

Families, Law and Social Policy: Future Research Strategy

Report of a workshop conducted in July 2002

**Families, Law and Social Policy Research Unit
Griffith Law School
December 2002**



Contents

| | |
|--|----|
| Foreword | 2 |
| Introduction | 4 |
| Session I: Legal processes and practices | |
| Legal processes and practices: Rosemary Hunter | 5 |
| Lawyers and processes: John Dewar | 10 |
| Summary of discussion | 14 |
| Session II: Children and post-separation parenting | |
| Children: The big issues 1991 – 2002: Mavis Maclean | 15 |
| The Longitudinal Study of Australian Children (LSAC): Bryan Rogers | 19 |
| Summary of discussion | 22 |
| Session III: Financial aspects of separation | |
| Financial aspects of separation and divorce: Grania Sheehan | 23 |
| Finances and property division: John Dewar | 26 |
| Summary of discussion | 30 |
| Session IV: Stakeholders' forum | |
| Attorney-General's Department: Sandra Ellims | 31 |
| Family Court of Australia: Jennie Cooke and Virginia Buring | 36 |
| Department of Family and Community Services: Jeremy Nott | 39 |
| Legal Aid Queensland: Nicky Davies | 41 |
| Child Support Agency: Sheila Bird | 43 |
| Australian Research Council: Sue Rowley | 44 |
| Summary of discussion | 45 |
| Appendix A: List of participants | 47 |

Foreword

John Dewar[#] and Grania Sheehan^{*}

This is a report of presentations and discussions that took place at the Research Workshop entitled *Families, Law and Social Policy: Future Research Strategy*, hosted by Griffith University in July 2002.

The workshop was intended to bring together academic researchers in family law with the 'end-users' of that research. In so doing, we hoped to foster a discussion that would enable us to chart a way forward for the family law research community in Australia. We asked some academic presenters to summarise the state of knowledge in specific areas – or to describe recently initiated data gathering projects – and we asked the community of end users (government departments and agencies, courts and service providers) to speak about their research needs, and their priorities for research activity. We asked all participants to engage in discussion and debate during the course of the workshop.

Why do this at all? To many, the answer is not obvious. Traditionally, academic research has been speculative, driven by theoretical concerns and not directed towards answering specific questions posed by government and other end users of research. Yet we would suggest that there are strong reasons for engineering a closer dialogue between researchers, government and other end users in the family law system.¹

The first is that family law research, by its nature, requires financial support; and that support comes either from government directly, or indirectly through agencies such as the Australian Research Council. More generally, if family law research is to flourish in an increasingly competitive research environment, researchers will need to link research objectives with applied outcomes that benefit the government, courts, service providers and, not least, separating and divorcing families. Therefore, if funding is a pre-requisite of research, then researchers need to be better acquainted with what information potential providers of funds might need or want and at what stage of the policy making (or service provision) process they require this information.

The traditional library-based model of legal research, though valuable, will not be sufficient to sustain a research culture across the discipline of family law as a whole, or to deliver such applied outcomes. In order to do this, the work of the range of relevant disciplines and professions must be integrated. The issues that relate to any one aspect of the family law system do not exist in a vacuum, nor are they the province of any single profession or discipline. As such, researchers, policy makers and professionals working at all levels – from theory and policy formation to clinical and court practice and service provision – must remain in constant dialogue, so that research, theory, policy and the law does not lose touch with the real lives of separating and divorcing families.

[#] Pro-Vice Chancellor, Business and Law, Griffith University; Chair, Family Law Council.

^{*} Director, Families, Law and Social Policy Research Unit; Senior Research Fellow, Socio-Legal Research Centre, Griffith University

¹ We are indebted to Mavis Maclean, from the University of Oxford and a participant in the workshop, for showing us her 'Socio-Legal Research and Legal Policy: Symbiosis or Stalemate' published as part of F. Van Loon and K. Van Aeken (eds) *Liber Amicorum Prof Dr Jean Van Houtte* (Acco Leuven/Amersfoort, 1999); see also R. Rist, 'Influencing the policy process with qualitative research' in N. Denzin and Y. Lincoln (eds) *Handbook of Qualitative Research* (Sage, 1994), Ch.34.

The second is that the government and other end users may not be aware of what research can do to improve policy formation or to measure the effect of implementation. Even where government does recognise the importance of research as a tool of evaluation, it may not know what can realistically be achieved through research and may not know how to go about commissioning it. In short, government needs to be educated about the research process.

Third, there are clear signs that the Commonwealth Department chiefly responsible for the family law system, the Attorney-General's Department, is increasingly recognising the need for research and evaluation. The Family Law Pathways Report recommended that there should be a clearly articulated national research agenda in family law, focussed on monitoring the family law system and changes to it.² The Family Court and the Child Support Agency have a longer, but still relatively recent, tradition of funded research informing their activities. This presents the research community with an historic opportunity to educate and inform - and, ultimately, to contribute to better informed policy and legislation.

Of course, there will be many obstacles to better collaboration between researchers and the respective end user groups in the family law system. One will be that academics and public servants work in very different environments and to very different timelines and priorities. While public servants may not fully appreciate the conditions under which academic research is produced, academics may be quite ignorant of the nature of the policy making process. They may, accordingly, have quite unrealistic expectations of what research will be relevant to policy formation, implementation or evaluation, and of how or when it should be fed into that process.

Yet there is more to unite the two communities than to divide them, and therefore strong reasons to overcome this potential divide. In particular, the money available from government for research is limited and the support needs of many separating and divorcing families is significant. We have to co-operate in order to produce a coherent research agenda, with benefits clearly defined in terms of national needs. Family law researchers and the end users of their research have a shared interest in ensuring a thriving culture of funded research in family law. The Workshop reported here begins that process.

Nathan, Qld
November 2002

² Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation* (Australian Government Publishing Service, 2001).

Introduction

The *Families, Law and Social Policy: Future Research Strategy* Workshop aimed to:

- map past and current research projects in the area of separation and divorce, family law and related social policy;
- identify the future needs for family law and related social policy research in Australia; and
- open up dialogue between researchers, government, courts, legal practitioners, service providers and other end users in the family law system with regards to research needs.

Presentations were made to the workshop by international and national scholars with expertise in the areas of family law and related legal practices and processes, family dynamics and child adjustment, and social policy. The presenters discussed past research findings, current research projects and identified future research directions. These presentations were structured around the following three sessions: *Legal Processes and Practice, Children and Post-separation Parenting, Financial Aspects of Separation and Divorce*. Every session was followed by a group discussion.

The final session was a Stakeholders' Forum in which key stakeholders from the Attorney General's Department, the Department of Family and Community Services, the Child Support Agency, the Family Court, Legal Aid and the Australian Research Council identified their current and future research needs in the area of Family Law. This report constitutes a record of these presentations and the key themes and specific research questions that emerged from the discussions that followed each session.

Session I: Legal Processes and Practice

Legal Processes and Practices

Professor Rosemary Hunter
Director of Socio-Legal Research Centre
Griffith University

- Family Lawyers
- Legal Aid
- Mediation/PDR
- Self-represented Litigants
- Family Law Reform Act
- Costs

Policy in these areas

- based on theoretical arguments
 - monolithic/simplistic positions
- Research into policies in practice
- based on false assumptions
 - sometimes inappropriate

Future direction

- more sophisticated, differentiated policies and programs based on research evidence

Family Lawyers

Policy scapegoats

- promote adversarialism
- drive up costs

Research evidence testing policy arguments

- neither claim is true
- family lawyers are conciliatory, prefer out of court resolution, use court to aid negotiations, try to save \$ for clients, except sometimes at very high end
- provide “informed guidance, support and expert facilitation through the divorce transition process within the legal frame”

Eekelar et al, *Family Lawyers: The Divorce Work of Solicitors* (2000)

Hunter et al, *Legal Services in Family Law* (2000), ch.7

Mather et al, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2002)

How to influence family lawyer attitudes and behaviour

- professional regulation, codes of practice etc. are remote influences
- peer interaction, Family Law Act, Family Court are crucial influences

Hunter et al; Mather et al;

Parker and Dewar, 'Tactics, Justice and Ethics in the Practice of Family Law' (2002)

Rhoades et al, *The First Three Years* (2000)

Family Law Reform Act

Policy:

- promote PDR
- promote principle of shared parenting, subject to best interests of the child
- ensure safety from family violence

Research:

- increase in applications to Family Court
- principle of shared parenting dominates
 - sometimes against best interests of child (e.g. interim contact)
 - to exclusion of family violence provisions
 - adverse impact on children and women experiencing family violence

Rhoades et al, *The First Three Years* (2000)

Dewar and Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999)

Costs

Policy proposal: fixed costs per stage

Williams, *The Review of Scales for Legal Professional Fees in Federal Jurisdictions* (1998)

Research:

- cost components and cost drivers; difficult for lawyers to control

Hunter et al, *Legal Services in Family Law* (2000)

Pesce, 'Analysing the Structure of Litigation Costs' (2002)

- scales too low; need greater efficiency in Family Court

ALRC, *Managing Justice* (1999, 2000)

Legal Aid

Policy in context of reduced public funding

- extended merits test
- cap on amount to be spent in individual cases
- restrict types of matters eligible for legal aid

- diversion to PDR where possible
- promote and assist self-help: information, kits, kiosks, forums, etc.

