Australian Law Reform Commission

Review of the family law system

Bruce Smyth PhD

ANU Centre for Social Research & Methods

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Pre-amble

The author of this submission works at the Centre for Social Research & Methods at the Australian National University (ANU). The Centre is located within the Research School of Social Sciences in the College of Arts & Social Sciences at the Australian National University (ANU). The Centre, which was established in 2015, is a joint initiative between the Social Research Centre (SRC), an ANU Enterprise business, and the Australian National University (ANU). Its expertise includes quantitative, qualitative and experimental research methodologies, public opinion and behaviour measurement, survey design, data collection and analysis, data archiving and management, and professional education in social research methods.

The Centre's research focuses on:

- The development of social research methods
- Analysis of social issues and policy
- Training in social science methods
- Providing access to social scientific data

Researchers within the Centre come from a range of disciplines including economics, econometrics, family law, political science, psychology, public health, social policy, sociology and statistics.

More specifically, for the past two decades, the author has been involved in numerous major studies of divorce and post-separation parenting (e.g., shared parenting; child support; spousal support; relocation and parenting disputes; financial living standards; allegations of family violence; binding financial agreements; mandatory divorce mediation; digital divorce) – including a recent study of high-conflict post-separation shared-time families, as part of an Australian Research Council (ARC) funded Future Fellowship. The views expressed in this submission might not reflect those of any co-authors or affiliated organisations involved in these studies.

"For every complex problem, there is a solution that is simple, neat, and wrong"
–H. L. Mencken

Scope of the present submission

Forty-seven questions are raised in the ALRC Issues Paper (2018: 7–10) to help frame responses to the Terms of Reference. These questions and the overarching Terms of Reference are vast in scope, and many of the issues under consideration have dogged the family law system since its inception.

The author is involved in supporting several organisations making lengthy and detailed submissions to the ALRC. These organisations represent and comprise experts on specific issues, and are far better placed to comment on specific ALRC Terms of Reference than me. For this reason, broad-brush reflections and questions are set out below rather than detailed recommendations.

For brevity, this submission focuses on seven areas: (a) modern families; (b) the ever-increasing length and complexity of the Family Law Act; (c) the inextricable links between love and money; (d) 'high conflict' families; (e) certifying mediation; (f) couple relationship education; and (g) the ongoing need for good data to monitor the wellbeing of families following relationship breakdown.

The 'modern family' in Australia

Australian families are immersed in a rapidly changing social landscape. Increases in Australian life expectancy and the aging of the population are occurring alongside major changes in family formation. Marriage rates are falling;[1] the crude divorce rate remains steady;[2] and non-marital cohabitation is on the rise. In brief, Australian parents are (a) less likely to be married than in the past, (b) getting older before parenting children, (c) having fewer children in individual relationships, and (d) having children in more than one relationship.[3] Moreover, a significant proportion of children in Australia are born outside of marriage. These demographic trends of course are not unique to Australia.

Although the proportion of Australians marrying has been falling, marriage still

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[1] ABS (2016) Australian Bureau of Statistics. (2016a). *Marriages and Divorces, Australia, 2015* (Catalogue No. 3310.0). Canberra: Australian Bureau of Statistics.

[2] Ibid.

[3] Australian Bureau of Statistics. (2017). *Census QuickStats*. Available at: http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036?opendocument; Qu & Weston 2008 Qu, L., & Weston, R. (2008). *Snapshots of family relationships*. Melbourne: Australian Institute of Family Studies.

remains the dominant partnership choice for adult Australians. Of Australians aged 15 years and over in 2016, around half (48%) were in a registered marriage; 10% were in a de facto marriage; and 12% were divorced or separated.[4] Around one quarter of Australians live alone (55% female).

Likewise, couple relationships remain the dominant family type. Specifically, of the 6.1 million families in Australia in 2016, 83% were "couple families" (including same-sex families) (45% with children; 39% without children); 16% were one-parent families (82% of these parents were female), and 2% were other family types.[5]

In addition, around one fifth of all children in Australia had a natural parent (mostly fathers) living elsewhere.[6] Of these children, three-quarters lived in one-parent families, 10% in stepfamilies and 12% in blended families;[7] around one quarter of children with a parent living elsewhere (mostly fathers) rarely or never saw their non-resident parent. In short, so-called 'father absence' remains a significant social problem in Australia, as elsewhere – with a range of social, emotional and financial consequences for children.

