

Family Law Reform in Australia, or Frozen Chooks Revisited Again?*

*Reg Graycar***

This Article focuses both on the changes that have been made to the legal framework governing post-separation parenting of children in Australia, as well as the processes and discourses via which these matters have been dealt with and debated. Alone among comparable common law jurisdictions such as Canada, the United States, and England, Australia's family law legislation, and the significant changes made to it in the past fifteen years, can be seen to have been particularly responsive to the lobbying of fathers' rights groups. It will be suggested that changes to the legislative framework that governs family law in Australia have taken place, at best, without any clear rationale or need and perhaps more problematically, have at times flown in the face of, rather than been undertaken by reference to, the evidence-based research about post-separation parenting practices and what we know about children's welfare or best interests, the paramount consideration that underpins decision-making in this field. The purpose of this discussion is to attempt to posit some possible explanations for this distinctive path of Australian family law "reform."

* For non-Australian readers, a "chook" is a chicken. As will be explained more fully below, the concept of "law reform by frozen chook" refers to lawmaking based on anecdote, rather than empirical evidence, *see* Graycar, *infra* note 6.

** Professor of Law, University of Sydney. The research for this paper has been supported by a grant from the Australian Research Council (DP 0771888). Many thanks to my co-investigator Jenny Morgan; to Margaret Harrison, Jenni Millbank and Helen Rhoades for their helpful comments and suggestions; to the commentator and all the participants at the workshop for their comments and the editors of this journal for suggestions; and to Laura Barnett and Anthea Vogl for their input, including assistance with research.

INTRODUCTION

Australia's national law governing divorce and related matters (such as the care of children after the separation of their parents), the *Family Law Act*, was enacted in 1975. It was heralded and widely publicized as an act to end fault-based divorce in Australia.¹ Not surprisingly, it was the subject of considerable public debate at the time, with dire predictions of the decline of marriage, the rise of the divorce rate and the breakdown of the traditional nuclear family. While the number of divorces did increase briefly in the first year after the introduction of the legislation (a phenomenon widely attributed to people waiting until the legislation passed so they could divorce without having to prove fault),² that controversy disappeared very soon after the legislation was passed. It would now be almost unthinkable to reintroduce fault-based divorce in Australia.³

Although the period since 1995 has seen almost constant legislative change in the area of family law, the first twenty years of the legislation involved little change of any substance to the broad principles governing divorce, custody,

1 For a background discussion, see the paper by former Attorney General, Kep Enderby, *The Family Law Act: Background to the Legislation*, 1 U.N.S.W. L.J. 10 (1975-1976).

2 For a graph of what is described as "the crude divorce rate" from 1901 to 2006, in which "the initial spike in 1976" is very clear, see *Parental Divorce or Death During Childhood*, AUSTRALIAN BUREAU OF STATISTICS (Sept. 29, 2010), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40Sep+2010#2>.

3 Fathers' rights groups, however, continue to call for the review of no-fault divorce in Australia, see, e.g., Press Release, Men's Rights Agency, 'No Fault' Divorce Should Be Reviewed (July 2009), available at http://www.mensrights.com.au/Media_Releases-MRA/MRA-Media_Release-MENS_RIGHTS_NO_FAULT_DIVORCE_SHOULD_BE_PROPERLY_Australian_Institute_Family_Studies_JUL2009.aspx. The current leader of the Federal opposition, Tony Abbott, called for the reintroduction of fault divorce as an opt-in alternative for couples in 2009. Members of his own party, the government and former Family Court judges alike almost immediately dismissed this suggestion as "ludicrous" or unnecessary, see *Make It Harder to Divorce, Says Tony Abbott*, THE AUSTRALIAN, July 11, 2009, <http://www.theaustralian.com.au/news/breaking-news/make-it-harder-to-divorce-says-tony-abbott/story-fn3dxity-1225748579056>; Sarah Collerton, *Abbott's Divorce Proposal "Ludicrous,"* ABC NEWS (July 14, 2009), <http://www.abc.net.au/news/stories/2009/07/14/2625441.htm>; Farah Farouque, *No Fault of Abbott's, but Big Marriage Idea Gets Little Support*, THE AGE, July 13, 2009, <http://www.theage.com.au/national/no-fault-of-abbotts-but-big-marriage-idea-gets-little-support-20090712-dhe7.html>.

and property matters.⁴ There was, however, a series of violent incidents in the early 1980s that guaranteed that family law remained on the front pages for some time, though it provoked little if any legislative response.⁵ It was not until the 1990s that the family law legislation became a particularly contested terrain in the parliamentary sphere. While there have been some changes that relate to property issues (most notably the introduction of a regime that gives legal recognition to private financial agreements),⁶ the main ground of contestation has been in relation to the care of children after separation.

-
- 4 This is not to say that there was no controversy, nor expressions of dismay by, among others, newly formed fathers' groups. The first inquiry took place after the act had been in effect for less than five years, see COMMONWEALTH OF AUSTRALIA, *FAMILY LAW IN AUSTRALIA: REPORT OF JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT* (1980). But the legislative reforms that flowed from that inquiry made little change of any real substance. For a detailed history of the post-1975 years, see Helen Rhoades, *Children's Needs and "Gender Wars": The Paradox of Parenting Law Reform*, 24 *AUSTL. J. FAM. L.* 160, 163-69 (2010). Perhaps the most significant change made to family law in the period was to the reach of the national family law legislation, with all states (except Western Australia) referring their powers over ex-nuptial children to the Commonwealth between 1986 and 1990 under AUSTRALIAN CONSTITUTION S 51(xxxvii). Under the reforms, the national family law regime dealing with children was made to apply to all children, irrespective of the marital status of their parents. More recently, the states have also referred their powers over property disputes involving people whose *de facto* relationships (both heterosexual and same-sex) have broken down and these are now determined under the federal *Family Law Act 1975* (Cth) (Austl.) and by the Commonwealth family courts. See *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (Austl.); see also Jenni Millbank, *De facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms*, 23 *AUSTL. J. FAM. L.* 160 (2009).
- 5 See, e.g., Colin James, *Media, Men and Violence in Australian Divorce*, 31 *ALTERNATIVE L.J.* 6 (2006) (discussing a number of violent incidents, such as the killing of a Family Court judge, a bomb blast that killed the wife of another Family Court judge, and various other similar incidents, and linking them to fathers' rights groups). One of the only changes to come out of this was the reintroduction of a degree of formality to Family Court proceedings (for example, the wearing of wigs and gowns) in a jurisdiction that had commenced with a markedly less formal approach, see LEONIE STAR, *COUNSEL OF PERFECTION: THE FAMILY COURT OF AUSTRALIA 186-87* (1996); Audio tape: ABC Radio, *The Law Report, Courtroom Couture* (Apr. 7, 2009), available at <http://www.abc.net.au/rn/lawreport/stories/2009/2536780.htm>.
- 6 See *Family Law Act 1975* (Cth) pt VIIIA (Austl.), amended by *Family Law Amendment Act 2000* (Cth) sch 2 (Austl.). These provisions are discussed

This Article focuses on both the changes that have been made to the legal framework governing post-separation parenting of children as well as the processes and discourses via which these matters have been dealt with and debated. Alone among comparable common law jurisdictions such as Canada, the United States, and England, Australia's family law legislation, and the significant changes made to it in the past fifteen years, can be seen to have been particularly responsive to the lobbying of fathers' rights groups. It will be suggested that changes to the legislative framework that governs family law in Australia have taken place, at best, without any clear rationale or need and, perhaps more problematically have at times flown in the face of, rather than been undertaken by reference to, the evidence-based research about post-separation parenting practices and what we know about children's welfare or best interests, the paramount consideration that underpins decision-making in this field. The purpose of this discussion is to attempt to posit some possible explanations for this distinctive path of Australian family law "reform."⁷

The Article starts with a brief historical description of the various reforms that have been made to the children's provisions of the *Family Law Act*, with particular emphasis on the two main suites of legislative reform: those that took place in 1995, and a more recent set of legislative reforms enacted in 2006. These are described below and discussed within a framework that questions the frequency with which legislative changes have been made to this area of law, particularly when set against comparable jurisdictions such as Canada and England. The Article also outlines what is now a wealth of empirical data about the impact of both the 1995 changes and those that were effected in 2006, and critically considers the findings of that research, before exploring possible explanations for the phenomenon of using legislative change to attempt to bring about normative changes to post-separation parenting.