Research:

- Legal aid cutbacks across Western world; different strategies adopted in different countries

Regan et al, *The Transformation of Legal Aid* (1999)
 ILAG Conference papers: Vancouver (1999), Melbourne (2001)
 Legal Services Research Centre International Conference (2002)

- Australian policy developments and drivers

Fleming, 'Australian Legal Aid Under the First Howard Government' (2000)
 Noone, 'The State of Australian Legal Aid' (2001)
 Hunter and Giddings, forthcoming

- Immediate impacts and individual cases of injustice

Springvale Legal Service, *Hitting the Ceiling* (1998)
 Dewar et al, 'The Impact of Legal Aid Changes on Family Law Practice' (1999)
 Clarke, *Trial by Legal Aid* (1999)

- Legal aid clients disadvantaged in having less money to spend on cases than private clients; subject to greater surveillance and difficulties with decision-making process
- Lawyers have no incentive to drag out legal aid cases because of low rates paid
- Lawyers abandoning legal aid work

Hunter et al, *Legal Services in Family Law* (2000)
 Dewar et al, 'The Impact of Legal Aid Changes on Family Law Practice' (1999)
 National Legal Aid study (1999)

- Effectiveness of new legal aid services
 - level of usage, nature of usage, who uses?
 - client satisfaction?
 - cost-benefit?
 - as alternative to litigation?

Hunter and Giddings, proposed...

Mediation/PDR

Policy: Legal Aid Guidelines promote PDR and require attempted PDR before grant of aid for litigation

Research:

- What is "PDR"? Why privilege third party interventions over initial negotiations between lawyers?
- Legal aid conferences held at different stages and for different purposes between States

- Problematic aspects of early intervention conferences
 - coercion to settle, not just to participate, because of lack of realistic alternatives
 - conferencing of inappropriate cases (e.g. severe violence, child abduction) because of lack of realistic alternatives
 - structurally, allegations of violence and child abuse could not be taken into account
 - low satisfaction with process and outcomes among women experiencing violence

Melville et al, *Phase One of a National Evaluation of Primary Dispute Resolution Programs in Legal Aid Commissions* (2000); Hunter et al (2000)

Policy: promotion of community-based mediation to resolve family disputes

Research:

- used by, and apparently appropriate for, only a limited group of clients: middle class, re. property disputes
- cf. NESB clients, clients who have difficulty advocating for selves
- Need for careful screening and protocols in cases involving violence
- Parties may settle for less than legal entitlements; questions of quality of outcomes vs. settlement rate

Love et al and Moloney et al, *Federally-Funded Family Mediation in Melbourne/ Sydney* (1995, 1996)
 Keys Young, *Research/Evaluation Study of Family Mediation Practice and the Issue of Violence* (1996)
 Batagol, 'Community Based Mediation: In the Shadow of the Law?', *forthcoming PhD thesis*
 Hunter et al, *Legal Services in Family Law* (2000)

- Clients unable to distinguish mediation from other dispute resolution processes
- Mediation can (should) co-exist with other dispute resolution (including court-based) processes, rather than being set up as a complete alternative

Davis et al, *Monitoring Publicly Funded Family Mediation: Final Report to the Legal Services Commission* (2000); Hunter et al (2000)

Self-representing Litigants

Restricting access to lawyers does not necessarily result in out of court, consensual resolutions!

Policy:

- rise in self-representation caused by cuts to legal aid
- self-representing litigants need assistance to function effectively in Family Court

Research

- levels of self-representation in Family Court are high (nudging 50% of cases), but not yet as high as in some US jurisdictions
- many litigants are partially rather than fully unrepresented

- reasons for self-representation vary
- Proportion of SRLs peaked following introduction of simplified procedures in Family Court
- Some SRLs require assistance, but others can be encouraged to seek legal representation, and some should be deterred from bringing serial applications
- Provision of assistance to SRLs can have the effect of increasing the proportion of people opting for self-representation (Maricopa Co. experience)

Family Court, '1998 Study of the Effects of Legal Aid Cuts on the Family Court of Australia and its Litigants' (1998)

ALRC, *Discussion Paper 62: Review of the Federal Justice System* (1999)

Dewar et al, *Litigants in Person in the Family Court of Australia* (2000)

Hunter et al, *The Changing Face of Litigation* (2002)

Sales, 'Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?' (1993)

Mather et al, *Divorce Lawyers at Work* (2002)

Conclusions

Pathways questions

- Who needs legal advice, and legal representation?
- Who needs legal aid, and what kind of legal aid service/s?
- Who can benefit from mediation/PDR, of what kind, at what point?
- Who can benefit from litigation? When does the court have an appropriate role?
- Which SRLs need assistance, and of what kind?
- Which SRLs should be deterred, and how?

Answers inform practice of lawyers, the Court, LACs, mediators, and other participants in the Family Law system

Lawyers and Processes

Professor John Dewar
Dean and Head of Law School
Director of Families, Law and Social Policy Research Unit
Griffith University

1. Finding ways in, through and out of the family law system

- Hazel Genn, *Paths to Justice: What people do and think about going to law* (Hart, 1999)

Found that those with family law problems had higher rates of advice-seeking than all other types of legal problem - 92% compared to 78% for employment, 69% for PI, 49% for housing, 36% for consumer. Similarly, a far higher % of family cases are resolved by court proceedings than any other type of matter.

- Fehlberg, Sheehan and Kelly, *Family Law Pathways and Processes: Case Studies* (AIFS, 2000)

16 case studies designed to gather information about pathways and experiences of recently divorced couples. A small scale qualitative study, which nevertheless provides some useful themes for future research, in particular:

1. Choice of pathway and experiences of them are related to a complex combination of factors, including 'the person', quality of post-separation relationships, services available and actually relied on
2. Family law system often criticised, but positive impact also acknowledged, especially where violence or emergency assistance needed
3. Parties themselves expressed preference for non-adversarial modes of DR, except where violence an issue
4. Parties expressed strong desire to do what was best for children, yet perceived systemic lack of child focus and involvement
5. Importance of clear and accessible information available early in process, concerning procedures and 'entitlements'
6. The decision to involve a lawyer was perceived as hostile but, once involved, lawyers credited with assisting parties to reduce conflict
7. Counselling and mediation perceived as settings in which conflict could be, and usually was, reduced
8. Degree of involvement in the formal family law system related to level of interpersonal conflict, extent to which both parties prioritise children's interests
9. Satisfaction with system related to timeliness of dispute resolution, level of conflict between parties, degree of coordination in service delivery, access to 'clear and honest' advice

- Implications?

Clear indication of need for better early diagnosis of violence and clearly delineated pathway for such cases.

Family law an outlier in terms of parties' perceptions of their needs for advice, but also one in which parties express clear preference for non-adversarial (non-legal?) modes of DR. Even so, a formalised outcome still arrived at in high % of cases compared to other areas of legal need.

So, subject to issue of violence pathway, task of family law to 'radiate clear messages' about 'entitlements' while providing non-adversarial pathways for parties to apply those messages to their own circumstances, and a means of enshrining agreements formally. How best to formulate 'the message'? (cf, 'norm form' project)

We could learn more about factors affecting choice of pathway, cost of different pathways, satisfaction with (and durability of) outcomes they produce, and the relationship of lawyers and court to other parts of the system. Such research could assist with development of diagnostic instruments suggested by Pathways.

2. Abused children and family law process

- Brown et al, *Resolving family violence to children* (Monash University, 2001)

Evaluation of Project Magellan: an 'outstanding success'. Magellan strongly child-focussed, multi-disciplinary but court-led, based on early intervention and drawing on expertise of expert investigations and child reps. Evaluation found evidence of reduced court events, reduced length of time to resolution, earlier resolution in court process, final orders more durable, reduced distress for children, reduced cost to LA Victoria (but note no control group - all eligible cases were in the project).

- Fehlberg and Kelly, *Jurisdictional overlaps between the Children's Court of Victoria and the Family Court* (2000) 14 AJFL 211-232 (and in IJLP&F)

Study of over 100 cases from Melbourne Children's Court and in ACT where FCoA also had jurisdiction. Main findings:

1. Tendency for State child protection services to withdraw from a case in favour of family court proceedings where a 'viable carer' had been identified (2/3 of cases). Most placements with viable carers appeared successful. In smaller number of cases, State dept also relied on care arrangements established by pre-existing FCoA orders
 2. Lack of co-ordination and communication between courts, in spite of agreed protocols, leading to potential for parallel proceedings.
 3. Potential for small number of cases to consume significant court resources.
- Family Law Council, *The interaction of public and private law in Australia: DP No 2* (2000)

DP outlines the problems, drawing heavily on Fehlberg and Kelly. Council's work continuing in this area.

- Implications?

Magellan demonstrates the value of clearly defined pathways for diagnosed violence/abuse cases. Suggests that a process that is child-focussed, timely and multi-disciplinary, but with court clearly in charge, works well and may be more efficient - cf AIFS case studies.

State/Federal interaction is in urgent need of action. Need for ongoing evaluation of any changes flowing from FLC's recommendations.

Role and impact of FMS?

