Families, policy and the law

Selected essays on contemporary issues for Australia

Edited by
Alan Hayes and Daryl Higgins

Australian Government
Australian Institute of Family Studies

© Commonwealth of Australia 2014

With the exception of AIFS branding, the Commonwealth Coat of Arms, content provided by third parties, and any material protected by a trademark, all textual material presented in this publication is provided under a Creative Commons Attribution 3.0 Australia licence (CC BY 3.0) <creativecommons.org/licenses/by/3.0/au>. You may copy, distribute and build upon this work for commercial and non-commercial purposes; however, you must attribute the Commonwealth of Australia as the copyright holder of the work. Content that is copyrighted by a third party is subject to the licensing arrangements of the original owner.

The views expressed in this publication are those of individual authors and may not reflect those of the Australian Government or the Australian Institute of Family Studies.

Suggested citation:

Hayes, A., & Higgins, D. (Eds.). (2014). *Families, policy and the law: Selected essays on contemporary issues for Australia*. Melbourne: Australian Institute of Family Studies.

Australian Institute of Family Studies, Level 20, 485 La Trobe Street, Melbourne VIC 3000 Australia. <www.aifs.gov.au>

ISBN 978-1-922038-48-7

Printed by Print Media Group

Contents

Acknowledgements viii
About the authors ix

1 Weaving a common narrative: An introduction to essays on families, policy and the law in Australia 1
Alan Hayes and Daryl Higgins

PART A—Diverse family formation: Identity, recognition and law 5

2 Trends in family transitions, forms and functioning: Essential issues for policy development and legislation 7
Ruth Weston and Lixia Qu

3 Ancestry, identity and meaning: The importance of biological ties in contemporary society 19
Rhys Price-Robertson

4 Past adoption practices: Key messages for service delivery responses and current policies 29
Pauline Kenny and Daryl Higgins

5 The forced adoption apology: Righting wrongs of a dark past 39
Nahum Mushin

6 Current open adoptions: Mothers' perspectives 47
Phillipa Castle

7 Perfecting adoption? Reflections on the rise of commercial offshore surrogacy and family formation in Australia 55
Denise Cuthbert and Patricia Fronek

8 Use of surrogacy by Australians: Implications for policy and law reform .. 67
Sam Everingham

9 Secrecy, family relationships and the welfare of children born with the assistance of donor sperm: Developments in research, law and practice 81
Sarah Wise and Gabor Kovacs

10 Gay and lesbian parenting: The legislative response 89
Adiva Sifris

11 Step-parenting 101
Claire Cartwright

12 Grandparents as primary carers of their grandchildren: Policy and practice insights from research 109
Deborah Brennan and Bettina Cass

PART B—Legal and statutory responses to families in difficulty 119

13 Contemporary issues in child protection intake, referral and family support 121
Leah Bromfield, Fiona Arney and Daryl Higgins

14 Mandatory reporting laws..... 131
Ben Mathews and Kerryann Walsh

15 Children in the out-of-home care system 143
Judy Cashmore

16 Justice and the protection of children 151
John Faulks

PART C—Relationship breakdown and family policies and practices 167

17 Children, families and the law: A view of the past with an eye to the future 169
Helen Rhoades

18 The ties that bind: Separation, divorce and the indissolubility of parenthood 177
Patrick Parkinson

19 Confidentiality and "family counselling" under the *Family Law Act 1975*..... 185
Richard Chisholm

20 Has confidentiality in family dispute resolution reached its use-by date?..... 195
Tom Altobelli and Diana Bryant

21 Family law: Challenges for responding to family violence in a federal system 207
Rosalind F. Croucher

22 Families with complex needs: Meeting the challenges of separation..... 215
Rae Kaspiew, John De Maio, Julie Deblaquiere and Briony Horsfall

23 Post-separation parenting arrangements involving minimal time with one parent 225
Rae Kaspiew, John De Maio, Lixia Qu and Julie Deblaquiere