More broadly, Australia has become one of the most work-oriented, high-income countries in the world.[8] Although many families in Australia enjoy a relatively high standard of living as a consequence, many are also struggling to balance work and family life.[9] Parenting children across two households (often with reduced financial resources) adds additional layers of complexity to work–life balance post-separation.

The diversity of families in contemporary Australia means that a fundamental challenge for the family law system is that of the provision of access to justice and services for all families – particularly for Aboriginal and Torres Strait Islander families, migrant families, LGBT families, poor families, rural and remote families, families with a family member with a disability, and families with other specific or complex needs.

One practical approach to supporting such families is for large mainstream service providers, such as Relationships Australia, to employ specialist social workers and counsellors, and to offer programs that target particular groups. Of course, in more

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[4] Australian Bureau of Statistics. (2017). *Census QuickStats*. Available at: http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036?opendocument

[5] Ibid

[6] Australian Bureau of Statistics. (2015). *Family Characteristics and Transitions, Australia, 2012–13* (Catalogue No. 3310.0).

[7] Ibid.

[8] Shepanski, P. & Diamond, M. (2007). *An unexpected tragedy*. Sydney: Relationship Forum.

[9] Strazdins, L., Baxter, J., & Li, J. (2017). Long hours and longings: Australian children's views of fathers' work – family time. *Journal of Marriage and Family*, 79(2), 965–982.

remote areas, where services meet the 'triple whammy' of distance, language and cultural barriers, many communities do not have the resources to offer programs. No simple solution suggests itself, with funding a necessary but not sufficient condition for supporting the needs of Australian families in their myriad of forms, circumstances and locations.

The Family Law Act: Choking in complexity and specificity?

The Family Law Act must surely be one of the most revised and evaluated pieces of legislation in the history of Australia – burgeoning in complexity and choking in specificity.[10]

For many years now, Professor Richard Chisholm has been wrestling with ways to simplify the Act and improve its ability to support children's needs. Is the time ripe for a careful re-examination of the core principles of the Act by a small group of Australian family law experts, similar to the American Law Institute review published in 2002? Much of the legislative reform in recent decades in Australia appears to have been the result of *ad hoc* reactions to political pressure points rather than consideration of a set of coherent higher-order modern-day principles.

Love and money …

As noted in the ALRC Issues Paper (2018: 13):

> There are a number of matters that are not referred to in the Terms of Reference. These include the operation of the child support scheme…. However, as these issues are closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC will consider in the course of this Inquiry.

On the operation of the Australian Child Support Scheme, I refer the Inquiry to a submission by Bryan Rodgers and myself made to the House of Representatives Standing Committee on Social and Legal Affairs Parliamentary Inquiry into the Child Support Program on 12 June 2014.[11] This submission sets out key findings from a large evaluation of the child support changes of 2006–08, funded by the Australian Research Council.

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[10] See Sampson for a neat case study in the US context: Sampson, J.J. (2011) Choking on statutes revisited: A history of legislative preemption of common law regarding child custody. *Family Law Quarterly*, 45(1), 95–117. In Australia, see: O'Brien, R. (2010). Simplifying the system: Family law challenges – can the system ever be simple? *Journal of Family Studies*, 16(3), 264-270.

[11] See Submission 13 at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Child_Support_Program/Submissions

Three points from our submission warrant mention:

- Love, money, and relationships are inextricably linked.[12] Money and resources have implications for children's living arrangements after separation, and vice versa: i.e., caring for children requires resources and infrastructure. While giving primacy to children's matters over finances helps parents to stay focused on children's needs, the reality is that money necessarily seeps into all aspects of post-separation family life.
- For many separated parents, child support and financial matters act as a 'lightning rod' for much pent-up anger, grief and disappointment surrounding relationship dissolution and the loss of everyday family life. Moreover, Australia recently initiated a number of changes to government income support payments to reduce pressure on the public purse. Cuts to welfare disproportionately affect some of the most vulnerable families in Australian society, particularly single parents. In addition, casualization of the workforce, wage stagnation, and under-employment are placing additional financial stress on many families, including separated families. A tight fiscal environment can add additional pressure on families, and the services that support them.
- Several years ago, Lawrie Moloney, Kim Fraser and I asked three questions: "(a) How has child support been thought about within the broader family law system in Australia? (b) Where can separating parents go to get help to talk with each other about child support? and (c) What might a system look like that can simultaneously accommodate the discussion of parenting arrangements and child support?"[13] We wondered whether there might be scope to provide services to assist separated parents with the capacity and the desire to discuss child support matters directly with each other, where appropriate. We still wonder whether there is the possibility for Family Dispute Resolution (FDR) services to do more in this complex, emotional, technical space. The 'Rolls Royce' model would be to employ a financial counsellor/mediator in Family Relationship Centres so that technical financial information (including income support; child support; superannuation splitting etc) could be offered in a co-mediation model. The use of a financial co-mediation model, however, is obviously not cost neutral.