3. Contact enforcement processes

- Helen Rhoades, *The 'no contact mother': Reconstructions of motherhood in the era of the 'new father'* (2002) 16 IJLP&F 71-94

Study of 100 applications for enforcement of contact in Brisbane and Melbourne. Designed to test 'no contact', 'selfish' or 'hostile' mother stereotype.

Major findings:

1. Few cases fitted the stereotype.
2. In most cases, the dispute arose out of concerns held by the resident parent about the contact parent's fitness to parent, with most applications resulting in new or varied orders that offered the children better protection. Very few orders enforced in their original terms
3. Enforcement proceedings often a continuation of abusive and controlling behaviour that took place during the relationship
4. Enforcement usually by contact parent against residence parent, not the other way round - - provides the contact parent with a 'capacity for ambivalence' denied the residence parent
5. Enforcement proceedings often 'mired in unresolved relationship issues'
6. Causes of breakdown in contact arrangements more complex than assumed by the 'selfish mother' stereotype, yet the factors promoting that stereotype are powerful.

- Implications?

Need for monitoring of new contact enforcement regime and evaluation of programs designed to support ongoing contact (cf AG/FACS/GU/AIFS/Melb research on Contact Centres)

[See also Rendell et al, *An unacceptable risk* (2000)]

4. Parental alienation syndrome and family court process

- S.Berns, *Parents behaving badly - Parental Alienation Syndrome in the Family Court* (2001) 15 AJFL 191

Study of files in which PAS alleged, focussing on tactical and discursive uses of PAS-based arguments. Findings included:

1. PAS allegations typically arise in response to allegations of violence or abuse against the parent making the PAS allegation - perhaps a strategy to deflect the abuse allegation?
2. In cases in which PAS allegations made, *both* parents 'exhibited serious deficiencies in parenting skills'.
3. Allegations against mothers slightly more common than allegations against fathers; the latter more likely to be proved.
4. High proportion of substantiated alienating parents making allegations of abuse against the other parent were unrepresented. Their allegations of abuse against the other parent required investigation and were found to be without foundation.
5. These cases present the Courts with complex evidentiary issues but with very limited resources to investigate them.
6. PAS seen as a means of conclusively proving the other parent unfit - persistence of a 'winner takes all' mentality, in spite of 1996 reforms.

Evidence of close association between allegations of PAS, self-representation and 'obsessive' personalities.

Summary of discussion

This session examined the operations and effects of legal processes and practices in the area of family law. The research covered in this session included an examination of the operation of family law in formal contexts, for example in the courts, or informal contexts, such as the law office, as well as an analysis of the experiences of those affected by the process of family law in particular self-represented litigants and victims of domestic violence. The participants identified the following key research themes.

Key themes

- Case management within the family law ‘system’ has come under increasing scrutiny in recent years, and the cluster of core legal process and practice concerns that emerged during the discussion reflect this attention. The needs for better early diagnosis of domestic violence, and clearly delineated pathways for these cases, is an issue of continuing importance for both the Family and Magistrates Courts and academic research.
- The impact of legal aid funding cuts has been assessed and debated and the growth in unrepresented litigants in family law matters has become a key focus for the Courts, law reformers and researchers alike. The nature of the assistance provided to unrepresented litigants and the effectiveness of this assistance in reducing court costs, improving the durability of legal outcomes and reducing distress on the part of the litigants is a research area of current and future importance.
- A particular focus of the discussion was on what sort of information litigants need to assist them (eg, information on how the court functions, options for resolving disputes, guidelines or rules for the average case to help litigants understand what is feasible and what can be expected in terms of the outcomes for particular disputes).
- Alternative or Non-adversarial modes of dispute resolution continue to be a focus of research and policy attention, and the ongoing evaluation of the quality of these services and the durability and fairness of service outcomes remains a research priority. This is particularly the case for vulnerable groups such as victims of domestic violence.

Session II

Children and Post-separation Parenting

Children: The Big Issues 1991 - 2002

Ms. Mavis Maclean
Director of Centre for Family Law and Policy
University of Oxford

Children: the Big Issues in Research and Policy

A pleasure to talk about, because it's the area, which makes one proud to be part of the family law business in UK. The Children Act 1989 represents the best of our thinking and practice. It developed through an unprecedented degree of cooperation between forward thinking practitioners, civil servants and academics...and the evaluation continues in that spirit (see "Delight and Dole, the Children Act 10 years on" published by Family Law last month. No complacency... but a definite absence of whinge in this area.

What were the issues 10 years ago when our Children Act came into effect in 1991, five years ago, and now... and what are they likely to be over the next few years... I will take a Dickensian approach here, and look at the ghosts of Christmas past, present and to come

Looking back, we can see that there were "noisy" issues which attracted debate at the time but have since seemed uncontentious, and the "silent" issues which is retrospect raised important questions for policy and practice

10 years ago when the Children Act 1989 came into effect

- In public law the big noisy issue was the bringing together of law relating to children, which involved the separation of criminal and family justice systems. Brenda Hale in *Delight and Dole The Children Act 10 years on* published in June says "no longer would the child protection system or children's services generally be the poor relation of the juvenile justice system", moving away from 100 years of bringing the two closer together
- In private law, the big silent issue was the elevation of private ordering through the no order presumption. With the welfare of the children in pole position, the new focus on parental responsibility rather than parental rights, and the acceptance of various forms of family organisation in which parents were parents whatever their civil status... in effect the acceptance of the separation of parenting from partnering..., the courts and lawyers moved back to become the service of last resort for child related disputes in families going through separation and divorce. The court would only intervene and make an order about where the child would live, or with whom the child would be in contact, if it was better for the child for such an order to be made.

The Act has been an amazing success... and followed by a flurry of related legislation around the world. Putting children at the centre of thinking...hearing their voices ... when one hears some of the US debates about custody and visitation, I am content to be removed from the notion of custody as ownership and to look to parental responsibility rather than parental rights. As Onora O'Neill has been saying in her recent Reith Lectures in the UK, rights are a dangerous business without a clear focus on obligation. (see A Question of Trust. Onora O'Neill, CUP 2002).

What were the big issues 5 years ago?

The silent issue: as the Act went in to effect, we had a number of different concerns about how it was working, particularly the worry about **delay** in dealing with cases involving children. The courts were charged with fast tracking some children cases. Again family was at the cutting edge of the beginning of reflection on the way courts did their business, and ideas about judicial case management which are now high priority throughout the civil justice system were first developed in Children Act cases. But it was in these cases where the sad truth emerged that case management can only manage matters within the court... it is impossible to control matters external to the court ... e.g. the supply of expert witnesses. (see Brophy and Bates Report to the Lord Chancellor's Department 1999) Margaret Booth in her report to the LCD on delay found that fast tracked cases were taking longer than others. This remains a serious problem.

- The noisy issue ... Child Support hit the headlines in the UK immediately after your legislation, culminating in our CSA in 1991. Opposition was noisy then and remained so... The Act was revised in 1995 but implementation of the simplification is being delayed due to lack of computer support. The issues are familiar to you... but I am still a firm fan of the move out of court to administrative agency, and from claim to right, at a time when legal aid is under pressure, and also a fan of the acknowledgment of different family forms. This Act gave **all** children a **right** to financial support as opposed to **some** children a **claim**. The failure of the research community to think about the relative claims of first and second families was unfortunate.

Christmas Present

The Big Issues now

- Big and noisy ... Contact is a major plank of government policy in UK family law at present, but almost by default, as all the other issues have fallen away. The attempt at divorce reform, the Family Law Act of 1996 which looked to establish divorce by process over time with heavy input of information, and a steer away from lawyers towards mediation has failed, and will be largely repealed when parliamentary time is available. Mediation has practically disappeared from the scene. Lawyers are back in favour as the base for one stop shop information and advice scheme known as FAINS (Family Advice and Information Network Services) organised by the Community Legal Service our publicly funded legal service (formerly the Legal Aid Board). Anything to do with divorce is so politically painful, that promoting contact is the only acceptable policy objective left. It is a highly conflicted area... as here... and the main issue for me is how to keep it away from politics, away from a dichotomy between family values and new liberals or even worse a gender based division between men and women. The silent bit of the debate is the important one for me.... in the old custody disputes we had a firm belief in the status quo... don't

disrupt the children unless there is an overwhelming reason to do so. In the current contact debates, we tend to have mothers and children wanting to maintain the status quo and fathers wanting change... but status quo, stability, "home" is seldom mentioned. The strong presumption in favour of contact which a couple of years ago was resulting in the ludicrous situation of ousters and contact orders in the same family has abated a little in the face of further evidence about the impact of parental conflict and violence on children.... But the fathers groups are very active, and a recent report to the Lord Chancellor from his advisory group on family law suggested a number of new court orders for enforcement of contact orders, including parenting classes etc. A telling recent research study based on a sample of step families contacted through 6000 school children found no relationship between contact and well being and development on the children. A far higher predictive value related to relationships within the home.... (Marjorie Smith and colleagues at the Thomas Coram Research Institute, 27 Woburn Square London WC1H 0AA, A study of stepchildren and step parenting, Report to the Department of Health 2001).

What are the Emerging Issues, as we meet in July 2002

All are big, but still silent....

- Support may be needed for all children involved in family transitions, and particularly those experiencing the impact of multiple transitions. Many of these transitions do not involve legal intervention, eg the ending of cohabitation, the arrival of new stepsiblings. We need to be able to identify those children most at risk, and the ways in which services can be made available.

