

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
<i>Alan Hayes and Daryl Higgins</i>	
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
<i>Ruth Weston and Lixia Qu</i>	
3 Ancestry, identity and meaning: The importance of biological ties in contemporary society	19
<i>Rhys Price-Robertson</i>	
4 Past adoption practices: Key messages for service delivery responses and current policies	29
<i>Pauline Kenny and Daryl Higgins</i>	
5 The forced adoption apology: Righting wrongs of a dark past	39
<i>Nabum Musbin</i>	
6 Current open adoptions: Mothers' perspectives	47
<i>Phillipa Castle</i>	
7 Perfecting adoption? Reflections on the rise of commercial offshore surrogacy and family formation in Australia	55
<i>Denise Cuthbert and Patricia Fronck</i>	
8 Use of surrogacy by Australians: Implications for policy and law reform ..	67
<i>Sam Everingham</i>	
9 Secrecy, family relationships and the welfare of children born with the assistance of donor sperm: Developments in research, law and practice	81
<i>Sarah Wise and Gabor Kovacs</i>	
10 Gay and lesbian parenting: The legislative response	89
<i>Adiva Sifris</i>	
11 Step-parenting	101
<i>Claire Cartwright</i>	
12 Grandparents as primary carers of their grandchildren: Policy and practice insights from research	109
<i>Deborah Brennan and Bettina Cass</i>	

PART B—Legal and statutory responses to families in difficulty	119
13 Contemporary issues in child protection intake, referral and family support	121
<i>Leah Bromfield, Fiona Arney and Daryl Higgins</i>	
14 Mandatory reporting laws.....	131
<i>Ben Mathews and Kerryann Walsh</i>	
15 Children in the out-of-home care system.....	143
<i>Judy Cashmore</i>	
16 Justice and the protection of children	151
<i>John Faulks</i>	
 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
<i>Helen Rboades</i>	
18 The ties that bind: Separation, divorce and the indissolubility of parenthood.....	177
<i>Patrick Parkinson</i>	
19 Confidentiality and “family counselling” under the <i>Family Law Act 1975</i>	185
<i>Richard Chisholm</i>	
20 Has confidentiality in family dispute resolution reached its use-by date?.....	195
<i>Tom Altobelli and Diana Bryant</i>	
21 Family law: Challenges for responding to family violence in a federal system	207
<i>Rosalind F. Croucher</i>	
22 Families with complex needs: Meeting the challenges of separation.....	215
<i>Rae Kaspiew, John De Maio, Julie Deblaquiere and Briony Horsfall</i>	
23 Post-separation parenting arrangements involving minimal time with one parent.....	225
<i>Rae Kaspiew, John De Maio, Lixia Qu and Julie Deblaquiere</i>	
24 Family violence and financial outcomes after parental separation.....	235
<i>Belinda Fehlberg and Christine Millward</i>	
25 Lionel Murphy and the dignified divorce: Of dreams and data.....	245
<i>Lawrie Moloney</i>	

PART D—Social science and developments in Australian criminal and family law	259
26 Prosecuting child sexual abuse: The role of social science evidence261 <i>Antonia Quadara</i>	
27 The scientists are coming: What are the courts to do with social science research?..... 275 <i>Michael Kearney</i>	
28 Social science and family law: From fallacies and fads to the facts of the matter 283 <i>Alan Hayes</i>	
Concluding reflections	297
29 Complex family issues: Collective awareness, common narratives and coordinated approaches to promoting resilience 299 <i>Alan Hayes and Daryl Higgins</i>	
Index	305

[1]

Weaving a common narrative **An introduction to essays on families, policy and** **the law in Australia**

Alan Hayes and Daryl Higgins

There are few areas of policy that carry greater complexity than those that focus on families. The dynamics of family formation are, and have always been, intricately connected with the evolving conditions of societies and the constraints and values they embrace at any given era. Some things, however, are perennial. The functions families fulfil have remained essentially unchanged despite the shifts in the circumstances and challenges that families confront. Not surprisingly, the ways in which policy-makers seek to address the needs of families also evolve and, in turn, influence the changing social context.

Broadly speaking, policy initiatives seek to support family stability, facilitate positive functioning, enhance their safety and security, and generally promote the wellbeing of family members to the benefit of their communities and the wider society. Family policy involves a complex mix of social, economic, educational, employment, housing and health policies, along with a range of other child- and family-focused priorities. These policy “levers” are used to enhance opportunities, build capacity and capitalise on individual and family strengths.

Just as social policy is framed by the complexities of family and societal change, child- and family-focused legal systems also confront the challenges of change. Changing social and policy contexts have far-reaching implications for the law. While legislation tends to follow such change, it can also drive change.

The collected essays in this volume seek to explore some of the complexities that confront both those who frame social policy and those involved in the social services and legal systems that intersect with child and family issues. The genesis of the volume was in a set of papers presented to the 12th Australian Institute of Family Studies Conference held in Melbourne from 25 to 27 July 2012. In reflecting on the wealth of material presented at the conference, we were impressed by the many papers that focused on topics at the intersection of policy and the law. We have added some invited essays to these conference presentations to provide succinct snapshots of some of the issues with

which Australia, like many other nations, grapples in this first part of the 21st century. It is by no means an exhaustive coverage of the terrain, but a sampling of some of the contemporary issues at the forefront of thinking about the complexities of the lives of Australian children and families.