[12] See e.g., Millman, M. (1991). Warm hearts & cold cash: the intimate dynamics of families and money. The Free Press: New York.

[13] Moloney, L., Smyth, B. & Fraser, K. (2010). Beyond the formula: Where can parents go to discuss child support together? *Journal of Family Studies*, 16(1), 33–47, at 33; See also: Fehlberg, B. Smyth, B. & Fraser, K. (2010). Compulsory pre-filing FDR for financial disputes: putting the cart before the horse? *Journal of Family Studies*, 16, 197–208.

'High-conflict' cases

'High-conflict' divorce cases have been consistently identified as difficult, complex, time consuming, and costly. They place great strain on individuals, practitioners and courts, as well as on the family law and child support systems more generally.

In the US context, Neff and Cooper estimated that 10% of cases are in the high conflict category and that this group of separated families take up 90% of family law courts' and professionals' time (p. 99).[14] Other estimates of 'high-conflict' – variously defined and measured – typically range from 5–25%.

A recent Australian longitudinal study[15] found that while 15% of separated parents reported "lots of conflict" or a fearful relationship at each of three waves over a five-year period, only 4% of individuals did so across all three waves. Unpublished data by Smyth and Rodgers – drawing on a different data set from a different time span – reported similar estimates.[16]

Several studies have found no consensus on the definition of 'high-conflict.' This lack of definitional clarity has led to considerable confusion among researchers, practitioners, and policymakers. The term has been of limited help in the pursuit of early identification and better case management and interventions on the ground – especially where one person may be unilaterally driving the conflict.

Recently, my colleagues, Lawrie Moloney (La Trobe University, Melbourne) and Steven Demby (New York), and I have been exploring one potentially important sub-type of 'high conflict': 'entrenched parental hatred'.[17]

Building on a disparate set of ideas in the psychology and philosophy literature, Moloney and I suggest that at its core:

> entrenched hatred stems from a deep-seated negative attachment to a

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[14] Neff, R., & Cooper, K. (2004). Parental conflict resolution: Six-, twelve-, and fifteen-month follow-ups of a high-conflict program. Family Court Review, 42(1), 99–114.

[15] Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J. (2014). *Post-separation parenting, property and relationship dynamics after five years*. Canberra, AU: Attorney-General's Department. Melbourne: Australian Institute of Family Studies.

[16] For instance, we found that 5% reported "lots of conflict" or a fearful relationship at each of three waves over a five-year period

[17] Smyth, B., & Moloney, L. (2017). Entrenched postseparation parenting disputes: The role of interparental hatred?, *Family Court Review*, *55*(3), 404–416, at 404. See also: Demby, S. (2017). Commentary on entrenched postseparation parenting disputes: The role of interparental hatred. *Family Court Review*, *55*(3), 417–423; Demby, S. (2009). Interparent hatred and its impact on parenting: Assessment in forensic custody evaluations. *Psychoanalaytic Inquiry*, 29(6), 477–490.

> former partner. It is demonstrated by a relentless and unforgiving negativity involving: (a) a global assessment of the former partner as bad or evil and deserving of no respect as a person or a parent; (b) persistent bitter feelings, mistrust, accusatory thought, and destructive impulses; (c) a steadfast inability to self-reflect, see other perspectives, or change, coupled with redirecting (projecting) internal conflicts away from self and onto another; and (d) a willingness to incur harm to oneself and one's children in the service of harming or even destroying the other parent.[18]

We argue that entrenched hatred by one or each parent towards the other is likely to reflect a key relationship dynamic for some in the high-conflict group, and that:

> naming hatred where it exists is a necessary precursor to effective interventions aimed at managing or resolving post-separation parenting disputes. [But] [w]hen hatred coexists with violent or abusive behavior, consideration of those behaviors and their consequences must take precedence.[19]

High conflict situations – particularly those that involve a deep hatred by one or both parents, allegations of violence, mental health issues, and/or substance abuse – require substantial forensic and therapeutic resources. We wonder whether these cases could be identified early in the court triage process, and kept within the court rather than bounce around community-based PDR? Adversarial process seems to be a great friend to litigants seeking to stay connected with a former partner through hate-driven conflict and/or coercive control.