24 Family violence and financial outcomes after parental separation..... 235
Belinda Fehlberg and Christine Millward

25 Lionel Murphy and the dignified divorce: Of dreams and data..... 245
Lawrie Moloney

PART D—Social science and developments in Australian criminal and family law **259**

26 Prosecuting child sexual abuse: The role of social science evidence 261
Antonia Quadara

27 The scientists are coming: What are the courts to do with social science research?..... 275
Michael Kearney

28 Social science and family law: From fallacies and fads to the facts of the matter 283
Alan Hayes

Concluding reflections **297**

29 Complex family issues: Collective awareness, common narratives and coordinated approaches to promoting resilience 299
Alan Hayes and Daryl Higgins

Index **305**

[29]

Complex family issues

Collective awareness, common narratives and coordinated approaches to promoting resilience

Alan Hayes and Daryl Higgins

Loss of relationships is an unfortunate fact of family life. Families inevitably confront the loss of loved ones. In earlier ages, with shorter life spans and many more risks, death was the typical way in which relationships ended. With greater longevity, however, "till death do us part" presents new challenges. Relationships now face a more protracted test of time than in earlier generations. The stages of life are elongating, with arguably more transition points along the way, and these can bring their own difficulties, complexities and dilemmas of choice.

In an ideal world, relationship difficulties, separation and divorce would not occur. The world, however, has never achieved that utopian state. Relationship breakdown—between couples, parents and children, as well as among other family members—raises thorny issues both for social policy and legal systems. The challenges are particularly difficult when children are involved. Best interest is the guiding principle, but policy and practice need to be able to deal with changes that occur as children develop and the complexities of family life unfold.

Conflict and dysfunction threaten the sustainability of any family, and some are much more likely to encounter such problems than others. Strong relationships carry considerable capacity for resilience—to bend but not break when buffeted by life's inevitable storms. "Resilience" is frequently used to describe families' ability to bounce back from misfortune. Resilience is not only a characteristic of the people involved—the strengths and resources they can marshal—but also reflects the situations and circumstances that they confront and the capacities within families, communities and the wider society to foster and sustain them. If circumstances place sufficient stress on couples, especially those with insufficient personal resources and supports from family, friends and neighbours, relationships can break, with far-reaching ramifications for all concerned.

The social policy challenge is to be mindful of the circumstances and threats to individuals and the stability of their families, to promote opportunities for early

intervention to avert potential trouble and to respond appropriately to support families experiencing difficulties. It is both a matter of strengthening families and maintaining the fences that help to prevent life's pitfalls.

The essays in this volume have addressed some of the issues facing families and their communities and those who seek to support, strengthen and assist them to overcome difficulties. In the Australian context, the complexity, in part, reflects the realities of a nation of federated states and territories. Policy is far from a unitary entity, and each jurisdiction has its own legislative responsibilities and frameworks. Aligning these is a far from simple proposition. That said, the contributions in this volume show the progress that is being made to better align and coordinate approaches to formulate and implement Australian policies and laws focused on children and families.

The essays also reflect the tension between the private worlds of families and the public spaces in which policy and the law operate. The view that much of what happens in families is inherently private has too often impeded appropriate responses to the challenges that families confront. Raising awareness of the issues confronting families contributes to the emergence of shared beliefs, aligned views and common narratives that can drive policy and shift practice. The essays in this volume also highlight the difficulties of coordinating approaches that span the social services and legal systems in order to achieve effective policy implementation.

Collective awareness

While the origins of advocacy for children and families are lost in antiquity, raising public awareness of the circumstances of children and their families has been a continuing force for change. In the early part of the 20th century, a key focus was on maternal and child health, particularly addressing infant mortality, which remained unacceptably high until the 1930s. From the 1950s on, commitment to improving the health of children continued. Across this time, however, emphasis on wellbeing steadily increased, reflecting the growth of knowledge about the importance of the emotional and social dimensions of child development. The increase in the survival of children beyond infancy progressively afforded a focus on aspects of their development beyond physical health, and highlighted the relationship between the quality of their life experiences and later outcomes.