A particular focus of the Article is the singular success of disgruntled fathers' groups (which, it should be noted, are apparently no more prevalent

in Reg Graycar, *Law Reform by Frozen Chook: Family Law Reform for the New Millennium*, 24 MELBOURNE U. L. REV. 737, 749 (2000); see also Belinda Fehlberg & Bruce Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year*, 16 INT'L J.L. POL'Y FAM. 127 (2002).

7 A key contextual framework within which this Article has been developed is the author's research on law reform processes, in particular in relation to family law reform. This theme has been explored, at least in relation to the 1995 reforms, in Graycar, *supra* note 6; Reg Graycar, *Frozen Chooks Revisited: The Challenge of Changing Law/s*, in CHANGING LAW: RIGHTS, REGULATION AND RECONCILIATION 49 (Rosemary Hunter & Mary Keyes eds., 2005); see also Reg Graycar & Jenny Morgan, *Law Reform: What's in It for Women?*, 23 WINDSOR Y.B. ACCESS JUST. 393 (2005).

in Australia than in other countries) in having their views translated into legislative reform, particularly when compared with the same kinds of activities in other countries.⁸ What the Article attempts to do is to suggest some distinctively Australian reasons for why law reform based on complaints by what a former Chief Justice of the Family Court called “squeaky wheels,”⁹ or as I have called it elsewhere, “law reform by frozen chook,”¹⁰ succeeds in Australia when campaigns based on the same stated concerns have not succeeded in capturing government in the same ways in other countries’ law reform processes.

I. A BRIEF HISTORY OF THE CHILDREN’S LAW DECISION-MAKING FRAMEWORK

As noted above, the *Family Law Act* came into operation in 1976, and was most notable at the time for its introduction of no-fault divorce. Far less attention was paid to the provisions about what was then referred to as custody and guardianship, though it was not long after the Act commenced operation that fathers’ rights groups first made claims in Australia that the law was biased against them. In her historical account of Australian family law and its reform, Helen Rhoades points out that at the time of the first inquiry after the commencement of the Act,¹¹ “arguments about children’s care arrangements consumed the bulk of the Family Court’s resources, and were reported to be the source of greatest client dissatisfaction, particularly among men.”¹²

8 For examples of some Australian fathers’ groups, see DADS IN DISTRESS, www.dadsindistress.asn.au (last visited Jan. 28, 2011); MEN’S RIGHTS AGENCY, www.mensrights.com.au (last visited Jan. 28, 2011). Many of these groups publicly claim credit for the success they have had in provoking both government inquiries and ultimate law reform, see Murray Mottram, *Why Howard Suddenly Started to Talk About Custody Battles*, THE AGE, June 21, 2003, <http://www.theage.com.au/articles/2003/06/20/1055828492831.html>.

9 See Alastair Nicholson, Chief Justice, Family Court of Australia, Proposed Changes to Property Matters Under the Family Law Act, Address at the Bar Association of NSW 8 (May 20, 1999), available at <http://www.familycourt.gov.au/wps/wcm/resources/file/eba9ed49decaf86/final.pdf>.

10 Graycar, *supra* note 6. As discussed below, an anecdote about a man’s wife having thrown a frozen chook at him is cited as having comparable authority (or perhaps as trumping) empirical studies on violence against women, see *infra* note 59 and accompanying text.

11 COMMONWEALTH OF AUSTRALIA, *supra* note 4.

12 Rhoades, *supra* note 4, at 164-65 (discussing these claims and the discourses

In 1983, the Family Court published a research report on the outcomes of custody disputes which opened by noting that the research was undertaken to explore claims by a group called “the Army of Men” that the Family Court discriminated against men in favor of women.¹³ They had claimed that men had a less than two percent chance of being awarded custody, a claim that was clearly refuted by this and other research.¹⁴

However, these claims of men’s disadvantage in the field of custody law continued unabated, and over the years different groups of men organized into what we now describe as “fathers’ rights organizations” and took advantage of public inquiries (not always about family law explicitly) to further these claims. For example, an inquiry by the Australian Law Reform Commission about the law of contempt in the early 1980s¹⁵ was flooded with submissions by men dissatisfied with the family law system who used the inquiry as a platform to further these claims of disadvantage and discrimination.¹⁶

In 1992, the Family Law Council, a national body established under

around them, including contemporary news reports as well as annual reports of the Court and research findings).

- 13 Sophy Bordow & Frank Horwill, *The Outcome of Defended Custody Cases in the Family Court of Australia*, 4 FAM. CT. AUSTL. RES. REP. 1 (1983).
- 14 *See id.*; Sophy Bordow, *Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome*, 8 AUSTL. J. FAM. L. 252 (1994); Margaret Harrison, *Recent Issues and Initiatives*, 52 FAM. MATTERS 61 (1999). These studies found that fathers had a greater chance of being awarded custody in defended rather than undefended cases. Harrison’s study of Family Court orders made in the Court’s Melbourne registry in 1980 found that seventy-nine percent of orders, including, significantly, consent orders, vested sole custody (then “care and control”) in the mothers. In defended cases — ten percent of the total cases — fathers obtained sole custody in thirty-one percent of cases, and when “split decisions” were taken into account (either separating children, or joint custody), custody of at least one child of a family was awarded to the father in forty-four percent of the cases, *see* Harrison, *supra*, at 62.
- 15 For the final report of this inquiry, see AUSTRALIAN LAW REFORM COMMISSION, CONTEMPT (1987), available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/35/>.
- 16 *See* Reg Graycar, *Equal Rights Versus Fathers’ Rights: The Child Custody Debate in Australia*, in CHILD CUSTODY AND THE POLITICS OF GENDER 158 (Carol Smart & Selma Sevenhuijsen eds., 1989); *see also* Miranda Kaye & Julia Tolmie, *Fathers’ Rights Groups in Australia*, 12 AUSTL. J. FAM. L. 19 (1998). For a more recent analysis, *see* Helen Rhoades, *Yearning for Law: Fathers’ Groups and Family Law Reform in Australia*, in FATHERS’ RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE 125 (Richard Collier & Sally Sheldon eds., 2006).

the *Family Law Act*,¹⁷ published a report on “Patterns of Parenting After Separation.”¹⁸ One of the issues raised by the Council was the unsatisfactory nature of the language of guardianship, custody and access used in the *Family Law Act*. While the Council referred to the significant attention then being paid to custodial parents (usually mothers) who allegedly “thwart” attempts by non-custodial parents to have access to their children, in fact, a less frequently acknowledged issue was the tendency of non-custodial parents to distance themselves from their children, to lose contact with them and to fail to support them.¹⁹ Having examined the changes in England brought about by the *Children Act* 1989 and in some other jurisdictions where the language of “custody” and “access” had been abandoned, the Council suggested that a move away from the “win/lose” connotations of the notion of custody may encourage more “non-custodial parents” to keep in contact with their children. The Council was clearly influenced by the English *Children Act* and its focus on shared parenting which in turn was based on the view expressed by the English Law Commission that “children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both,”²⁰ and a recommendation by the Law Commission that the legislation should encourage “both parents to feel concerned and responsible for the welfare of their children” after separation.²¹

The Family Law Council’s report on Patterns of Parenting was not implemented. However, also in 1992, the national Parliament established a Joint Select Committee on the Operation and Interpretation of the *Family Law Act*.²² That Committee had wide-ranging terms of reference, yet made

17 See *Family Law Act 1975* (Cth) s 115(3) (Austl.); *Family Law Council*, AUSTRALIAN GOVERNMENT, ATTORNEY GENERAL’S DEPARTMENT, available at http://www.ag.gov.au/www/agd/agd.nsf/page/Family_Law_Council (last visited Jan. 28, 2011).

18 FAMILY LAW COUNCIL, PATTERNS OF PARENTING AFTER SEPARATION: A REPORT TO THE MINISTER FOR JUSTICE AND CONSUMER AFFAIRS (1992), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil_Publications_ReportstotheAttorney-General_Patternsofparentingafterseparation.

19 A national child support scheme was established in Australia in 1986, see Reg Graycar, *Family Law and Social Security: The Child Support Connection*, 3 AUSTRALIAN JOURNAL OF FAMILY LAW 70 (1989); Belinda Fehlberg & Mavis Maclean, *Child Support Policy in Australia and the United Kingdom: Changing Priorities but a Similar Tough Deal for Children?* 23 INT’L J.L. POL’Y & FAM. 1 (2009).