We need to keep in mind the importance of keeping the spotlight on the children and not on the adult conflict, remembering the importance of other parties to the children especially grand parents and friends. (see Judy Dunn and Kirby Deater Deckard's report to the Joseph Rowntree Foundation 2001 "Children's Views of their Changing families")

Support services must be accessible to children. We are beginning to raise the question of whether it is appropriate to put help into schools... I think it is IF these are services for **all** children. It may be time to think hard about moving beyond the law, and legal disputes as so many of these new family forms and relationship are not regulated by the law.

- finally DIVERSITY

7% of the UK population comes from minority ethnic groups

In London there will be no ethnic majority by 2004, no group will constitute more than 50% of the population

How should the legal framework respond to this change?

At the Lord Chancellor's Department we are carrying out a research programme at the moment on the courts and diversity. There are emerging problems of a practical; nature concerning the availability of translation, appropriate timed for court sittings, treatment of women in public settings.

But in addition more fundamental questions are emerging about what we do about very different beliefs and values:

We have always had to deal with the question with respect to some religious beliefs, such as Jehovah's Witnesses who refuse blood transfusions for their children. Where the issue is an acute medical matter the legal response is relatively clear cut. Law overrides the parents in the interests of the children

BUT the decision can be far more difficult where the potential benefits may be less clearly defined.

Private law: the question of contact

In a recent case involving a family from the Sikh community, an assisted marriage had taken place in UK, a child was born, but the father returned to India shortly afterwards. . The wife remarried, within the Sikh community, and some years later the first husband returned and sought contact with his child. The stepfather objects, saying that in the Sikh religion a child can only have one father. If the bio father were to establish a relationship with the child he would have to leave. Originally contact was granted by the court. On appeal it was held that the status quo was in the child's best interest at the present time, though the matter could be reconsidered later.

Public law: Current work for the LCD indicates that all families coming before the courts in these cases have multiple problems and there is no question of ethnic difference or cultural diversity leading to unwarranted public intervention. But understanding the context may impact on the courts' view of the ability of parents to alter their parenting behaviour.

In child protection the issues appear clearer... but when the court orders a particular form of family functioning the matter is more difficult to resolve, and the role of law more contentious.

To conclude

The move away from an interest in the legal status of parents and the primacy of the parental responsibility continues... and I like that... but it leads us on to the issues of how much law we want here... is there enough protection for vulnerable family members outside the marriage and divorce jurisdiction? Are separating cohabitant parents in need of more support, and if so should this be legal protection? And how far should the law go beyond dealing with "bad" behaviour and positively require "good" behaviour through a particular form of family functioning?

The Longitudinal Study of Australian Children (LSAC) An overview

Developed by Ann Sanson & Katherine Wilson with adaptations

**Presented by Dr. Bryan Rodgers
Centre for Mental Health Research
Australian National University
<http://www.aifs.org.au/lzac/>**

Background

- funded by the Department of Family and Community Services (FaCS)
- to provide major evidence base for policy and intervention initiatives under FaCS' Stronger Families and Communities Strategy
- to examine the impact of Australia's social and cultural environment on the next generation

The Consortium

In partnership with FaCS, LSAC is conducted by a Consortium of 9 leading research bodies:

- the Australian Institute of Family Studies (the lead organisation)
- the Australian Council for Educational Research
- Charles Sturt University
- the Institute for Child Health Research, W.A.
- Murdoch Children's Research Institute, Melbourne
- Macquarie University
- Queensland University of Technology
- National Centre for Epidemiology and Population Health and Centre for Mental Health Research, ANU
- the Social Policy Research Centre, University of NSW

LSAC's design

- "the child" is the sampling unit
- Cohort 1: about 5000 children
 aged 0 years in 2003
 followed until aged 6-7 in 2009
- Cohort 2: about 5000 children
 aged 4-5 years in 2003
 followed until aged 10-11 in 2009

Sample design

- representative of all Australian children in selected age ranges
- clustered by postcode (to study community level effects)

- exclusions: remote communities; children with no primary parent; unusual language groups
- all children in family of in-scope age included (e.g. twins, 0 *and* 4 year olds)
- sampling frame - Medicare or telephone listing

Study informants

- child's parents:
 - * primary (typically biological mother)
 - * secondary (resident / non-resident)
- childcare providers
- pre-school teachers
- primary school teachers
- interviewers (observations and direct assessments)
- the child (when of an appropriate age)

Timeline

- 2002 - Stage 1 (approximately the first 12 months of the project)
 - * data items identified, developed and validated (pilot sample)
 - * design and sampling frame finalised
- 2003 - 1st wave of data collection
 - * Pilot (Feb- March)
 - * Main sample (from May)
- 2004 - 1st wave data available
- 2005, 2007 - 2nd & 3rd major waves
- 2004 (2006? 2008?) - supplementary wave(s)
- 2009 - final wave of data collection

Specific research questions

- 14 specific research questions spanning four research domains:
 - ◆ Family Functioning
 - ◆ Health
 - ◆ Non-parental Child Care
 - ◆ Education
- NB: input variables and outcome measures for these questions overlap

Family functioning

- What are the impacts of family relationships, composition and dynamics on child outcomes, and how do these change over time?
- What can be detected of the impacts and influences of fathers on their children?

Parental separation

- Currently, about one in four Australian children experience parental divorce by the age of 16 years.
- In the LSAC samples, over 1,200 children will have experienced parental divorce by the time of the six-year follow up (ie 2009).

Residence and contact

- a national picture
- information provided by both parents

- a comparison between two cohorts
- change over time for individual families
- factors before and after separation that influence residence and contact arrangements

Children's outcomes

- social development
- psychological development
- educational progress
- physical health
- use of services

Parental outcomes

- mental health
- substance use
- employment
- external supports (formal and informal)
- repartnering

Other family outcomes

- socio-economic circumstances
- geographical mobility
- family cohesion
- conflict
- parenting style and practices

Potential research questions

- predictors of relationship breakdown
- disadvantages before and after separation
- short- and long-term effects of separation
- family structure and family functioning
- what factors mediate children's outcomes
- moderating factors, eg age and gender

Limitations of data

- Family Court and other legal processes
- other conflict between separated parents
- use of Primary Dispute Resolution services
- socio-economic circumstances of non-resident parent

Summary of the discussion

This session had as its core focus research that assists families to fashion post-separation parenting arrangements for children that meet the expressed needs of children. The following key themes and specific research questions emerged from this session.

Key themes

- There are tensions in the practical application of models of shared parenting for certain groups of families. In particular, this is so with respect to families where there has been domestic violence, substance abuse and allegations of child abuse. All levels of the family law system (the courts, legal practitioners, service providers and families) continue to struggle with the questions of: (a) how to fashion residence and contact arrangements for these particular families that are child focussed; (b) how to enable these families to move forward to manage contact on their own without recourse to the courts; and (c) under what circumstances should contact be prevented from taking place.
- Commonwealth government departments and agencies commit significant resources towards the development and delivery of services that assist parents to maintain close ties with their children post-separation, for example through the provision of children's contact services, the Contact Orders Pilot, parenting programs and other parenting compliance or re-education regimes. The value of these programs in terms of outcomes for children in the longer-term, and reduced use of the courts in the short-term, however, remains unknown. Program evaluation and intervention are priorities in this area.
- The discussion identified that there is an absence of empirical research on different types of residence and contact arrangements, the quality of parent-child contact and the impact of varying arrangements on long-term outcomes for children.

Session III

Financial Aspects of Separation and Divorce

**Financial aspects of separation and divorce:
An overview of past research and
future research priorities**

**Dr. Grania Sheehan
Senior Research Fellow
Socio-Legal Research Centre
Griffith University**

Background - Australian Context

- Separation and divorce is an immediate financial crisis
- Longer -term financial hardship attributed to economic and social factors
- Significant legislative and policy attention is paid to this transition

Recent Australian Research:

Financial support of children (Smyth & Weston, 2000)

- Child support does not create hardship for wage earning men
- Child support does keep women wage earners and social security recipients above the Henderson poverty line
- Child support does not fully address an income shortfall on the part of resident parents

⇒ *Information is needed on the costs of caring for children in relation to different parenting arrangements*

Financial hardship post-divorce (Smyth & Weston, 2000)

- Women are more financially disadvantaged than men
- The highest rates of financial disadvantage are for:
 - ♦ single older women
 - ♦ sole mothers
- Men living alone or as sole fathers experience hardship

Domestic violence and financial hardship (Sheehan & Smyth, 2000)

- Spousal violence in the divorcing population appears widespread
- ‘Severe’ violence: 30% women vs. 5% men
- The more severe the violence, the greater the economic disadvantage post-separation
 - ♦ increase in % of women living below 120% of the HPL
 - ♦ decrease in % of women in paid work some 6yrs post-separation

Forgone earnings associated with marriage (Chapman, Dunlop, Gray, Liu & Mitchell, 1999)

- The forgone earnings associated with breaks in women’s workforce participation to have decreased in the past decade

- The costs to women of staying out of paid work to have and care for children remain substantial (ie. 28% of lifetime earnings or \$200,000 for the birth of a child)

=> *Patterns of financial hardship post-separation and divorce are dynamic and need to be monitored as a function of social, economic and demographic change*

Dividing family wealth (Sheehan & Hughes, 2001)

- Consistency in dividing property
- Wealthy marriage = lower % share to the wife
- Emphasis is on the children's needs
- Future needs of former spouse do not appear to have been taken into account - a shortfall that is, in part explained by limited asset wealth

Spousal support (Behrens & Smyth, 1999)

- Spousal maintenance is: Rare (paid in < 7% of cases), minimal (Median: \$6,640 per annum), and brief (typically lasting less than 2 years)

Domestic violence and property division (Sheehan & Smyth, 2000)

- Women who report experiencing severe violence receive well below the average share of property for women despite significant financial need and the ongoing responsibility for dependent children
- Victims of severe violence are the most likely to have left the family home: precedence is given to safety over entitlements to property?