Awareness can both drive changes in the circumstances of children and their families and be a response to changes driven by other forces, such as the demographic and social shifts considered by the authors in Part A of this book. So collective awareness is itself dynamic and is revisited and revised in the light of new insights, knowledge and concerns.

A critical mass of public concern is often the catalyst for policy, legislative and service changes. The commitment to reform can also arise within policy and legal circles, and awareness-raising then becomes a means of building the groundswell of public concern that reinforces political will. Most typically, however, it is the confluence of community concern *and* political will that drives policy change and legislative reform.

In recent years, efforts to raise public awareness have focused on those who experience trauma and the harms that flow from it. Of particular salience have been issues concerning child abuse (including sexual assault) and the removal of children from their families, as discussed by the essays in Part B, as well as family violence and the effects of separation and divorce on children and their parents. With regard to the last of these, there has been a particular focus on parenting arrangements following

relationship breakdown, as explored in the essays in Part C. While the architects of "no fault" divorce sought more dignified approaches to settling matters when relationships became clearly irretrievable, post-separation arrangements remain a complex and changing terrain that presents particular challenges for both policy and the law. As such, several of the essays in this collection focus on the complications for family law of dealing with relationship breakdown, especially where family violence is suspected.

Despite wide media coverage of incidents of terrible family violence, problems that affect children and challenge their families have been, and in some quarters still are, regarded as better kept behind closed doors. Increasingly, however, there is recognition of the wider ramifications and costs to society, especially given the realisation that the harm to individuals spreads, endures and crosses generations.

Yesterday's policy has a habit of becoming today's problem. In this early part of the 21st century, ignorance has turned out to be far from bliss as we gain greater understanding of the long-term effects on children, families and communities of policies and practices that had seemed good ideas at the time. Collective awareness has led to a sequence of public admissions of the shortcomings of previous generations. They began with apologies to the Stolen Generations of Aboriginal children removed from their parents and to the Forgotten Australians and Former Child Migrants who were separated from their parents and placed in institutional settings. Most recently, the apology to those affected by forced adoption was an important act of reconciliation and respect for the many who carry the scars of past practices. The discussions of forced adoption in this volume highlight the consequences of not considering the effects of actions that were justified with arguments relating to what was thought to be "in children's best interest" and for "the greater good" of the society at large.

Common narratives

Greater awareness can be a precursor of shared beliefs, aligned views and common narratives that can then galvanise calls to action and new policy approaches. Such narratives frame an issue of concern. For example, the narrative that has followed recognition of the seriousness of child abuse, sexual assault and neglect has led to the development of the National Framework for Protecting Australia's Children 2009–2020, a joint initiative of all Australian governments and the community sector, and endorsed by the Council of Australian Governments (COAG, 2009). Similarly, awareness of the extent and seriousness of violence, especially as it affects women and children, has resulted in the National Plan to Reduce Violence against Women and their Children 2010–2022, again endorsed by COAG (2010). Both reflect a broader public concern about the unacceptability of violence and aggression.

Although an important first step, common narratives are not sufficient to achieve sustained change. Views of a problem can also reflect a shared set of beliefs that are subsequently proven to be wrong. Practices such as the forced removal of children or the belief that family violence is a private matter were part of a common narrative at the time that persisted despite accumulating evidence of their serious shortcomings and enduring harms. Notwithstanding, however, a common view can facilitate coordinated approaches to addressing social problems. Such narratives can advance understanding and bridge disciplinary divides, in part by permitting the alignment of concepts, terminology and practice.

But common narratives may also mask very different understandings of the problem by those who work within the range of relevant disciplines. The same concepts and

words may be quite differently understood by practitioners in social-science-based disciplines and the law, for example, and the depth of understanding of key concepts, methods and approaches may vary considerably. In addition, while reform of the law is driven through the formal process of establishing precedents and the implications of appeals against particular judicial outcomes, the social sciences are shaped by replication (or more particularly the failure to replicate), and the resulting accretion of knowledge and occasional shifts in paradigm. The essays in Part D touch on the complexities of reconciling paradigms across areas that may seem similar, but that carry considerable differences in modes of thought and practice.

