positions when he relocated to Canberra in February 2006. He is currently working especially on the proposed ‘shared parenting’ amendments to the Family Law Act 1975, on which he has given evidence to parliamentary inquiries and has presented a number of conference papers.

The invitation to give a ‘summary of key learnings’ is both flattering and impossible. People came to this splendid conference with extensive and diverse knowledge, and, no doubt, a mixture of expectations: variously wanting information about what’s going on; wanting to participate in a critique of what’s going on; hoping to have some good talks, and a good time. No doubt we will all take different ‘learnings’ away from the conference. So any concluding comments, of course, will inevitably reflect one person’s view. So I will try to resist the temptation to air my own views about what the law should be, or how things should be done.

I have seven points. They are kinds of themes—ideas that struck me in the whirling melee of wonderfully interesting and challenging ideas that we have heard for the last couple of days.
1 Starting points

It is quite interesting to think about starting points. Where do we all start with this topic? The ‘Australian excitement’—if I can use that phrase—started with a highly conflicted discourse between adults. Adrienne Burgess memorably spoke of public debates as having been ‘colonised by the separated fathers’ discourse’. In some ways, I thought that the public debate in Australia mirrored the dynamics of difficult parenting cases: two parents fighting bitterly about a child, but in some ways for themselves. Not an ideal starting point for parenting decisions, or for law reform!

So let’s look at some other possible starting points that we have heard about during this conference. Lawrie Moloney snuck in a wonderful little idea (as he does): that empathically listening to children is what entitles you to intervene in their lives. And Joan Kelly, who has lots of lovely ideas, told us about one aspect of her long and distinguished career: listening to kids and being terrifically impressed at what they said. What a nice starting point!

Our starting points will be influenced by who we happen to be, as was richly illustrated by all the overseas speakers, who revealed the cultural complexity of family law. All this makes me a little uncomfortable with political aspirations to create a ‘cultural change’ (unless it means that we should all take some time off to listen to the slow movement of the Bach double violin concerto).

So, I think this conference might make us a little more alert to our starting assumptions; and perhaps a bit more thoughtful about the things we take for granted, and the things that we regard as problematical.

2 Process

The second point is the importance of process in dealing with parenting disputes—certainly a strong message from this conference. The 2003 parliamentary committee that produced the report Every Picture Tells a Story certainly emphasised the importance of process, something made even more remarkable because its terms focused mainly on whether the law should be changed to introduce a presumption that children should spend equal time with each parent. But it can take more than limited terms of reference to keep an important idea down!

There is a lot of consensus, I think, in the area of process. Look at the Family Court’s Children’s Cases Program, or the New Zealand developments described by Chief Judge Peter Boshier, or the North American developments described by Nick Bala and Joan Kelly. There is, of course, much diversity and complexity, but you can see some pretty strong themes. A lot of process developments are going in similar directions—essentially very good directions. I must say, from my point of view, all this stuff about process is extremely encouraging.

3 Child focus

My third point is this whole ‘child focus’ business. We heard different phrases: ‘child-sensitive’, ‘child-inclusive’, ‘child-responsive’, and so forth, but this focus on the child (regardless of how you express it) seems to me to be a tremendous idea.

We also heard about different ways of putting that tremendous idea into practice. We heard from Dianne Gibson about how the Family Court is doing more to include children in dispute resolution processes. We heard about children having a right to
appeal in the New Zealand Court, and we heard much about child-inclusive practice in various jurisdictions and in various settings.

It was wonderful to hear all this, and it’s extremely satisfying to find what might have seemed not so long ago to be a slightly eccentric idea now very much getting into centre stage. Listening to children seems the key, and there are now lots of good people doing it, and learning from each other about what works best for children.

So I must say I leave this conference with a very good sense of a child focus. It seems to me that a child focus is one possible way out of family law as a debate between men and women.

4 The role of law: Constricting or liberating?

My notes on this point are uncertain: I have phrases like ‘release or regulate?’, ‘back-seat driving?’, ‘no confidence in professionals?’