=> *Identify the cost to families, the government and the community of certain groups failing to secure a fair settlement*

Access to the family law system for property matters (AIFS, 1999 & Hunter, 1999)

- Increase in the number of parties who settle property matters privately (18% in the 1980's to 38% in the 1990's)
- property matters comprise 10% of legal Aid Commission cases in family law
- property matters comprise 52% of private solicitor cases but 79% of these cases are self-funded

=> *How to improve knowledge of legal entitlements to property*

=> *How to improve access to the court system for disadvantaged groups should they require assistance in securing these entitlements*

Broad areas of future research need

- To investigate the financial circumstances, legal and service needs of particular disadvantaged groups (single older women, sole parents and victims of domestic violence).
- To monitor the impact of changes in the demographic and economic profile of separating and divorcing families, and the ways in which these changes challenge the parameters of the current legislative framework and legal practice.
- To begin to quantify the long-term costs to Government and the community of reduced access to the Court and rule of law for financial matters.

Studies covered in the presentation

Behrens, J., & Smyth, B. (1999), *Spousal support in Australia: A study of incidence and attitudes*, Working Paper 16, AIFS: Melbourne.

Chapman, B., Dunlop, Y., Gray, M., Liu, A., & Mitchell, D. (1999) ‘The Foregone Earnings from Child Rearing Revisited’, *Discussion Paper No. 407*, Centre for Economic Policy Research.

Hunter, R. (1999), *Family Law Case Profiles*, Justice Research Centre, Sydney.

Sheehan, G., & Hughes, J. (2001), *Division of Matrimonial Property in Australia*, Research Paper 25, AIFS: Melbourne.

Sheehan, G., & Smyth, B. (2000), Spousal Violence and Post-Separation Financial Outcomes, *Australian Journal of Family Law*, 14, 102 - 118.

Smyth, B., & Weston, R. (2000), *Financial living standards after divorce: A recent snapshot*, Research Paper 23, AIFS: Melbourne.

Submission by the Australian Institute of Family Studies to the Federal Attorney-General in response to the discussion paper: Property and family law: Options for change, Australian Institute of Family Studies, 1999.

Finances and Property Distribution

Professor John Dewar
Dean and Head of Law School
Director, Families, Law and Social Policy Research Unit
Griffith University

1. Superannuation

- Dewar, Sheean and Hughes, *Superannuation and divorce in Australia* (AIFS, 1999)

Analysis of ADTP data relating to superannuation assets on divorce. Enabled comparisons to be drawn with similar data from *Settling Up*. Main findings:

1. Superannuation more widespread than in *Settling Up* (81% of couples compared with 55%).
 2. Uneven distribution of value between men and women, and differences in knowledge of own and partners' entitlements. Also differences in factors affecting levels of men's and women's entitlements (eg, overall asset wealth significantly affected men's values but not women's).
 3. Significance of super relative to other assets has increased since *Settling Up* from 14% to 25%. Super assets are of greater relative significance in low asset marriages than high asset marriages.
 4. Superannuation taken into account in dividing assets in less than half of all cases. Low asset couples less likely than others to take it into account, even though it has the greatest significance for this group.
 5. Inclusion of superannuation in the asset pool for division means that women's share of assets received drops from 64% to 52%.
- Sheehan, Dewar and Ip, *Division of superannuation on divorce* (current, GU funded)

A study of how practitioners and judges are preparing for the implementation of super splitting legislation later this year, how they are advising clients in the run-up to implementation and what they expect the impact of the legislation to be. Designed as part 2 of a 3 part study, part 3 of which will examine the operation of the law post-implementation. Research issues:

1. Will the super splitting legislation achieve its objectives of ensuring an equitable distribution of superannuation entitlements?
2. How will it affect low asset couples for whom super is relatively of the greatest importance? Cf requirement of court order or legal advice - necessary because of 3rd party involvement.
3. How often will the full machinery of the legislation be used to divide income streams or split underlying interests?
4. What will be the effect of notionally including super as 'property' and therefore as part of the asset pool?

5. What effect will the legislation have on the division of other assets and overall settlement patterns, especially shares to women?
6. Longer term effects on retirement incomes and women's economic security in retirement?

2. Financial agreements

- Fehlberg and Smyth, *Pre-nuptial agreements for Australia: Why not?* (2000) 14 AJFL 80

Analysis of ADTP data, showing that very few couples made use of pre-nuptial agreements (under old law) and general perception that such agreements would not assist couples to reach fairer agreements. Strong attitudinal support for the alteration of agreements in the interests of children.

- Fehlberg and Smyth, *Binding pre-nuptial agreements in Australia: The first year* (2002) 16 IJLP&F 127-140

An analysis of patterns of use of agreements under new Div VIIIA, based on evidence from peak lawyers' groups, practitioner writing and conference papers and survey evidence from family lawyers. Main findings:

1. Interest confined to certain groups, eg high asset individuals, second marriages, those with specific valuable assets to protect (eg, business assets).
2. Lawyers concerned about liability issues.
3. Clients concerned about tax issues and reluctant to discuss break up of relationship at its commencement. Initial enquiries often did not lead to follow-up; sometimes, negotiations failed and the relationship ended.

- Implications

Need for continuing research into uses, durability and effects of binding financial agreements?

3. Violence and property distribution

- Sheehan and Smyth, *Spousal violence and post-separation outcomes* (2000) 14 AJFL 102

OSW-funded study by AIFS of prevalence of family violence, its effects on division of assets and post-separation circumstances. Main findings:

1. Prevalance of violence differed according to definition adopted, as did pattern of victim and offender - eg, Injury based, W=14%, M=3%; Legal, W=65%, M=55%: 'spousal violence is not an exceptional circumstance for divorced women and men but rather the norm'
2. Significant correlation between report of abuse and receipt by victim of less than 40% of assets - eg, women who reported serious abuse were x3 likely to receive less than 40% of property than women who did not report such abuse.
3. Severe abuse also found to have an effect on post-separation living circumstances.

4. Need for caution in assuming that violence *causes* these effects - violence may be part of a constellation of factors that lower women's share of assets, eg limited access to justice.
- Middleton, *Domestic violence, contributions and s.75(2) considerations: An analysis of unreported property judgments*

Study of 35 unreported judgments in which issues of violence were raised. Designed to examine effects of *Kennon* on patterns of litigation.

1. Violence issues attract more attention in cases than previously.
2. Relevance of violence to contributions and to s.75(2) factors are recognised and given effect by the Court, and parameters of *Kennon* have been advanced and defined in these cases.
3. Most of these cases have been unreported, so benefits of these decisions have been lost.

4. **Rules vs discretion: 'Norm form'**

- Harvey, Karras, Parker, Dewar, Wright and Bottomley, *Negotiating by the light of the law* (current, Monash/ANU/GU/Newcastle/L&JF)

Study of the effect of 'norm form' on lawyers' negotiating behaviour in three areas - family law, contract/commercial law and company law. Interested in whether the form in which legislation is drafted (ie, fixed rules, wide discretions) is a significant factor in determining processes our agreed outcomes. Main findings:

1. No evidence that norm form plays a significant role in lawyer's negotiating behaviour; power, personality and attitudes to risk more significant. Conventions matter more than formally expressed rules.
 2. Rich variety of negotiating styles evident.
 3. Lawyers expressed slight preference for discretionary norms.
 4. Fine gradations of discretion unlikely to be significant. Instead, legislators/drafters should emphasise clarity and purpose of legislation to maximise compliance and correct interpretation: 'there is a case for assisting parties to bargain in the *light* of the law rather than its shadow'.
 5. Comprehensibility to the lay person and predictability of result to the lawyer are most conducive to settlement - this is not necessarily correlated with norm form as such, although it may be strategically more effective to start at the rule end of the spectrum.
- Garrison, *How do judges decide divorce cases: An empirical analysis of discretionary decision-making* 74 NCL Rev 401; *The economic consequences of divorce: Would adoption of the ALI principles improve current outcomes?* 8 Duke J Gender L & Policy 119

Empirical study of judicial decision-making in New York under a highly discretionary divorce statute. Suggests that it is possible to enact clearer rules in divorce, and set clearer standards and values, but is sceptical of the value of ALI model of highly structured rules for

property distribution. Suggests that a clear statement of what the law is for is more important than the issue of rules vs discretion. Similar to Harvey et al?