Although the Australian family law system is one of the most coordinated, developed and integrated systems in the world, there are financial limits to the extent that Courts have the forensic resources to deal with some of the hardest and most complex cases. There are also financial limits to the extent that services on the ground (e.g., Children's [supervised] contact services) have the resources they need to meet the needs of the families and to do so in a timely manner. As Australia continues to deal with a budget deficit and other fiscal challenges, a fundamental challenge for the family law system will be to ensure that it can fund its existing services, and add specialist services where necessary, to deal with an expanding array of client needs and circumstances. There is much evidence to suggest that since the family law changes of 2006, the Court's caseload is becoming increasingly complex and challenging.

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[18] Smyth & Moloney (2017: 408).

[19] Op cit, p. 404.

Certifying mediation

As part of the family law changes of 2006, an expanded use of Family Dispute Resolution and mediation techniques was introduced to assist families attempting to resolve their disputes without resorting to court proceedings where possible.

As noted recently by my colleagues[20] and I: "the stated object of section 60I of the *FLA* is to ensure that all persons who have a dispute about children's matters 'make a genuine effort to resolve that dispute by family dispute resolution' before an application can be made for an order under Part VII of the *FLA*. The legislative method was to provide that unless one of a number of exceptions apply, parties cannot commence proceedings for orders relating to children unless they have filed a certificate by an FDRP relating to the parties' participation in dispute resolution".

As is now well known, there are five different categories of certificate that can be issued by a Family Dispute Resolution Practitioner (FDRP). The full description of each category of certificate is set out in section 60I(8) of the *FLA.* They may each be paraphrased as a certificate verifying that the person:

1 "did not attend family dispute resolution, but this was because another party (or parties) to the dispute refused or failed to attend ('failure or refusal to attend' certificate);

2 did not attend family dispute resolution because the FDRP considers that it would not be appropriate to conduct family dispute resolution ('inappropriate for FDR' certificate);

3 attended family dispute resolution and all attendees made a genuine effort to resolve the dispute ('genuine effort' certificate);

4 attended family dispute resolution and that one or more of the attendees did not make a genuine effort ('not genuine effort' certificate);

5 began attending family dispute resolution, but the practitioner considers it would not be appropriate to continue with family dispute resolution ('no longer appropriate for FDR' certificate)".[21]

However, although implemented over a decade ago, little empirical research into the process of issuing s 60I certificates has been conducted.

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[20] Smyth, B., Bonython, W., Rodgers, B., Keogh, E., Chisholm, R., Butler, R., Parker, R., Stubbs, M., Temple, J., & Vnuk, M. (2017). *Certifying mediation: A study of S 60I certificates*. ANU Centre for Social Research & Methods Working Paper (No. 2/2017), November. ANU Centre for Social Research & Methods: Canberra, at 1.

[21] Op cit, p2.

In 2016, a NSW study was commissioned by Interrelate with the financial support of the Australian Government Attorney-General's Department. The study was conducted by staff at the Australian National University, the University of Canberra, and Interrelate. It was designed to explore elements of the operation of the certificate-issuing process created by s. 60I of the Family Law Act 1975 (Cwlth). Specifically, it sought to explore: (a) "the number and categories of certificates issued, and the characteristics of clients who do and do not receive them"; (b) "the factors and circumstances influencing the decision of Family Dispute Resolution Practitioners to issue different categories of s. 60I certificates"; and (c) "clients' understanding of the purpose of the certificate, and the various dispute resolution pathways (if any) used by families after receiving a s. 60I certificate".[22]

Our study raised several key questions worthy of further investigation:

- What is the purpose of the different categories of certificate?
- Are the five categories of certificate useful?
- Should the legislation require that a certificate be issued to everyone who participates, or attempts to participate, in FDR?
- Is the wording of the 'refusal, or the failure to attend' clause of the certificates clear?
- Can the certification system be improved for families with complex needs, and for the family law system more broadly?
- Can FDRPs be better supported in issuing s. 60I certificates?
- What can be done to help disputing parents who do not appear to have the financial resources to pursue litigation?
- Do judicial officers make use of the s. 60I certificates in any way? Should they?

An obvious role for future research would be obtaining a nationally representative snapshot that would include clients, lawyers, and judicial officers, and make use of administrative data to explore trends and regional variations.