20 LAW COMMISSION OF ENGLAND AND WALES, REVIEW OF CHILD LAW: GUARDIANSHIP AND CUSTODY, REPORT NO. 172 ¶ 4.5 (1988).

21 *Id.* ¶ 2.10.

22 JOINT SELECT COMMITTEE ON THE OPERATION AND INTERPRETATION OF THE FAMILY LAW

only minor recommendations in relation to children's issues, focusing instead mainly on property issues. A substantial number of the submissions to the 1992 Joint Select Committee were also made by men concerned that their "rights" were ignored by the Family Court and the legislation.²³

Some short time after the release of the Joint Select Committee's report, the Federal Attorney-General asked the Family Law Council to examine and report on the operation of the U.K. *Children Act*, a request that the Council noted was made in light of the government's predisposition to depart from the existing regime of guardianship, custody and access in the *Family Law Act* and to enact provisions based on those contained in the English *Children Act*.²⁴ The government asked the Council to report within three months and this prevented it from undertaking its usual process of public consultation. As it happened, the three months included Christmas and New Year which in the southern hemisphere fall during the summer vacation period. The response was delivered to the Attorney-General in March 1994, and it broadly recommended that the U.K. *Children Act* terminology be adopted in Australia.

Significantly, for the purposes of this discussion, at that time no empirical work had been undertaken on the impact of the *Children Act*, and in particular, on the effects, if any, of its discarding of the language of custody and guardianship. While the Council noted in its report that evidence from England showed that "reactions to date to the changes in terminology made in that act have been positive,"²⁵ the research that underpinned that statement extended to some letters being sent to various organizations in the United Kingdom (replies were received from eight of the ten recipients); a letter from the Chief Justice of the Family Court to the Chair of the Parliamentary Joint Select Committee; and the impressions of one of the members of the Council — a Family Court judge — who had visited England some months previously and talked to a number of his judicial colleagues.²⁶ The council's letter of advice concluded that "Council remains convinced that the custody/access model should be replaced and that a change in terminology similar

ACT, THE FAMILY LAW ACT 1975: ASPECTS OF ITS OPERATION AND INTERPRETATION (1992).

- 23 See Linda Hancock, *Reforming the Child Support Agenda: Who Benefits?*, 12 JUST POL'Y 20, 28-30 (1998) (noting how the majority of views put to Australian parliamentary committees, such as the 1992 Joint Select Committee, have come from non-resident parents).
- 24 Family Law Council, Letter of Advice to the Attorney-General on the Operation of the U.K. Children Act 1989, at ii (Mar. 10, 1994) (on file with author).
- 25 *Id.* at 7 ¶ 31.
- 26 *Id.* at 2-3 ¶¶ 6-9 (note that the author was also a member of the Family Law Council at that time).

to that in the UK legislation will assist in improving arrangements between separating parents in relation to the ongoing care of their children.”²⁷ As John Dewar has recently described it, given the paucity of empirical evidence, it “was, by and large, a leap into the unknown.”²⁸

During 1994 and 1995, various drafts of a Family Law Reform Bill were prepared. Consultations were held with bodies such as the Family Law Council, practicing family lawyers and the Family Court of Australia. However, a parallel development was an inquiry by the Australian Law Reform Commission (ALRC) into equality for women.²⁹ In the first part of its main report, the ALRC pointed out some concerns about the operation of the family law system in relation to women who had been targets of violence, and made a number of recommendations directed at ensuring that more regard was paid to safety, both for those women and for their children.³⁰ This led women’s organizations, brought together by a newly created “National Women’s Justice Coalition,” to join in the consultation process about the Reform Bill and, in particular, to call for changes to some of the draft provisions.³¹

The amending legislation was passed in 1995 and came into effect from 1996.³² Broadly, it had a number of aims. These included:

- To effect attitudinal change,³³ with a view to encouraging both parents to remain involved in the care of their children after separation, and to see them “continuing” to “share” their parenting responsibilities despite their separation.³⁴

27 *Id.* at 7 ¶ 31.

28 John Dewar, *Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia*, 24 AUSTL. J. FAM. L. 139, 141 (2010).

29 AUSTRALIAN LAW REFORM COMMISSION, EQUALITY BEFORE THE LAW: JUSTICE FOR WOMEN, REPORT NO. 69 PART 1 (1994) (the author was also a part-time Commissioner involved in that inquiry).

30 *Id.* (especially chapter 9).

31 For an account of the concerns raised at the time by women’s organizations, and of the process that they engaged in to be heard on these proposals, see Susan Armstrong, “*We Told You So. . .*” *Women’s Legal Groups and the Family Law Reform Act 1995*, 15 AUSTL. J. FAM. L. 129 (2001).

32 *See Family Law Reform Act 1995* (Act No. 167 of 1995) (Cth) (Austl.).

33 This was also an objective of the English reforms, *see* LAW COMMISSION OF ENGLAND AND WALES, *supra* note 20, ¶ 2.4.

34 Cth, Parliamentary Debates, House of Representatives, 21 Nov. 1995, 3303 (Peter Duncan, Parliamentary Secretary) (Austl.); Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) ¶ 5 (Austl.); *see also* Family Law Council, *supra* note 24, at 13 (recommending that the *Family Law Act* make it clear that parental responsibility for children “does not cease on separation and that the

- To reduce disputes between parents following separation, by removing the “proprietary” notion of children inherent in custody battles.³⁵
- To direct attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision-making.³⁶ The legislative changes sought to emphasize the idea that children have “rights,” while parents have “responsibilities.”
- To encourage private ordering and the use of “primary dispute resolution” mechanisms, such as counseling and mediation.³⁷
- Finally, to ensure that contact would not expose people to a risk of violence because of inconsistent contact orders and “family violence orders,” and to ensure that evidence of domestic violence is taken into account when making parenting orders.³⁸

In order to achieve these objectives, the main changes made by the legislation were the inclusion of a statement of objects and principles, which, among other things, provided that children have “the right to know and be cared for by both their parents” and “a right of contact” with both parents (except where that would be contrary to the children’s best interests);³⁹ a new concept of “parental responsibility”⁴⁰ replaced the long standing concepts of guardianship and custody; and a new range of orders for “residence,” “contact,” or “specific issues” was introduced.⁴¹ In doing this, the legislation moved beyond the English legislation on which it was said to be based. It did

best interests of the child will generally require continuing contact with both parents and complementary parenting skills”).

- 35 Cth, Parliamentary Debates, House of Representatives, 21 Nov. 1995, 3303 (Peter Duncan, Parliamentary Secretary) (Austl.) (debating *Family Law Reform Bill 1994*); Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) ¶ 5 (Austl.).
- 36 Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) ¶ 5 (Austl.).
- 37 *Id.* ¶ 2.
- 38 *Id.* ¶¶ 6-7. This came at a time when there was considerable focus on the issue of violence and concerns that the no-fault divorce aspects of the legislation had led to a lack of attention to the relevance of violence to decision-making in family law, particularly in relation to children, see Reg Graycar, *The Relevance of Violence in Family Law Decision-Making*, 9 AUSTL. J. FAM. L. 58 (1995).
- 39 *Family Law Act 1975* (Cth) s 60B(2) (Austl.).
- 40 *Id.* s 61B.
- 41 *Id.* s 64B. These changes are summarized in HELEN RHOADES, REG GRAYCAR & MARGARET HARRISON, *THE FAMILY LAW REFORM ACT: THE FIRST THREE YEARS* 15-17 (2000); see also Dewar, *supra* note 28, at 140-41, 143-44; John Dewar & Stephen Parker, *The Impact of the New Part VII Family Law Act 1975*, 13 AUSTL. J. FAM. L. 96, 102-07 (1999).

much more than change the language: It abolished the concepts of guardianship and custody altogether. What this meant was that where previously it had been clear that the “custodial” parent had the right to make day to day decisions about the child(ren), as a result of the reforms no such decision-making power accompanied “residence” or “contact.” Instead, the parents now had “parental responsibility,” which was almost invariably shared, irrespective of where (or with whom) the child(ren) lived. Not surprisingly, as the results of research explained below demonstrate, that led to a greater, not lesser number of disputes, particularly contravention applications.⁴² Judges were also required by the act to ensure that their orders for residence and contact do not expose any person to an “unacceptable risk” of family violence,⁴³ and the need to ensure safety from family violence was included among the objects of the Act.⁴⁴

Within a few years of the commencement of the amendments, research looking at the effects of the legislation cast serious doubt on its having achieved its stated aims.⁴⁵ In summary, the research found there to be no evidence that shared caregiving had become a lived reality for the children of those separated parents who had engaged with the “family law system.” While some parents had workable and flexible shared residence arrangements after separation, these tended to be made without legal assistance and without any knowledge of the *Reform Act* by parents who had generally exercised their responsibilities jointly and co-operatively before their separation.⁴⁶ Although the legislation aimed to promote agreement, it was found to have intensified dispute among those who could not agree.⁴⁷ As one respondent told researchers, “[t]he shared parenting concept is totally at odds with the types of parents who litigate.”⁴⁸ That finding reflected earlier U.S. research which demonstrated that the advantages of shared parenting were dependent upon

42 For data on the increase in contravention applications, see RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 91, 95, 101 fig. 3 (presenting the steady increase in applications from 1995-2000); *see also* Dewar & Parker, *supra* note 41, at 108.