Summary of the discussion

Separation and divorce is a major economic setback for many families. This session had as its core focus research into the operation of the law that assists families in dealing with the financial consequences of separation and divorce. This session also examined the broad-based policy, economic and demographic changes taking place in Australia that influence the way in which the financial aspects of separation and divorce are effected.

Key themes

- An important issue raised during the discussion was the existence of different legislation in different states that deals with the division of property and financial resources on the end of a defacto relationship. Concerns were raised about the capacity of such a fragmented system to resolve financial matters efficiently and fairly for a growing group in the population. Ongoing research that can inform the process of law reform in this area is needed.
- The financial provisions of the *Family Law Act* that govern the way property is to be allocated on divorce are inherently complex and confer wide discretion in settling property matters. No direct rule or guidance as to the proportion of the division between the parties is provided. The new legislation allowing superannuation to be split on divorce is a case in point. In the absence of a clear prescription in law of the rules for division, and limited access to legally aided assistance in property matters, there is a need for research into how this aspect of the law can be made more accessible to people.
- Discussion focussed on the nature and characteristics of the population group that do not register under the Child Support Scheme and choose to manage their child support by themselves. The processes that they have gone through and the financial arrangements they make needs to be better understood.

Session IV

Stakeholders Forum

Attorney-General's Department

Ms. Sandra Ellims
Assistant Secretary
Family Law & Legal Assistance Division

Background

- Family Law Act 1975
 - no-fault divorce
- Family Law Amendments 1996
 - new Part VII re children; clarify & extend primary dispute resolution (PDR) mechanisms
- Family Law Amendments 2000
 - parenting compliance regime (parents can be ordered to post-separation parenting courses, inter alia)
 - financial agreements about distribution of property on marriage breakdown, can be made either before or during marriage or after separation
- Superannuation legislation
 - provide for the splitting of a superannuation interest on marriage breakdown, can be done by agreement or court order
 - commences in December 2002
- Family Law Amendments 2002 (proposed)
 - clarify the spousal maintenance and property provisions
 - enable the court to make orders binding on 3rd parties
- Family Law Council
 - established under Family Law Act
 - consists of judges, public servants and others chosen by AG for their expertise in the area
 - advises AG about workings of the Family Law Act, legal aid in relation to family law, and anything else relating to family law
 - has convened Committees to develop practice guidelines for family lawyers (rec 4 FLPAG report), to review its 1996 report on involving and representing children in family law (rec 21 FLPAG report), and to provide advice about indigenous issues (rec 22 FLPAG report).
- Family Law Section of Law Council of Australia
 - the professional association for practising family lawyers in Australia
- Family Law Pathways Advisory Group (FLPAG)
 - body of experts including Govt, non-Govt, academics, service providers - established May 2000 to advise Govt on how to achieve better family law system
 - Report in July 2001; 28 recommendations
- ALRC

- ALRC will be given a reference to review all current legislation relating to family law system to achieve consistency in operation (rec 25 FLPAG report)
- Govt policy
 - promote non-adversarial processes and decision-making for family law matters, wherever possible
 - 1999 additional injection of nearly \$16m to encourage and increase the use of PDR processes
- Govt election commitments
 - keep separating families out of courts wherever possible; fund community-based counselling, mediation, education workshops
 - reform family law system, enforcing parenting orders
 - promote & enhance Australian Law Online
 - help separated families maintain contact with their children; maintain children's contact services
 - Superannuation legn, division of assets, family law and bankruptcy
 - support and promote recommendations of FLPAG
 - aim to support family law system working in more co-ordinated way
 - national education campaign – ‘parenting as life-long journey’
 - promote, enhance family support services in regional Aust
- Child Support Agency (CSA)
 - often one of the first points of contact; could play gatekeeper role
 - a couple of CSA centres involved in small trial with local Relationships Australia (RA) offices to direct switch callers to the RA counselling service – NB not all separating families contact the CSA
 - has conducted research into child contact issues
 - has found link between child contact and payment of child support
 - Child Support Act and Child Support (Amendment) Act
- Family Court of Australia
 - some pre-filing counselling services withdrawn within last year, now provided by community sector
 - recent moves to address case assessment/management processes
- Federal Magistrates Service
 - has family law jurisdiction, but simpler cases only
 - refers out to PDR services provided in community
- Centrelink
 - often one of the first points of contact for separating families, especially the resident parent; could play gatekeeper role

Research

- Broadly:
 - Australia's family law is a no-fault, non-rights based (for parents in conflict) legislation which specifically encourages non-adversarial decision-making and an on-going parenting relationship between the parties. At the same time, the Family Law Act has to operate within an adversarial legal system and culture which, by its nature, is fault- and rights-driven, and contains no elements to protect the future relationship between the parties
 - the big question, therefore, is ‘how can a non-adversarial family law system be properly accommodated within an otherwise adversarial legal system and culture?’

- a part of researching this may be to explore ways that other cultures deal with conflict, both family and non-family – researching minority groups’ means of dealing with these issues
- can lawyers tell us what they need in order to use non-adversarial decision-making processes with their family law clients?
- how do different models of dispute resolution affect family relationships in the longer term?

- Detail:

Successful post-separation parenting service models.

- Counselling, mediation services being conducted by community-based organisations.
- Innovative Contact Orders Pilot also being conducted, trialing mix of education, counselling-type interventions and group work.
- Three-stage parenting compliance regime: parents can be ordered to preventative or remedial measures, or sanctions as last resort. Stage 2 directs them to post-separation parenting program – little used to date, differing views as to whether this has been a success
- Effect of parents being helped to focus on children during/after separation, rather than becoming entrenched in their own warfare

Durability of outcomes of different models of dispute resolution.

- No longitudinal research conducted on different long-term outcomes from, say, mediation as opposed to judicial determination - anecdotal evidence only.
- Mandated attendance at PDR versus voluntary attendance. (Most Contact Orders Pilot participants interviewed said attendance should be mandatory for separating couples)
- Timing of dispute resolution used – catch families early? No known evidence of which type of service is most appropriate for which stage in the continuum.
- While there is an enormous amount of literature about the value of non-adversarial processes to resolve conflict between separated parents, it is still hard to find any really solid, evidence-based research that shows, unequivocally, that mediated solutions are better for the children than arbitrated decisions.

Effective, non-judicial system to support parents to meet their responsibilities, particularly following parenting orders.

- No known longitudinal research to follow up the making of parenting orders.
- Managing appropriate level of flexibility about families’ changing circumstances.
- Research into the making of parenting orders themselves – level of child focus at this stage?
- What sort of support do parents and children need at this stage? What level of input do parents/children have, or should they have, into the parenting orders?

Practicability and appropriateness of consent orders, including appropriateness to children’s changing needs.

- As in 3 above, no known longitudinal research to follow up the making of consent orders.
- Managing appropriate level of flexibility to allow for children’s changing needs.
- Research into the making of consent orders; impact of family violence, power imbalance

- Type of support parents and children need when making consent orders, and for follow-up after consent orders have been made

Impact of family violence, and family violence proceedings, on a family's pathway through the family law system (rec 18.5 FLPAG report).

- role of specialist family violence (domestic violence) courts in various jurisdictions
- inconsistent practices between States and Territories
- Note that Family Court of WA is running a Project Columbus for families presenting with child abuse and family violence, to provide targeted interventions as part of the litigation pathway, eg refer men to DV perpetrator programs

Early identification of families for whom litigation is appropriate.

- early assessment procedures (NB common assessment tool currently being developed as result of FLPAG report – FaCS is lead agency). This will facilitate people being referred to the best service for their needs at the time; we are yet to see how it might identify families to fast-track to court
- needs of families on litigation pathway
- pilot model to fast-track litigation for these families

7. Perceptions of bias in the system, particularly gender bias.

- judicial outcomes often seen by men to favour women
- outcomes in domestic violence situations often seen by women to favour men
- is there support appropriate to men's needs, to encourage ongoing fathering relationship with children post-separation (non-resident fathers)?
- system currently has little acknowledgment of gender differences in communication and help-seeking behaviours.

• Other related research:

- Australian Institute of Family Studies (AIFS) – Australian Temperament Project – longitudinal study of children's development, began 1983, investigating pathways to psychosocial adjustment across childhood and adolescence; and influence of personal, family and environmental factors.
- AIFS – Development in Diverse Families Project – how the structure of families influences children's adjustment; will measure quality of relationships, parenting practices, whole-of-family functioning.
- AIFS – Family and Marriage Program – analysing broad trends in leaving home, couple/family formation, family stability, family dissolution and re-formation, as well as associated values and beliefs.
- AIFS – Divorce Transition Project – long term study on transition of people through divorce; work to date has concentrated (at least that which we have seen) on economic transition, eg financial impact of divorce on women.
- AIFS – Post-Separation Parenting – this project in final stages of development.
- Department of Family and Community Services – Longitudinal Study of Australian Children (part of Stronger Families and Communities Strategy) – will identify key factors influencing child outcomes over developmental life in the early years.
- Household, Income and Labour Dynamics in Australia Survey
- Griffith Uni – research into expectations and experience of children's contact services – currently under way
- Family Law Council – Committees addressing some recommendations of FLPAG report (mentioned above)

- j. Australian Institute of Health and Welfare (AIHW) – Family Support Services Project – scoping study of information about family support services funded/provided by Cwth, State/Territory governments; support services data collections; conducted in first half of 2000, report in Oct 2000
- k. AIHW – Child Health and Wellbeing Project – information about diseases, conditions, injuries affecting children and data on these over last decade; risk factors and indicators; this Project linked to a 1993 WA Survey which discussed levels of family discord, and links between family discord and health of the child.
- l. AIHW – Australia’s Young People – Their Health and Wellbeing Project – young people aged 12-24 years, information on diseases, injuries, major risk factors; mental health recognised as a National Health Priority Area; causes of depression understood to limited degree only, risk factors include family/relationship conflict.
- m. Department of Health and Ageing – research project on youth suicide – 3 literature reviews commissioned to provide summary of current state of research in this area.