We note in our report[23] that one perennial thorny issue across many areas of family law is that of what to do when one party refuses to engage with the process. One of the many challenges faced by FDRPs is the difficulty of dealing with clients who appear to be stalling rather than directly refusing to participate in FDR. Again, no single or simple intervention suggests itself. More research and research translation are needed in this complex area.

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[22] Smyth, B., Bonython, W., Rodgers, B., Keogh, E., Chisholm, R., Butler, R., Parker, R., Stubbs, M., Temple, J., & Vnuk, M. (2017). *Certifying mediation: A study of S 60I certificates*: *Summary Report*. ANU Centre for Social Research & Methods Working Paper (No. 2/2017), November. ANU Centre for Social Research & Methods: Canberra.

[23] Ibid.

Back to basics: Early intervention and prevention?

One important policy strand underpinning the Family Law Act is the promotion of reconciliation.[24] Not that long ago, early intervention and prevention dominated policy discussions in a range of domains. But in recent years, particularly in the area of family relationships, there appears to be less interest in either.

Australians, for example, seem to have little appetite for couple relationship education, with low numbers attending. Generally, those attending are couples required or encouraged by religious organizations to participate. Australian government policy reflects a similar disinclination. Much of the political interest in couple relationship education more broadly has been—and remains—focused on relationship breakdown and the provision of services at the sharp end of the relationship spectrum rather than in preventing relationship difficulties before they occur.[25] There has been a marked decline in couple relationship education on the one hand, and an expansion of parenting education on the other.

Some colleagues and I[26] have recently argued that supporting and enriching couple relationships is critical to successful parenting. Yet Australian policy—possibly reflecting broader cultural and attitudinal barriers—appears to neglect this important nexus. We wonder whether government can do more to support and strengthen couple relationships in Australia.

Improving the evidence base

In Australia, as in many other Western countries, family law is an area in which anecdote often reigns supreme. This is because (a) it is easy to relate to personal stories and (b) empirical data are frequently lacking on pressing policy questions. While not discounting the validity of individuals' experiences and the importance of involving the broader community in the policy process, policy makers should be alive to the risk of anecdotal evidence shaping policy for a minority rather than for the majority – especially where the rationale behind policy decisions involves a complex set of issues that do not appear to be well understood (e.g., that equal shared parental responsibility does not mean equal or near-equal parenting time).

Australia now has some of the best data in the world on post-separation parenting, family violence, child support, family law system processes, and child and parent wellbeing post-separation. This is largely because of a sizeable investment by the

[24] See e.g., S13B(1) of the Family Law Act.

[25] van Acker, E. (2008). *Governments and Marriage Education Policy: Perspectives from the UK, Australia and the US*. Palgrave Macmillan: Hampshire.

[26] Smyth, B., Hunter, C., Macvean, M., Walter, M & Higgins, D. (in press). Education for family life in Australia. In M. Robilla & A. Taylor (Eds.) *Family life education around the world*. Springer: NY.

Australian Government on monitoring the impacts of legislative changes on families, along with substantial funding for major longitudinal studies, such as: the AIFS Longitudinal Study of Separated Families; the Longitudinal Study of Australian Children (LSAC); and the Household Income and Labour Dynamics in Australia (HILDA) Survey. The ANU Child Support Reform Study also continues to yield important insights, as do ongoing time series collections, such the ABS Family Characteristics Survey.

Administrative data also constitute an important source of information on separated families.[27] These data, however, are currently under-utilized for research and monitoring purposes.

Australia has invested a large amount of money and effort into the collection of data for evaluating the family law and child support reforms. There is much value in the increased availability and use of existing data sources (both survey and administrative data) to improve the evidence base on the operation of the family law system. In the current tight fiscal environment, it makes sense to make the full use of existing data before embarking on new data collections.

Conclusion

Much has changed in the social, demographic and economic landscape since the Family Law Act was introduced in 1975. The Act grows thicker each decade, perhaps reflecting the increasing complexity of Australian families and modern family life. A central thread running through this submission is that funding and resources matter, and that many of challenges to the family law system defy simple solutions or quick fixes. I wish the ALRC every success with its review.

Bruce Smyth PhD
Associate Professor of Family Studies
ANU Centre for Social Research & Methods
Australian National University, Canberra

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[27] See, e.g., the national prevalence and incidence estimates derived from Department of Human Services administrative data: Smyth, B. & Chisholm, R. (2017). Shared-Time parenting after separation in Australia: Precursors, prevalence, and postreform patterns. *Family Court Review*, *55*(4), 586–603.