43 *Family Law Act 1975* (Cth) s 68K (Austl.).

44 *Id.* s 43(ca).

45 *See* RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 1-10 (Executive Summary); *see also* Dewar & Parker, *supra* note 41, at 107-12.

46 RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 59-60.

47 *Id.* at 60; Dewar, *supra* note 28, at 143.

48 One counselor interviewed noted that the concept of parental responsibility had become “a new tool of control” for “abusive non-resident parents,” RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 60.

parents having voluntarily agreed to the arrangement, and upon a previous history of cooperation between the parents.⁴⁹

As for the change in terminology and its stated aim of moving away from win-lose language, by the time of the publication of the results of a three year study in 2000, it was found that the change of language had not permeated the consciousness of those litigating under the act and the vast majority of parents had never heard of “residence”: They, the media and those working in the system still routinely used the language of custody.⁵⁰

Perhaps the most disturbing finding made in both studies was that there had been a shift in the focus of interim contact hearings, from asking whether it was in the best interests of the child(ren) for access/contact to be ordered, to asking how to maintain contact until the final hearing. In fact, many interim contact hearings resulted in what became *de facto* final orders, either because funding for legal representation ran out, or the time it took to get to a final hearing led to the establishment of a status quo that became too difficult to disturb.⁵¹ With the new “pro-access/contact” focus at interim hearings, this became entrenched practice because of the difficulties in having the matter considered by way of a final hearing where it is more likely that the proper question, i.e., is access in the best interests of the child, would be considered.

Courts appear to have given primary consideration to the new stated object concerning a child’s right to contact with both parents and therefore took a conservative approach at interim hearings to ensure that contact continued, or that relocation was restrained,⁵² even though of those matters that did actually proceed to a final hearing, no real change was identified from the outcomes as compared to the pre-1996 regime. The clear finding from both evaluations was that children were more likely to be exposed to situations involving violence because of the shift toward the presumption in favor of contact at interim hearings. This was ironic, given the introduction in 1996 of express provisions in the act about the need to protect children from violence, compared to the earlier period where, without any such provisions, courts were more cautious when making interim decisions.

49 Susan Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981); Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233 (1990).

50 See RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 61.

51 *Id.* at 79-80; Dewar & Parker, *supra* note 41, at 109-10.

52 *Family Law Act 1975* (Cth) s 6OB (Austl.); see also Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179 (2012).

Finally, the research demonstrated that the new reforms had created considerable opportunities for disputes, particularly about contact, and this was reflected in data that showed that there had been a very large increase in the numbers of contravention applications brought by non-resident parents, alleging breaches of contact orders.⁵³

It might have been thought that these findings would discourage any further movement in the direction of joint parental responsibility or moves toward imposing shared parenting on parents who cannot agree about the care of their children. The clear message from the research was that parents capable of and interested in shared parenting after separation were those who had tended to share parenting before separation. They were also the parents least likely to have their disputes resolved via legal processes, whether by way of a final hearing or via negotiation in the shadow of the law. The obverse is that those people who do use the law — a law that from 1996 has provided for a legal regime of joint parental responsibility and encouraged “shared parenting” — are those least likely to be able to cooperate in the parenting of their children.

However, it was not long after these results were published that a further parliamentary inquiry was initiated in 2003 when the Prime Minister acceded to persistent lobbying by the fathers’ rights groups and asked a parliamentary committee to investigate whether there should be a fifty-fifty presumption, i.e., that children whose parents had separated should spend half their time with each parent.⁵⁴ While a number of expert groups and individuals gave evidence

53 RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 54, 91, 95 (noting that in one instance a non-resident father brought a contravention application, seeking a specific issues order permitting him to take the parties’ son to a counselor, because the child had been caught reading a pornographic magazine in his room. The self-represented father argued that the resident parent had breached her “parental responsibility” by failing to consult him about the child’s punishment, that she had “no right” to deal with the issue unilaterally, and that he had “a right as a father” to be consulted about this matter); *see also* Dewar & Parker, *supra* note 41, at 108.

54 STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS, *EVERY PICTURE TELLS A STORY: REPORT ON THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION* (2003). Shortly before the Parliamentary Standing Committee was established, the government had appointed yet another group to inquire into family law, *see* FAMILY LAW PATHWAYS ADVISORY GROUP, *OUT OF THE MAZE: PATHWAYS TO THE FUTURE FOR FAMILIES EXPERIENCING SEPARATION* (2001). This history is described in the report by RAE KASPIEW ET AL., *EVALUATION OF THE 2006 FAMILY LAW REFORMS 1-3* (2009) (research conducted by the Australian Institute of Family Studies).

to the 2003 Parliamentary Standing Committee inquiry, it was to some degree characterized by what Helen Rhoades and Susan Boyd have described as its “obvious antipathy towards empirical work.”⁵⁵ This is perhaps most clearly illustrated by a comment made by the chair of the 2003 Parliamentary Committee during one of the public hearings: “I am a bit of an anti-research person myself. I do apologise if I offend you. I figure it is time we get out of the research and get into delivering exactly what our families need.”⁵⁶

In an article published in 2004, Rhoades and Boyd discussed the process of the 2003 Standing Committee inquiry in considerable detail, showing how the committee manifested little interest in the research that had been published since the 1995 reforms came into effect, preferring instead to rely on anecdotal evidence. They quote the committee’s chair, Kay Hull, a member of parliament who, in response to a researcher who provided survey data about the continuing gendered nature of children’s care, commented:

I know that my sons have a far different role in their children’s lives than my husband had in our children’s lives. . . . I would consider that my sons are the primary care givers, even though they are the primary breadwinners as well. . . . My concern is that all your studies show and all the indications seem to be that women are still the primary caregivers, but I am not sure that that is the case.⁵⁷

What Mrs. Hull seems to be relying on here is a form of “commonsense,” an exhortation to a belief in a shared sense of how the world works that flows, not from empirical reality, but rather from personal experience.⁵⁸

Her stated view had considerable resonance with a comment made some years ago by one of the proponents of the 2003 inquiry. In August 1999, the

55 Helen Rhoades & Susan Boyd, *Reforming Custody Laws: A Comparative Study*, 18 INT’L J.L. POL’Y & FAM. 119, 134 (2004).

56 Cth, Parliamentary Debates, House of Representatives, 29 Aug. 2003, 17 (Kay Hull, Chair of the House of Representatives’ Standing Committee on Family and Community Affairs); see also STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS, *supra* note 54.

57 Quoted in Rhoades & Boyd, *supra* note 55, at 134-35. Note that the most recent results from the Australian Institute of Family Studies show that Mrs. Hull’s intuition is not correct: Even after the introduction of a much less flexible shared care presumption, it is still overwhelmingly mothers who are the primary caregivers, see Ruth Weston et al., *Care-Time Arrangements After the 2006 Reforms: Implications for Children and Their Parents*, 86 FAM. MATTERS 19 (2011).