I can best express the idea by telling you about Miss Smith. Meek and shy, Miss Smith was talking to an old-style social worker. The social worker said, ‘What’s your problem, Miss Smith?’ But she was too shy to identify any problem that would satisfy the social worker. Eventually, the social worker said briskly, ‘Come, come, Miss Smith, tell me what it is that you want?’ Miss Smith replied, in a little voice, ‘I just want to be myself’. The social worker said, ‘Come, come, Miss Smith, I think we can do a little better than that’

So with all this talk about cultural change, and mediators and such people not being neutral any more, I worry a little about Miss Smith and the social worker.

John Dewar gave us a slightly dark view of the law, saying that it was paradoxical that at the same time that the government says it is encouraging lawyers to step gracefully aside, and having nice non-lawyers helping people, it was passing legislation that was increasingly regulative and prescriptive.

And it does seem to me that there is an interesting question about whether the things that we are doing in the law or elsewhere are in the way of bossing people around and telling them what to do—‘changing behaviour’—or, on the other hand, showing some confidence in people, both professionals and parents, and creating a framework designed to increase their ability to focus on the children’s interests and needs.

A fine example of what can be done comes from the Child Support Agency. We heard from a number of people from Child Support Agency, including Trevor Sutton, tell us that the child support system is moving towards more voluntary payments.

Another area where recent developments seems to be in the area of bringing things out of people rather than bossing them around, is in the contact schedules that Joan Kelly and Bruce Smyth have described. These are ways of encouraging people to think about a wide range of possibilities, represented with clever little drawings of beds and things. This approach is a kind of open-ended thing, rather than a closed and prescriptive and bossy approach. It also draws on the research about what’s good for children, and what children want.
5 Resources

The next point I have is about resources. All I am going to say about resources is that we need them! And we don’t only need them in the new Family Relationship Centres. Whatever you say about the new legislation, it is likely, in my view, that the courts are going to get more work to do, and that this work is going to be more difficult. Indeed, both the Chief Justice and the Chief Federal Magistrate emphasised the need for adequate resources.

Think about Magellan or enquiries about whether there has been domestic violence. We now have an agency that enforces child support obligations, but for parenting orders (whether contact or domestic violence allegations or whatever) we don’t have the equivalent body; it’s up to the people affected to bring contravention proceedings and go back to court. Many can’t do it without legal assistance, and may or may not be able to get legal aid.

There is a huge resources issue, I believe, at the pointy end in those difficult cases that really have to be adjudicated. I suspect that in the public reports and statements we have heard, the resources issue has been under-emphasised.

6 Research

The second last thing I am going to say is that we have got out of this conference a tremendous sense of how important research is and how rich and diverse it is; and, of course, what a wonderful thing the Australian Institute of Family Studies is! I think there are two ways to rise about a negative, polarised public debate. I’ve already mentioned one, namely a child focus. The other is research. I hope we would all aspire to an ideal of evidence-based family law, and the wealth of information revealed at this conference shows how precious that ideal is, and how we can move towards it.

We heard much that is encouraging: aspects of the Child Support Scheme; the slightly lessening amount of domestic violence in Canada; the improving patterns of contact between fathers and children; and the patchy but interesting development of collaborative law. We shouldn’t rule out the possibility that there might be cultural changes of a good kind.

The family law system, and many of the people who practise it, are showing that they can identify behaviour and ideas that haven’t worked terribly well, learn both from the public debate and the research, and move on to something better.

7 A goal

I want to thank the Australian Institute of Family Studies, and Professor Alan Hayes in particular, for this conference, which was just terrific. I have had a wonderful time, and I am sure everybody else has.

The final thing I want to say is that there is one goal that I believe we all share. The goal is beautifully captured in a cartoon by Tandberg in a little book that the Family Court published.

There is a small child standing between two parents. The parents are silent and the child is saying, ‘My parents are separated, but I’m still together’.