Coordinated approaches

Most social problems cross the bounds of several specialist areas of policy and practice, and no single discipline possesses the knowledge required to manage the multiple facets of families with complex issues. Multidisciplinary teams are the norm in most areas of medicine, especially those focused on difficult cases. This has been so for quite some time.

Increasingly, this is also the situation in the areas of policy and practice discussed in the present volume. That said, however, spanning the gulf between the social sciences and the law is not always easily achieved. The topics selected here also reflect the considerable complexity of the factors that lead to problems arising and impede easy solutions. While some families grapple with a single problem, others struggle with a package of inter-related problems. What seems like a single issue soon reveals a complicated mix of challenges and needs.

The first set of essays well illustrates the changing face of families, the diversity of their formation and the forces that shape individual identities. Policy seeks to keep pace with developments that are occurring not only in families, but in their neighbourhoods, their communities, and the wider society. The law confronts the challenge of rapid change; family forms and their dynamics also confront the law, as does technological change.

Many of the essays have focused on the ways in which public policy and private law can address the aftermath of relationship difficulties and dissolution. Such policies and laws strive to return fracturing family relationships to safe, secure and stable functioning. Family law initiatives have brought together the information and expertise required to collaboratively manage post-separation parenting matters. The Magellan case management model in the Family Court of Australia specifically focuses on achieving better coordination of parenting matters involving allegations of sexual assault or serious physical abuse of children (Higgins, 2007). Other initiatives involve coordination between lawyers and psychology/counselling professionals in resolving family law disputes where there are concerns about family violence, and the allocation of Independent Children's Lawyers to complex children's matters in family law proceedings, as discussed in chapters 16 and 20.

Recognition of the need for better coordination of social services has resulted in innovations such as the Australian Government's Communities for Children initiative (Edwards, Gray et al., 2011; Edwards, Wise et al., 2009), and coordinated approaches such as Victoria's Services Connect (Department of Human Services Victoria, 2013). The former is a place-based early intervention program focused on strengthening families and achieving better coordination of services and supports within each target community. The latter is a strategy that explicitly aims to overcome complicated organisational

structures, policies and programs focused on the many different needs of families living in circumstances of disadvantage and vulnerability. While these are but two of a rapidly growing list of initiatives, they illustrate practical approaches to coordinating the services that seek to strengthen and integrate community capacity to support families with complex, multiple needs.

When it comes to addressing these needs, both policy and the law are framed in the context of the following realities: change is a constant, difference is the norm and complexity is a simple fact of life! This collection of essays both outlines some of the key problems and sketches some of the positive prospects for progress in addressing contemporary social problems that bear on children and their families. Collective awareness of the issues involved and common narratives are the starting points for better coordinated approaches to promoting the resilience of individuals and the wellbeing of their families.

References

Council of Australian Governments. (2009). *Protecting children is everyone's business: National Framework for Protecting Australia's Children 2009–2020*. Canberra: COAG. Retrieved from <www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>.

Council of Australian Governments. (2010). *National Plan to Reduce Violence against Women and their Children 2010–2022*. Canberra: COAG. Retrieved from <www.dss.gov.au/sites/default/files/documents/05_2012/national_plan.pdf>.

Department of Human Services Victoria. (2013). *Services Connect: Better services for Victorians in need*. Melbourne: DHS.

Edwards, B., Gray, M., Wise, S., Hayes, A., Katz, I., Muir, K., & Patulny, R. (2011). Early impacts of Communities for Children on children and families: Findings from a quasi-experimental cohort study. *Journal of Epidemiology and Community Health*, *65*(10), 909–914.

Edwards, B., Wise, S., Gray, M., Hayes, A., Katz, I., Misson, S. et al. (2009). *Stronger Families in Australia study: The impact of Communities for Children* (Occasional Paper No. 25). Canberra: Department of Families, Housing, Community Services and Indigenous Affairs.

Higgins, D. J. (2007). *Cooperation and coordination: An evaluation of the Family Court of Australia's Magellan case-management model*. Canberra: Family Court of Australia. Retrieved from <www.aifs.gov.au/institute/pubs/magellan>.