58 For a discussion of the role of “commonsense” in judicial decision-making, see Reg Graycar, *The Gender of Judgments: Some Reflections on “Bias,”* 32 U. BRIT. COLUM. L. REV. 1 (1998).

national newspaper *The Australian* published a cover story about the Family Court in which the Lone Fathers' Association spokesperson, Barry Williams, was quoted as saying: "Official statistics on family violence . . . used by the Family Court, academia, law societies and other professional bodies, are incorrect." He maintained, for example, that men and women were equally violent. "My ex-wife, for example, once chucked a frozen chook at me," he said by way of illustration.⁵⁹

Australian researchers Angela Melville and Rosemary Hunter have also noted the frequency with which such commonsense, but erroneous, assumptions are relied on in family law reform discourses.⁶⁰ In a discussion of their empirical study of family law clients in the legal aid system they documented, and also disproved, some of the common assumptions that are used in family law, such as "women fabricate false allegations of violence to refuse access," or "the Family Court is biased against men."⁶¹

Rhoades and Boyd note that the resulting report of the 2003 Parliamentary Committee surprised a number of those who had participated by not only acknowledging the empirical research, but relying on it in the final recommendations. Specifically, it was the empirical research that the Committee cited in support of rejecting the originally proposed "equal time presumption"; instead the Committee acknowledged what the research has always made clear, that is, that there are dangers in a one-size-fits-all model, given the diversity of post-separation families and the diversity of their care arrangements.⁶²

But while it looked as if reason might prevail, that was not the end of the family law reform story. Despite the rejection by this committee of a clearly stated policy preference by government for an "equal sharing" principle in the law, the government legislated for one anyway. In 2006, the *Family Law*

59 Miriam Cosic, *Court in the Middle: Where Divorce Settlements Become Gender Wars*, AUSTL. MAG., Aug. 21-22, 1999, at 20. This story is the inspiration for my notion of "law reform by frozen chook," see Graycar, *supra* note 6.

60 Angela Melville & Rosemary Hunter, "As Everybody Knows": *Countering Myths of Gender Bias in Family Law*, 10 GRIFFITH L. REV. 124 (2001).

61 See *id.* at 127-29, 131-35. Retired Family Court judge Richard Chisholm was commissioned by the Attorney General in 2009 to review many of the practices, procedures and laws that apply in the federal family law courts in the context of family violence. His report found that there was no evidence to support the claim that allegations of violence are frequently fabricated. See RICHARD CHISHOLM, FAMILY COURTS VIOLENCE REVIEW 48 (2009), available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Chisholm_report.pdf/\\$file/Chisholm_report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Chisholm_report.pdf/$file/Chisholm_report.pdf).

62 Rhoades & Boyd, *supra* note 55, at 135.

Amendment (Shared Parental Responsibility) Act amended the *Family Law Act* to introduce a rebuttable presumption of shared parental responsibility (the only exceptions were in cases involving child abuse and violence).⁶³ These reforms have recently been described as going “further than their Australian predecessor, and indeed further than many other English-speaking jurisdictions, in . . . [promoting] equal sharing of time post-separation much more actively.”⁶⁴

The contentious nature of the legislation was clearly recognized in a discussion paper prepared by the Parliamentary Library shortly after the bill’s introduction:

The former Chief Justice of the Family Court has been reported as saying the Bill is pandering “to the strong pressure that’s been put on the Government by various militant fathers groups by requiring the court to consider whether children in custody disputes should spend equal time with both parents.”⁶⁵

The Senate Legal and Constitutional Affairs Committee (LACA) noted that considerable concern had been expressed in evidence and submissions that the presumption of equal shared parental responsibility (and the focus on increasing shared parenting more generally) would increase the risk of family violence and abuse occurring.⁶⁶

The legislation, which came into effect in 2006, requires that, in addition to a presumption of “equal shared parental responsibility,” a court making an order must consider whether an order for the child to spend equal time with both parents is in the best interests of the child and reasonably practicable.⁶⁷ If such an order is not made, the court must then consider making an order for “substantial and significant time” with both parents, which is statutorily defined as including both weekdays and weekend days.⁶⁸ The willingness of each parent to actively support such a regime also became a factor for the court’s consideration when making a parenting order. The so-called “friendly

63 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1 (Austl.); see *Family Law Act 1975* (Cth) s 61DA (Austl.).

64 Dewar, *supra* note 28, at 141.

65 Mary Anne Neilsen & Jennifer Norberry, *The Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 99 BILLS DIGEST 45 (2006) (footnotes omitted).

66 SENATE STANDING COMMITTEES ON LEGAL AND CONSTITUTIONAL AFFAIRS, INQUIRY INTO THE PROVISIONS OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005, at 14-28 (2006).

67 *Family Law Act 1975* (Cth) s 65DAA(1) (Austl.).

68 *Id.* s 65DAA(2).

parent” provision requires the court to take into account “the willingness and ability of each of the child’s parents to facilitate and encourage a close and continuing relationship between the child and the other parent.”⁶⁹

In addition, research commissioned by the Attorney General’s Department in 2009 into family violence and family law reported that many of those who used family court services post-2006 said “they did not disclose violence to the court for fear that if their allegations were unproven they would be viewed as an ‘unfriendly parent,’” and this resulted in children being exposed to perpetrators of violence for longer periods.⁷⁰

Other aspects of these reforms included the introduction of a network of family relationship centers and an increased emphasis on “family dispute resolution,” i.e., non-court-based dispute resolution which has become a prerequisite before applications can be made to courts (except in cases involving concerns about family violence or abuse).⁷¹

Just as occurred in relation to the 1995 reforms, there have been several evaluations of these reforms (though the more recent evaluations were much larger in scale than those that followed the 1995 reforms). Not surprisingly, both the Australian Institute of Family Studies report⁷² and a separate study examining the application of the violence and abuse exceptions, undertaken by a former Family Court judge,⁷³ demonstrated that the reforms had not been effective in protecting women and children from violence and abuse. As summarized by Dewar, their findings showed that “shared parenting is being agreed to, or ordered judicially, in circumstances that are harmful to children in a significant minority of cases. [The reports suggest] that the legislation and process require significant amendment if the court system is to respond effectively to cases involving violence, or allegations of abuse.”⁷⁴

In a contemporaneous development, just as these research reports were being finalized and discussed, the High Court of Australia, the ultimate appeal court in Australia, in a rare foray into family law,⁷⁵ set aside a decision involving

69 *Id.* s 60CC(3)(c).

70 Dale Bagshaw et al., *The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006*, 86 FAM. MATTERS 49, 55 (2011).

71 These reforms were introduced under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 4 (Austl.) (now found in the *Family Law Act 1975* (Cth) s 60I (Austl.)).

72 KASPIEW ET AL., *supra* note 54, ch. 10.

73 CHISHOLM, *supra* note 61.

74 Dewar, *supra* note 28, at 142.

75 Like many of its international counterparts, the High Court controls its own jurisdiction by requiring those who seek to have the Court hear an appeal to

the equal time provisions and as a result, has now cast the interpretation of these provisions into some considerable doubt.⁷⁶ That case illustrated the absurd lengths to which an application of the equal shared time presumption could lead. The parents, who had lived in Sydney, moved to Mt Isa, a remote mining town in western Queensland (some 1,860 kilometers from Sydney) where the husband had secured employment. The parents had one five-year old child and separated shortly after the move. The mother wished to return to Sydney where she would be able to be employed and would, inter alia, have access to family support, but the father refused to move. The Federal Magistrate's Court, hearing the dispute at first instance,⁷⁷ decided that, since it was in the child's best interests to have equal time with both parents, an order for equal time should be made. Because the father refused to move, this in effect required the mother either to stay in Mt Isa (which she did, living in a mobile home in a caravan park) or to move back to Sydney without her child.

The High Court held (unanimously) that the Federal Magistrate's Court had misinterpreted the legislation by not considering the "reasonable practicability" of an equal time order first:

Section 65DAA(1)(b) [the equal time presumption] requires a practical assessment of whether equal time parenting is feasible. Since such parenting would only be possible in this case if both parents remained in Mount Isa, [the trial judge] was obliged to consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable.

Had consideration been given to the question only one conclusion could have been reached, one which did not permit the making of the order. From the time that she returned to Mount Isa to the date of the hearing the mother had been required to live in a caravan park, and live there with the child on alternate weeks. Apart from the facilities being limited, it could not be said that such an environment is usually ideal for a child. The availability of alternative accommodation did not seem likely. Rental accommodation is scarce in Mount Isa and the

apply for "special leave to appeal" which is granted in only a small proportion of cases. For the matters that are considered by the Court in relation to whether to grant special leave, see *Family Law Act 1975* (Cth) s 95 (Austl.); *Judiciary Act 1903* s 35A (Austl.).

76 *MRR v GR* [2010] 240 CLR 461 (Austl.). For a critique of the decision, see Richard Chisholm & Patrick Parkinson, *Reasonable Practicability as a Requirement: The High Court's Decision in MRR v GR*, 24 AUSTL. J. FAM. L. 255 (2010).