Family Court of Australia

Ms. Jennie Cooke
General Manager
Client Services

Ms. Virginia Buring
Executive Adviser
National Support Office

A. Family Court of Australia as end user:

1. Models of service delivery

The FCoA has an interest in research which would deliver information which would inform decisions about models of service delivery - what works and why, as well as what doesn't work. Our commitment to undertaking an evidence-based approach to practice has been adopted as a result of the Mediation 2001 and Beyond project. While this project was focussed on our mediation services the longer term objective is to apply the same approach to all elements of FCoA service delivery.

Evaluations of services which are currently delivered, in a range of contexts – court and community – would be valuable to help shape the future of our services in a changing social and economic context.

- Dispute resolution models:

With respect to approaches to dispute resolution, the FCoA would like to be able to learn more about what leads to constructive settlements –

- characteristics of clients,
- what pressures there are on settlement,
- what models of dispute resolution have the best influence on reaching consensus and acceptance of outcomes,
- combinations of the above

What leads to sustainable agreed parenting arrangements?

Under this broad topic some concentration on consent orders would be valuable:

- What are the influences on reaching consent? – emotional, economic, process.
- What opportunities are there to apply some quality control to consent arrangements? Are they in the best interests of children? Are they practical for the particular family?
- What happens to consent orders? Do they survive, how long, or with variation?
- Do the FCoA interventions actually influence consent?
- If so, how?
- What are the impacts on children?
- How can children be involved in the process?

- Attitudes

Are attitudes to the legal system and legal profession changing and does this impact on people's choice of dispute resolution model and then on their acceptance of the outcome? What can be done about this?

2. Information to clients:

Information sessions are currently made available to clients of the FCoA at their first Court event. The content could be enhanced by reference to current research – some more information on the broader outcomes or experiences of different dispute resolution models could be valuable assistance to clients' choices at this stage.

This might also be valuable to include in collaborative community education products as part of the comprehensive campaign recommended by the Pathways Report.

3. Professional development and training:

The FCoA would be also looking for research around service delivery which could be valuable to training programs for all staff – client services, lawyers and mediators, as well as professional development programs for judges, mediators and DRs.

B. Other topics?

- Intensive research on the chronic litigators

The FCoA is particularly interested in following up on the area of on-going support which the Family Law Pathways Report identified as a particularly significant gap in what is now available to separating families. High conflict families who have not been able to resolve their dispute without accessing judicial determination are not well supported by the current system. We believe these families often become those who return repeatedly to the litigation system because by definition they require ongoing decisions when arrangements to support orders made break down.

What are the best ways to help these clients sustain the outcome which has resulted from a judicial decision after lengthy and acrimonious dispute? Is it possible to provide them with the skills and support to enable them to manage their on-going and changing parenting responsibilities without returning to litigate?

A study of people in this group who do manage to sustain arrangements after an order by determination may enlighten how to assist those who don't. Are there any?

- Contact/post separation parenting

Models that work when parents are not living with the child. What factors contribute to sustainability. What works in a range of different social and economic environments. Links between post separation parenting and pre separation arrangements and relationships. This kind of research could usefully expand the range of options available to decision makers or mediators, as well as help make a better fit to the needs of individual families.

- A study of the impact on post separation parenting skills for those families for whom the conflicted relationships that predated separation continue or
 - what helps parents develop and maintain problem solving skills that they may have had when in tact?
 - What are the differences between these two groups in ability to focus on the best interests of the child?
 - What strategies could be developed in terms of skills development or support services which could enable on-going management of parenting responsibilities?
- Empirical research on families experiences of the non-integrated family law system to identify where the disjointedness impacts most seriously on their ability to deal comprehensively with their post separation needs and get on with their lives. This

should assist the system players to determine where to focus efforts to build better links etc.

Question: What would we see as a priority?

C. Useful to the research community?

In the past FCoA's data collection has not been able to support research about experiences of family law litigation or about the profile of the clients of the Court. It has been based on outdated technology and a series of several data collections which were not connected. Much research in the past has therefore had to rely on manual examination of a selection of court files or on interviews with personnel. With the roll-out of Casetrack this will be improved. Casetrack data should deliver a much more comprehensive picture of outcomes and client characteristics and enable future research to be targeted to issues which the overall data identifies as needing attention.

We anticipate that it will improve our understanding of what happens to clients on the litigation pathway. Cross matching of data will be possible to connect outcomes to client characteristics and to interventions.

Family Court's research committee – recently reconstituted.

Headed by Justice Chisholm, other members are Margaret Harrison and David Saunders, PAU who is the executive officer for the group.

There are about 4 projects currently under way with the endorsement of the Court. The Committee is in the process of settling its guidelines on how the Court will manage applications.

Note that the issue of privacy makes it no longer possible to access Court files.

Department of Family and Community Services

Mr. Jeremy Nott
Assistant Secretary
Family Relationships Branch

Notes for Research Discussion

A short background on FaCS:

- Responsibility for income support (including FTB and child support)
- And a range of support services
- Strong welfare reform focus
- Also a strong interest in structure of families
- Decline in traditional support structure lifts importance of other formal and informal structures
- Ageing population also has important implications for the future of Australian families and almost every aspect of FACS' programs.

FACS has strong interests across what you could call the life cycle of the Australian family. In all of these areas, there are important policy issues affecting outcomes for families and the effectiveness of the social safety net. Some key research issues:

- Formation
 - When?
 - What is driving decisions?
 - What is the relationship skill base of couples?
 - Can it be improved?
- Relationships
 - De facto vs married
 - Drivers of structures/choices
 - Determination of quality/ longevity
 - Quality of parenting
 - Support networks – what works
- Breakdown
 - The process
 - The dynamics of decision making
 - Intervention points
 - Experiences of children
 - Long term effects – (fair bit has been done)
- What Works?
 - Support networks
 - What is the path people take to income support and what points are there where the pathway can be changed for the better

- Dynamics
- Poverty
- Employment outcomes
- Other outcomes
- Support structures for employment and social participation eg: Personal support program and personal advisers

In all these areas, there are lots of unanswered questions and we would be keen to explore the issues further.

Legal Aid Queensland

Ms. Nicky Davies
Senior Legal Consultant, Family Law

LEGAL AID QUEENSLAND STRATEGIC PLAN 2002/2005

KEY RESULT AREAS

CHANGING ENVIRONMENT

Respond to identified needs and system change.

Research and identify services needed by disadvantaged Queenslanders

Develop a needs profile.

Develop services in response to legal system changes and emerging issues

Service delivery models:

- needs of the legal system
- needs of the community

ACCESS

Improve access to legal services.

Target awareness initiatives to ensure improved access for communities or groups that require priority

- youth
- indigenous
- women
- rural and remote

Develop alliances, align services and collaborate with the community and service providers

Use innovation and technology to improve access to services

Some possible research questions

What are the outstanding legal needs of disadvantaged Queenslanders?

What service delivery models can meet those needs for the clients, the community and the legal system?

Litigants in person - who are they? - are they known to the legal aid system? Refusals or non-starters?

Use of videoconferencing in family law issues - implications for outcomes in mediation and court?

Systemic disadvantage experienced by indigenous women in accessing legal aid services - partnering for solutions?

Do gender neutral legislative provisions and policies produce gendered outcomes?

Expert reports in family law - are they useful? - are they value for money? - are the outcomes different if a child representative is involved?

Developments in child representation practices in the family law system

Children's participation in family law cases – do we know enough about child inclusive practices in the family law system?

Impacts of the new Family Court Case Management System on parties and lawyers (Family Law Practitioners Association).

Child Support Agency

Ms. Sheila Bird
Acting General Manager

The following material summarises some of the current research work of the Client Research Unit of CSA.

Profiling Clients

Initially four client segments are to be examined in this research. These are as follows:

- Clients with ended Cases
- Clients with restarted Cases
- Client with Child Support Agreements
- Client with a levels of care other than sole

A statistically valid of each group will be extracted from our datasets and further examined using an administrative by-product survey method. This means that the CSA computer system will be used to further profile these groups of clients examining differences within each group and differences in comparison to the entire CSA population.

The purpose of this research is to have a sound understanding of each client segment replacing anecdotal information currently used and to understand what motivates each group. The research may also assist in determining and creating targeted service delivery to clients in an environment of limited resources.

Income Alienation Project

One of the original objectives of the Child Support Scheme was that “work incentives to participate in the labour force are not impaired”.

Anecdotally, the view that some payers give up their employment or reduce their income as a result of their child support liability is widespread. It is often unclear as to whether such decisions are made as a matter of economic necessity, or in an attempt to ‘punish’ the payee. It is also possible that the stress of separation itself leads some payers into losing their employment through no choice of their own.