77 *Rosa v Rosa* [2008] FMCAfam 427; aff'd *Rosa v Rosa* [2009] FamCAFC 81.

waiting lists for it long. The mother said that she could not afford good quality accommodation in any event and the cheaper rental properties were in “rough” areas.

The mother had limited opportunities for employment in Mount Isa. When the parties lived in Sydney she had worked part-time. She had full-time opportunities available to her with her previous employer in Sydney which provided her with flexibility of hours. In Mount Isa the mother supported herself from social services payments and income from casual employment. The disparity between her income and that of the father had not been addressed by the time of the hearing. She said there was no employment in Mount Isa for someone of her experience and there were limited opportunities for flexible hours.

The evidence of the Family Consultant was that the mother was “definitely despondent” about being in Mount Isa, as her living conditions were not good and she was isolated from her family. The Family Consultant said that the mother was depressed and recommended that she attend counselling. The finding of [the trial judge] that “the mother’s anguish and depression in being in Mount Isa . . . can, to a significant degree if not in their entirety, be dealt with by . . . counselling” is not supported by this evidence.⁷⁸

Critically, the Court held that the order was simply not one that could have been made by the trial judge had s/he considered whether it was reasonably practicable. Certainly, this decision has been an important precedent that has perhaps shifted the decision-making away from a near-automatic making of orders for equal time, but it is too early to tell what the consequences of the decision have been in practice.

So at the end of another period of “family law reform,” we are left with legislation that purports to require courts to make orders for children to live, in the majority of cases, so as to have equal time or substantial time with each parent. There is no age limit in the legislation, despite recent research questioning the impact of such arrangements on children’s wellbeing and, in particular, demonstrating its clearly detrimental effect on very young children and babies.⁷⁹ Other evaluative research is showing that the changes have not been effective in protecting women and children from violence, despite attempting to create legislative exceptions for such cases;⁸⁰ that the legislative framework, having been subjected to so many amendments over

78 *MRR v GR*, paras. 8-12.

79 JEN MCINTOSH ET AL., *POST SEPARATION PARENTING ARRANGEMENTS AND DEVELOPMENTAL OUTCOMES FOR INFANTS AND CHILDREN: COLLECTED REPORTS* (2010).

80 KASPIEW ET AL., *supra* note 54, at 253-54.

such a relatively short period of time, has become overly cumbersome and complex and that those who work with it are finding it increasingly difficult to work with, while those whom it affects (parents) find it almost impossible to comprehend.⁸¹

Dewar has recently summarized some of the themes that have run through this series of reforms, and two of these are of particular interest for the purposes of this discussion:

Less reliance on empirical evidence or research findings as the basis for legislative policy, and greater reliance on an assertion of the rights, interests or claims of particular groups.

...
The politicisation of family law, to the point that legislative change is the subject of organised lobbying (especially by fathers' groups) and extensive media interest.⁸²

In the next Part of this Article, I will attempt to flesh out some possible explanations for the distinctive direction in which Australian family law reform has traveled in recent decades.

II. SOME REFLECTIONS ABOUT AUSTRALIA'S DISTINCTIVE APPROACH TO FAMILY LAW REFORM

In 2000, Dewar introduced an issue of the *Australian Journal of Family Law* by pointing out that

[t]he consistent message of all the research . . . is that, in its day to day operation, family law fails to protect women and children from financial and physical harm. Yet this message seems to go unheeded by family law policy makers. Family law policy often seems to be made in the teeth of, rather than on the basis of, the research and other empirical evidence available.⁸³

Ten years later, in an introduction to an issue of the same journal, Dewar noted that "the findings of the [2009] AIFS evaluation of the 2006 changes indicate that we have absorbed almost nothing from the lessons of previous evaluations of law reform."⁸⁴

81 *Id.* at 335-36.

82 Dewar, *supra* note 28, at 142.

83 John Dewar, *Introduction*, 14 *AUSTL. J. FAM. L.* 79 (2000).

84 Dewar, *supra* note 28, at 140.

Canadian and English research has demonstrated that despite the proliferation of groups of disgruntled fathers, and indeed their relative success at having their voices heard publicly, the legislatures in these jurisdictions have not responded to them with the same enthusiasm.⁸⁵ No national leader, other than former Australian Prime Minister John Howard, has publicly stated his or her support for their ambitions to bring about what is often crudely described as “equal time” outcomes in relation to post-separation parenting.⁸⁶

In Canada, while such groups were highly successful in getting the issue onto the parliamentary agenda,⁸⁷ the Canadian government appears to have moved further away from the fathers’ rights groups after its own Joint Select Committee inquiry in 1998.⁸⁸ The Canadian government subsequently undertook significant consultations and commissioned research, finally producing the Final Report on Custody and Access and Child Support in November 2002, just before a bill addressing these issues — Bill C-22 — was introduced.⁸⁹ Unlike the 1998 report, the 2002 report was quite scholarly and avoided relying on fathers’ rights movement arguments. In particular, the government rejected presumptions and did not include any legislative

85 See Richard Collier, *The Outlaw Fathers Fight Back: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform — Reflections on the UK Experience*, in *FATHERS’ RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE*, *supra* note 16, at 53; Rhoades, *supra* note 16; Rhoades & Boyd, *supra* note 55; Julie Wallbank, *(En)Gendering the Fusion of Rights and Responsibilities in the Law of Contact*, in *RIGHTS, GENDER AND FAMILY LAW* 93 (Julie Wallbank et al. eds., 2010).

86 See Phillip Hudson, *PM Orders Inquiry on Joint Custody*, *THE AGE*, June 25, 2003, <http://www.theage.com.au/articles/2003/06/24/1056449244109.html>. Howard referred the issue of “equal time” to the 2003 parliamentary inquiry that produced the *Every Picture Tells a Story* report, see Murray Mottram, *Why Howard Suddenly Started to Talk About Custody Battles*, *THE AGE*, June 21, 2003, <http://www.theage.com.au/articles/2003/06/20/1055828492831.html> (the subtitle of Mottram’s article was “Rebuttable joint custody is the catchcry for a group of influential lobbyists”).

87 KRISTEN DOUGLAS, *DIVORCE LAW IN CANADA* (2008), available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/963-e.pdf>; Susan B. Boyd, *Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law*, 20 *WINDSOR Y.B. ACCESS JUST.* 141 (2001).

88 See SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS, FOR THE SAKE OF THE CHILDREN (1998) (Can.).

89 Bill C-22, An Act to Amend the Divorce Act, Second session, 37th Parliament, 2003 (Can.); DEPARTMENT OF JUSTICE, FINAL FEDERAL-PROVINCIAL-TERRITORIAL REPORT ON CUSTODY AND ACCESS AND CHILD SUPPORT: PUTTING CHILDREN FIRST (2002) (Can.).

requirement of “equal time.” The bill was introduced in December 2002; in February 2003, it was referred to a Standing Committee on Justice and Human Rights. Notably, Bill C-22 never passed the second reading stage. To date, there has been no change in the law on custody and access, much to the disappointment of fathers’ groups who considered the bill that was introduced (though not passed) to place insufficient emphasis on shared parenting.⁹⁰ The authors of a Canadian National Longitudinal Study of Children and Youth have instead called for more research on the effects of shared custody.⁹¹

Similarly in England, Collier notes that

[f]or all their activities and public visibility, the success of F4J [Fathers for Justice] in influencing government policy would appear to be limited. Shared equal parenting has been explicitly and unequivocally rejected. The government’s position has been informed, rather, by the insights of a body of research, including that of socio-legal scholarship, much of which has directly countered key points advanced by F4J: the assumption, for example, that the vast majority of men are, in fact, equal carers; the belief that the “50/50” shared parenting split is, in the vast majority of cases at least, workable in material and practical terms.⁹²

In Australia, by contrast, despite the pessimism that surrounded the establishment of the 2003 inquiry, its recommendations were appropriately cautious and responsive to the evidence. Yet in the event, those recommendations were ignored by the government because the agenda appears already to have been set by the reference from the Prime Minister to consider the introduction of equal time.

How can we explain the fact that Australia, while having a common history of public expressions of concern and dismay by fathers’ groups has, unlike the United Kingdom and Canada, continued to legislate in ways that seem designed to respond to those groups’ concerns? Even more problematically, this has occurred at the same time as significant bodies of research have been published showing the negative effects of the legislative changes that seek to impose shared parenting on those parents who are least able to agree on the post-separation care of their children. While there is no clear and obvious answer to this question, the remaining part of this Article contains some speculative if cautious suggestions that might be posited by way of explanation.