By comparing payers of child support with the general population, we could test whether payers of child support are more likely than others to leave employment or experience reduced earnings. If the data shows that this is the case, survey or interview work may be necessary to explore exactly what happened to client, and why they made the choices they did.

Approach:

1. Interrogation of CRU dataset to identify key differences between payers whose income drops following assessment and other payers (*this stage currently in progress*).
2. Comparison of these results with existing external statistics publicly available from ABS, ATO, DEWRSB etc.
3. Comparison of CSA data with ATO earnings data (assuming this data can be obtained).

Australian Research Council

Professor Sue Rowley
Executive Director, Humanities and the Creative Arts

What would be involved in forming a national research strategy?

A framework generated from the current ARC review of Humanities and Creative Arts disciplines:

1. A stocktake:

- how strong is the research field, nationally?
- nationally, what important needs or problems require research?
- what opportunities are there for research and research funding?
- how will research be developed, with goals of excellence, international scholarly impact and contribution to Australian life?
- what opportunities are there to connect research with professional practice?

Some indicators

- there appear to be some strong researchers in the field, contribution to public debate and policy
- there is 1 research centre
- there are relatively few ARC grants awarded in family law
these indicators suggest that this is not a strong research area nationally at this point in time. But it would depend on levels of resourcing other than ARC funding.

2. A roadmap (ie forming objectives and strategies to achieve them)

- research training
- networking researchers nationally
- partnerships with legal profession and institutions
- interdisciplinary and inter-agency collaborations
- programs of research
- participation in public debate and expert commentary
- dissemination of research finding to stakeholders
- draw on existing databases
- research methodologies

Some of these points were developed with reference to the presentations by other members of the panel. Others were anchored in an overview of ARC funding over 1993-2002.

Summary of the discussion

Research in the area of families, law and social policy must integrate the work of a range of different disciplines and professions. It should also meet the research needs of a variety of stakeholders, and do so in a timely fashion that keeps pace with the policy making process. This brings with it numerous challenges. The following in particular were identified in the discussion: (a) to better integrate research into related policy development process; (b) to install evaluation studies into family law related community services and programs as they are being developed; (c) to develop strong partnerships between academics, government, the courts and service providers for the purpose of generating quality research that is consistent with national needs; and (d) to develop a national research strategy.

Key themes and research questions

- The discussion focussed primarily around the need to undertake applied research that is immediately and directly relevant to current government agendas in policy development and law reform. ‘Patchy diagnostic studies’ are not always adequate to inform the policy planning process. Evidence-based research should be integrated into the policy formulation process. Program evaluation and interventions should, where possible, operate in parallel with the development of a new service program or policy, and should be budgeted for as part of initial costing.
- It was acknowledged that not every research project and research output needs to inform current policy in an immediate and obvious way. Research in family law will often need to be ahead of the current government, courts and community agendas, and it may also need to address generic questions and fundamental principles which cut across single policy areas, reform and practice needs. Applied research of an evaluative nature needs to be supported by a strong program of theoretical and basic research. Questions concerning the effectiveness of programs, policy and law are inextricably connected to theoretical debate and developments.
- There was an expressed need to continue to extend present partnerships and collaborations between researchers, the courts, government, legal practitioners and service providers in order to maximise the utilisation of research findings in the family law domain. The development of such partnerships was viewed as crucial if research capacity is to be built up to the point where it is able to address ‘deep-seated’ and ‘intractable problems’ in the family law system.
- The development of a set of national research priorities would assist in building up current areas of research excellence, and would go some way to ensuring that the research conducted is clearly connected with national needs.

This same need was earlier identified by the Family Law Pathways Advisory Group (FLPAG) in the report *Out of the maze: Pathways to the future for families experiencing separation* (2001). The FLPAG recommended that a comprehensive, system-wide research strategy in the area of family law should be developed with input from key players.³ It would create linkages with researchers in the area, and develop a national

³ Ibid at 93-94.

research agenda that complements the work already completed or planned. The strategy would include monitoring and evaluating aspects of the new integrated family law system. Research would need to be conducted into the development of the education and information strategies that will form an important part of the new integrated family law system. Finally, a uniform assessment tool for families would need to be developed and family law professionals trained in its use.

The workshop discussions identified similar priorities and identified specific research need that are consistent with those identified by the FLPAG.

List of Participants

| Name | Organisation / Contact Details |
|-----------------------|--|
| Dr. Juliet Behrens | Faculty of Law Australian National University Canberra Act 2601 behrensj@law.anu.edu.au |
| Prof Sandra Berns | Law School Griffith University Nathan Campus, Qld 4111 s.berns@mailbox.gu.edu.au |
| Ms. Sheila Bird | Child Support Agency 40, Cameron Avenue Belconnen, Act 2617 sheila.bird@csa.gov.au |
| Ms. Virginia Buring | Family Court of Australia GPO Box 9991 Canberra, Act 2601 virginia.buring@familycourt.gov.au |
| Ms. Jennie Cooke | Family Court of Australia GPO Box 9991 Canberra, Act 2601 jennifer.cooke@familycourt.gov.au |
| Mr. Paul Crowley | Family, Youth & Civil Law Division Victoria Legal Aid GPO Box 4380 Melbourne, Vic 3001 paulc@vla.vic.gov.au |
| Dr. Yvonne Darlington | School of Social Work & Social Policy University of Queensland St. Lucia, Qld 4072 y.darlington@social.uq.edu.au |
| Ms. Libby Davies | Family Services Australia 22, Napier Close Deakin Act 2600 libby@fsa.org.au |

| | |
|----------------------|--|
| Ms. Nicky Davies | Legal Aid Queensland GPO Box 2449 Brisbane, Qld 4001 ndavies@legalaid.qld.gov.au |
| Prof John Dewar | Law School Griffith University Nathan Campus, Qld 4111 Griffith University j.dewar@mailbox.gu.edu.au |
| Ms. Sandra Ellims | Family Law & Legal Assistance Division Attorney General's Department Robert Garran Offices National Circuit Barton Act 2600 sandra.ellims@ag.gov.au |
| Ms. Barbara Hook | Law School Griffith University Nathan Campus, Qld 4111 Griffith University b.hook@mailbox.gu.edu.au |
| Ms. Lyn Hulett | Logan West Contact Service Logan West Playgroup Centre Orr Court Hillcrest Qld 4118 <u>lwcc3@powerup.com.au</u> |
| Prof Rosemary Hunter | Socio-Legal Research Centre Law School Griffith University Nathan Campus, Qld 4111 rosemary.hunter@mailbox.gu.edu.au |
| Dr. Regin Ip | Socio-Legal Research Centre Law School Griffith University Nathan Campus, Qld 4111 L.ip@mailbox.gu.edu.au |
| Ms. Mavis Maclean | Oxford Centre for Family Law and Policy University of Oxford 32, Wellington Square Oxford OX1 2ER mavis.maclean@socres.ox.ac.uk |

Ms. Christine Millward
Australian Institute of Family Studies
300, Queen Street
Melbourne Vic 3000
christine.millward@aifs.org.au

Mr. Jeremy Nott
Family Relationships Branch
Department of Family & Community Services
Box 7788, Canberra
Mail Centre, Act 2610
jeremy.nott@facf.gov.au

Ms. Zoe Rathus
Women's Legal Services
387, Ipswich Road
Annerley Qld 4103
wlsi@gil.com.au

Dr. Bryan Rodgers
Centre for Mental Health Research
Australian National University
Eggleston Road, Acton
Act 0200
bryan.rodgers@anu.edu.au

Ms. Selina Roosmale-Cocq
Commission for Children & Young People
PO Box 12671
George Street, Qld 4003
sroosmale-cocq@childcomm.qld.gov.au

Ms. Margaret Roots
Catholic Welfare Australia
PO Box 326
Curtin Act 2605
margaret@catholicwelfare.com.au

Prof Sue Rowley
Humanities and the Creative Arts
Australian Research Council
GPO Box 2702
Canberra Act 2609
Sue.Rowley@arc.gov.au

Dr. Grania Sheehan
Socio-Legal Research Centre
Law School
Griffith University
Nathan Campus, Qld 4111
g.sheehan@mailbox.gu.edu.au

Mr. Bruce Smyth
Australian Institute of Family Studies
300, Queen Street
Melbourne Vic 3000
bruce.smyth@aifs.org.au

| | |
|-------------------------|---|
| Dr. Elizabeth van Acker | School of Politics & Public Policy Griffith University Nathan Campus, Qld 4111 e.vanacker@mailbox.gu.edu.au |
| Mr. Garry Watts | Watts McCray Level 14, Lachlan Tower 17-21, Macquarie Street Parramatta, NSW 2150 gwatts@wattsmccray.com.au |
| Ms. Nola Webb | Attorney General's Department Cnr Blackall & Macquarie Street Barton, Act 2600 nola.webb@ag.gov.au |
| Ms. Ruth Weston | Australian Institute of Family Studies 300, Queen Street Melbourne Vic 3000 ruth@aifs.org.au |
| Ms. Lisa Young | Law School Murdoch University GOP Box S1400 Perth WA 6849 young@central.murdoch.edu.au |