90 See Sheldon Gordon, *Father’s Day*, CAN. B. ASS’N MAG., Dec. 2003, <http://www.cba.org/CBA/National/dec03/cover.aspx>.

91 DOUGLAS, *supra* note 87, at 17.

92 Collier, *supra* note 85, at 60.

One possible suggestion is that while the fathers' rights groups in other countries may have higher profiles, it is precisely the lack of any such profile that might make similar groups more effective in Australia. So, for example, in England, the group Fathers for Justice (F4J) became very well known through some of its more public activities, such as one member of the group scaling the walls of Buckingham Palace in a Batman costume to protest, as he put it, "being shafted again by a rotten system and a hostile mother."⁹³ Other group members staged high profile "super dad" stunts such as climbing up the London Eye dressed as Batman in order to stage an eighteen-hour protest and throwing purple flour in Parliament at then-Prime Minister Tony Blair in order to "highlight MPs' failure to help fathers gain access to children through the courts."⁹⁴ By contrast, while in Australia there is a proliferation of groups with names such as "Dads in Distress," "Men's Rights Agency," "Fathers 4 Equality," and "the Shared Parenting Council," these groups do not have the profile of their energetic (and somewhat flamboyant) counterparts in, say, the United Kingdom. This may well work in their favor as they are therefore not necessarily widely perceived as "crazy."

Moreover, it has been consistent government practice in Australia to accord these groups a seat at the table: As long ago as 1987, Barry Williams of the Lone Fathers' Association was a member of the original Child Support Consultative Group, chaired by Justice Fogarty of the Family Court, which reported to the government in 1988 with a proposed legislative formula for the assessment of child maintenance in Australia.⁹⁵ Williams was also a member of the more recently formed Ministerial Taskforce on Child Support Reference Group, along with Bettina Arndt, a journalist and media person who has connections with fathers' rights organizations.⁹⁶ This has given such groups

93 See Maxine Frith, *Fathers 4 Justice Protest at "Batman" Custody Hearing*, THE INDEPENDENT, Sept. 21, 2004, <http://www.independent.co.uk/news/uk/crime/fathers-4-justice-protest-at-batman-custody-hearing-547071.html>. On Mother's Day 2005, the *New York Times Magazine* featured a cover story about Fathers 4 Justice, see Susan Dominus, *The Fathers' Crusade*, N.Y. TIMES MAG., May 8, 2005, <http://www.nytimes.com/2005/05/08/magazine/08FATHERS.html>.

94 *Blair Hit During Commons Protest*, BBC NEWS (May 19, 2004, 9:24 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/3728617.stm; *Fathers 4 Justice*, BBC NEWS (Apr. 22, 2008, 3:10 PM), http://news.bbc.co.uk/2/hi/uk_news/3653112.stm.

95 See CHILD SUPPORT CONSULTATIVE GROUP, CHILD SUPPORT FORMULA FOR AUSTRALIA: A REPORT FROM THE CHILD SUPPORT CONSULTATIVE GROUP (1988).

96 See MINISTERIAL TASKFORCE ON CHILD SUPPORT, IN THE BEST INTERESTS OF CHILDREN — REFORMING THE CHILD SUPPORT SCHEME (2005), available at <http://www.fahcsia.gov.au/sa/childsupport/pubs/FullReformReport/Pages/default.aspx>; see

a legitimacy that they may not have had in other countries (though of course this does not explain why they have been given that legitimacy).⁹⁷

While it is possible at the time of writing to be cautiously optimistic that some of the more dangerous reforms may yet be wound back, following an announcement by the federal Attorney-General in November 2010,⁹⁸ it is nonetheless important to stress that despite the very prominent role played by former Prime Minister Howard in promoting the fathers' agenda, concern about family law and a sympathy for the plight of separated fathers has long been a bipartisan issue in Australia. It must be recalled that it was the Labor Government which brought in the 1995 reforms and the Parliamentary debates that introduced those changes are marked by expressions of great concern about the place of fathers in post-separation parenting, with little if any attention devoted to the difficulties that might be experienced by mothers who remain the vast majority of primary caregivers.⁹⁹

It might be tempting to suggest that there is some peculiarly Australian form of antipathy to the results of research (recall the comment of the chair of the 2003 Parliamentary Committee: "I'm a bit of an anti-research person myself").¹⁰⁰ Yet one of the more significant aspects of the *Family Law Act* was the establishment, from the time it came into effect, of two statutory research and policy bodies to work in the field of family law. The Australian Institute of Family Studies was established under part XIVA of the *Family Law Act* and is a world leading source of empirical research on families and

also Bruce Smyth, *Modernising the Child Support Scheme*, 71 FAM. MATTERS 58, 61 (2005); Bettina Arndt, *Bringing Home Benefits for Distant Dads*, THE AGE, May 18, 2000, <http://www.fact.on.ca/news/news0005/th00051a.htm>.

97 For discussion of the limited space provided for women's organizations in Family Law reform contexts, see Armstrong, *supra* note 31.

98 See Press Release, Robert McClelland, Attorney General, Protecting Children at Risk of Violence (Nov. 11, 2010), available at http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FourthQuarter_11November2010-Protectingchildrenatriskofviolence. Since the election of the Labor Government in November 2007, there have been a number of initiatives that appear to acknowledge some of the problems the reforms have led to, see, e.g., AUSTRALIAN LAW REFORM COMMISSION, FAMILY VIOLENCE — A NATIONAL LEGAL RESPONSE, FINAL REPORT (2010), available at <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>; CHISHOLM, *supra* note 61; KASPIEW ET AL., *supra* note 54.

99 Some of the comments made in the Parliamentary debates are extracted in RHOADES, GRAYCAR & HARRISON, *supra* note 41, at 14.

100 See Rhoades & Boyd, *supra* note 55.

the consequences of relationship breakdown.¹⁰¹ Meanwhile, section 115 of the *Family Law Act* provides for the existence of the Family Law Council, a national body that has since 1976 advised the Attorney-General on family law policy (and, as outlined above, played a significant role in the shift away from the previous law on “custody” to the joint parental responsibility regime that now prevails). And, while there seems to be a clear trend to ignore empirical research in relation to children/custody, there are clear examples of research being extensively relied on in other family law policy contexts, most notably in the creation of the child support scheme,¹⁰² and in the development of policy about matrimonial property.¹⁰³

Another possible factor is a certain distrust and suspicion of the Family Court of Australia itself. Considered a highly innovative court when established, it became the target of a considerable amount of opprobrium by fathers’ groups and in its early years, was also a target of a different kind: I have referred earlier to the deadly spate of bombings and murders that occurred in the early 1980s.¹⁰⁴ During the period of conservative government commencing in 1996, the Court’s outspoken Chief Justice was himself a target of criticism by the government.¹⁰⁵ That suspicion of the Court appears to have manifested in a desire not to vest too broad a discretion in it; and to constrain that discretion by bright lines and clear rules. However, that does

101 See, e.g., KATHLEEN FUNDER ET AL., *SETTLING DOWN: PATHWAYS OF PARENTS AFTER DIVORCE* (1993); PETER McDONALD, *SETTLING UP: PROPERTY AND INCOME DISTRIBUTION ON DIVORCE IN AUSTRALIA* (1986) (both publications were part of pioneering research completed by the Australian Institute of Family Studies into the economic consequences of marriage breakdown in Australia, and the former was relied upon in AUSTRALIAN LAW REFORM COMMISSION, *MATRIMONIAL PROPERTY* (REPORT No 39) (1987)).

102 See CHILD SUPPORT CONSULTATIVE GROUP, *CHILD SUPPORT FORMULA FOR AUSTRALIA: A REPORT FROM THE CHILD SUPPORT CONSULTATIVE GROUP* (1988).

103 As noted above, the *Matrimonial Property Report* was significantly informed by the work of the AIFS. Two chapters of the report are described as being concerned with “the pioneering empirical work undertaken by the Commission in conjunction with the Family Court and the Australian Institute of Family Studies to gather information about the operation of the present law,” AUSTRALIAN LAW REFORM COMMISSION, *supra* note 101, at 3.

104 See *supra* note 5.

105 The court has been frequently expected to directly respond to allegations of “bias” towards mothers and to cite quantitative data to substantiate the lack of such bias, see Janet Fife Yeomans, *Court to Investigate Custody “Bias,”* THE AUSTRALIAN, Oct. 1, 1998; see also Helen McCabe, *At War with the Law,* HERALD SUN, Dec. 8, 1998; *Williams Criticises Nicholson Over Legal Aid Comment,* AUSTRALIAN ASSOCIATED PRESS, Oct. 31, 2001.

not explain the more recent legislation. By 2006, the more recently created Federal Magistrates Court, which has a family division, had taken over the bulk of the dispute resolution work that was formerly done by the Family Court.

Nonetheless, it is significant to note that a key aspect of the 2006 changes involved what is, in effect, an outsourcing of family law decision-making to a national network of Family Relationship Centres, where decision-making is not in the hands of judges or magistrates but rather is outsourced to community organizations. The use of non-legal personnel is itself not new: The Family Court was renowned for its reliance on court counselors and mediators, but that work took place directly “in the shadow of the law,” i.e., under court supervision. What is new is that the current penchant for Family Relationship Centres is not court-annexed and they may be the first and only forum that many separating families encounter.

I have focused at some length on the fathers’ groups and their role in this continuing “reform” of family law to attempt to respond to their concerns. But what of the women? What political role, if any, have they played? There is considerable research on how the voices of the powerful drown out the voices of the powerless: In the context of family law reform, men have the ears of the politicians, the women and children simply do not. Moreover, the stories that the men tell are those that politicians find easier to hear¹⁰⁶: It is indeed sobering to read in 2011 that women whose post-separation parenting arrangements have been characterized by violence still meet resistance when they talk about that violence.¹⁰⁷ And there are all sorts of pragmatic reasons for why the fathers’ stories resonate so clearly: Since it is overwhelmingly women who are raising children after separation and divorce (not because of “biased” courts, but because of a history of gendered patterns of caregiving), they are not as free as men are to spend time lobbying politicians and otherwise generally engage in public activities.¹⁰⁸

106 One of the best discussions of this phenomenon is by Kim Lane Scheppele, *Manners of Imagining the Real*, 19 *LAW & SOC. INQUIRY* 995 (1994). For a discussion of the “stock story,” see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2418-22 (1989).

107 See CHISHOLM, *supra* note 61; Bagshaw et al., *supra* note 70, at 54.

108 See Hancock, *supra* note 23, at 28-30 (analyzing how the majority of views put to parliamentary committees, such as the 1992 Joint Select Committee, come from non-resident parents). This issue of the differential access of women and men to political discourses was expressly put to the Joint Select Committee, see NATIONAL COMMITTEE ON VIOLENCE AGAINST WOMEN, SUBMISSION TO THE JOINT SELECT COMMITTEE ON CERTAIN ASPECTS OF THE OPERATION AND INTERPRETATION OF

This is not to suggest that women's organizations have not played a role in trying to engage politically with these debates. Certainly in relation to the mid 1990s reforms, there was considerable activity by a newly formed Women's Justice Coalition.¹⁰⁹ But while women's groups have been engaged in the law reform process, largely their focus has been on issues of violence. Important as that issue was and remains, by contrast, scant attention seems to have been paid to other important aspects of the legislative changes that took away common law notions of pragmatic caregiving responsibilities, including, however unfashionable this might now be, the "right" attached to custodial parents to make day to day decisions about children in their care. As explained earlier, this has now been replaced with a notion of joint parental responsibility requiring a caregiving parent to consult about any and all decisions and therefore leaving open endless possibilities of conflict, disagreement, power and control.

CONCLUSION

In 2000, in my *Law Reform by Frozen Chook*,¹¹⁰ I argued that there was a clear disconnect between the progressivity that marked Australia's legal recognition of same-sex relationships, and before that, heterosexual non-marital relationships, and the reactive or even reactionary ways in which heterosexual family law was then developing and perhaps more significantly, the discursive terrain in which it was being played out. At the time, the only possible explanation seemed to be the persistence of what some have called a "gender war."¹¹¹ It was also suggested that the lack of overt opposition to the changes to laws recognizing non-marital relationships could have been

THE FAMILY LAW ACT, PART 2, at 71-72 (1991); see also Martha Fineman, *Illusive Equality: On Weitzman's "Divorce Revolution,"* 11 AM. B. FOUND. RES. J. 781, 787-88 (1986); Ruth Lister, *Women, Economic Dependency and Citizenship*, 19 J. SOC. POL'Y 445 (1990).

109 See, e.g., Armstrong, *supra* note 31.

110 Graycar, *supra* note 6.

111 Some of the publications I referred to then were MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* (1999); Nicholas Bala, *A Report From Canada's "Gender War Zone": Reforming the Child-Related Provisions of the Divorce Act*, 16 CAN. J. FAM. L. 163 (1999); see also Richard Collier, *From Women's Emancipation to Sex War? Men, Heterosexuality and the Politics of Divorce*, in UNDERCURRENTS OF DIVORCE 123 (Shelley Day Sclater & Christine Piper eds., 1999); Rhoades, *supra* note 4 (recently returning to the theme of gender wars).

due to those changes not being perceived as involving “taking something away,” whereas laws that affect the relationships between men, women and their children after separation are more often perceived as having zero sum outcomes.

There is a clear discursive inconsistency that flows from the fact that post-separation parenting, while formally a site of children’s rights and parents’ responsibilities, tends in practice to become a contested terrain of fathers’ rights versus women’s rights. It is important to stress that Australia’s national family law does not acknowledge any concept of “parents’ rights” in relation to post-separation parenting: The rights are those of children, while the parents have responsibilities. All the rights set out in the *Family Law Act* in relation to children after separation address the rights of children, including the right of children “to know and be cared for by both their parents,” “to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care,” and to enjoy their culture, with particular reference to the right to enjoy Aboriginal or Torres Strait Islander culture.¹¹²

This contradiction between a children’s rights-focused law, and a parents’ rights framework of contestation, has been noted by Rhoades, who suggests that the “centrality of the child development research to family law decision-making has been displaced by concerns about fairness to parents.”¹¹³ And there is a certain irony in the continuing contestation and focus on fathers’ rights, given that the initial impetus for doing away with the language of custody, guardianship and access was because it was seen as distancing non-custodial parents (usually fathers).

More than fifteen years after the most groundbreaking reforms to the laws governing parenting after separation, the gender war framework is still operating and there appears to be no sign of its abatement in sight. We can only hope that in the wake of yet another set of devastating research findings that clearly shows that the aims of the latest reforms have not been achieved, a courageous government might be prepared to take the risk of trying to disrupt the seemingly inexorable gender war. Yet this seems unlikely if a comment in a newspaper a short time before the last Australian federal election in 2010 has

112 *Family Law Act 1975* (Cth) ss 60B(2)(a), 60B(2)(b), 60B(2)(e) (Austl.). Section 60CC(e) also makes reference to the child’s right “to maintain personal relations and direct contact with both parents on a regular basis.” When the objects provisions were first introduced in 1995, they were based squarely on the language of the Convention on the Rights of the Child, Nov. 20, 1989, 1557 U.N.T.S. 3.

113 Rhoades, *supra* note 4, at 175.

any validity. Referring to the recent proliferation of commissioned research on the effect of the family law changes, veteran journalist Adele Horin noted:

So sensitive is the subject that a senior officer in the Attorney-General's Department remarked to a researcher this year: "We have to slow this down; we know it's worth 1 million votes." Any suggestion of rolling back the 2006 [family law] reforms risked reigniting emotive campaigns by men's groups that considered the changes a victory for fathers' rights.¹¹⁴

Also writing in response to the most recent set of published data demonstrating once again the failure of family law reform to protect children and the women who are by and large their primary caregivers, Rhoades has noted: "These findings highlight the dangers of political law-making processes when it comes to regulating family life, and suggest that it is time we left the 'gender wars' discourse behind and begin to craft a genuinely evidence-based response to children's care needs."¹¹⁵ Perhaps the frozen chook will eventually thaw out and we can move away from law reform by anecdote and ideology and instead, as Rhoades suggests, focus on what are the best ways of responding to children's care needs after their parents separate.

114 Adele Horin, *Next Government Must Confront the Dangers in Family Law Reforms*, SYDNEY MORNING HERALD, Aug. 28, 2010, <http://www.smh.com.au/opinion/politics/next-government-must-confront-the-dangers-in-family-law-reforms-20100827-13vx8.html>.

115 Rhoades, *supra* note 4, at 175.