Some of the topics have long histories, whereas others have more recently emerged. The aim of the collection is to stimulate consideration of some of the challenges confronting those at the intersections of social policy and the law. While individual authors may hold clear positions on the underlying issues, the volume is not a work of advocacy; rather, it seeks to explore some of the key issues and complexities involved in each topic area and stimulate informed consideration of these. Our focus in creating this collection of essays is to try to highlight the common narratives. Academic and professional disciplines tend to approach issues from their own separate perspectives and use different language and assumptions. These can amplify difference despite broad common commitment to advancing the best interests of children and their families. Some of the research and scholarship described here has used insights from interagency efforts and collaborative approaches to overcome existing gaps and divergent approaches.

The volume is organised in four parts. Part A, “Diverse Family Formation: Identity, Recognition and the Law”, has 11 contributions (Chapters 2–12). Weston and Qu explore contemporary trends in family formation, transitions and functioning. They conclude that while there have been historical shifts in family formation and diversity in family form, the functions of families remain relatively unchanged. Some forms, however, are generally more stable than others and marriages tend to have greater longevity than cohabitating relationships. That said, within each form there is still variation in functioning.

Shifts in family formation and form shape identity and fuel the desire of many to seek their origins. The chapter by Price-Robertson reflects on the rise of interest in genealogy and the popularity of online sites that enable tracing of one’s ancestry. He argues that, in the absence of “grand narratives”, many seek meaning through identifying their biological origins.

However, biological origins are not always clear, especially for those who have experienced adoption in the era when the process was “closed”. The confidentiality of records related to adoption during that period makes it very difficult, if not impossible, to tap one’s roots. Three essays (Chapters 4–6), by Kenny and Higgins, Mushin, and Castle, explore the legacy of policies in this area, including those that underpinned the practice of forced adoption and the more recent era of “open” adoption. With hindsight, policies that resulted in the forced removal of children from their families are now seen as resulting in considerable pain and enduring harm for many of those involved. One generation’s actions have become another’s cause for apology. Castle considers the current policy of open adoption and explores the gulf between legislation and the lived realities of mothers, fathers and adoptive parents.

The focus of the next three essays (Chapters 7–9) is the rise of surrogacy and donor insemination and the complexities they present. Cuthbert and Fronck explore the effects of surrogacy on family formation and the emergence of commercial surrogacy arrangements as a means of “acquiring” children, especially as intercountry adoption becomes a less accessible option. Such arrangements carry considerable challenges, both for traditional views of family formation and for the law as it grapples with the commercial aspects of surrogacy. There is also a gulf between the “power” of the couple who will raise the child conceived under commercial surrogacy arrangements and the woman who carries the foetus from conception to delivery. Everingham considers the

tensions between the “biological imperative” to have a child who is genetically related to at least one of the members of the couple and the legal constraints they confront in considering surrogacy arrangements. Wise and Kovacs focus on the policy and legal issues attending assisted reproduction. They especially consider the implications for family functioning arising from the shift to providing access to the identity of those who provide sperm for donor insemination procedures.

Sifris (Chapter 10) explores the legal complexities of same-sex parenting, highlighting the challenges that attend the diversity of family forms and the legislative complexities of dealing with these while also safeguarding the best interests of children. The final two essays in this part (Chapters 11 and 12) extend beyond the biological nuclear family to reflect the challenges facing step-families (Cartwright) and families headed by grandparents (Brennan and Cass).

Part B, “Legal and Statutory Responses to Families in Difficulty” (Chapters 13–16), focuses on the child protection system and its intersections with the law, including where decisions are taken to remove children from their families as a result of serious abuse and/or neglect, or to limit involvement with a parent living elsewhere, following separation and divorce. Bromfield, Arney, and Higgins (Chapter 13) provide an overview of the state of Australian child protection systems, focusing on the implications of increasing demand, workforce constraints, limited capacity for early intervention and increasing rates of placement of children and young people in out-of-home care. Mathews and Walsh (Chapter 14) then explore the legislative principles that underpin Australia’s range of mandatory reporting requirements, and how reporting systems can be refined and reformed. The next contribution, by Cashmore (Chapter 15), focuses on out-of-home-care in Australia, providing an overview of the numbers of children in care and discussing options for improvements to the system to enable children to develop the stable relationships that underpin positive development. In the final essay in this section, Faulks (Chapter 16) explores the complexities in family law matters involving allegations of serious child abuse. It provides a detailed consideration of the key issues related to judicial officers in the family courts having available to them evidence about abuse from various parties: the children affected, those to whom it is reported, and the parent alleged to be the perpetrator.

In Part C, nine essays (Chapters 17–25) explore the theme of “Relationship Breakdown and Family Policy and Practice”. We introduce this section with Rhoades’ historical overview of the development of Australian family law, and consideration of current challenges and future directions. The need to achieve a closer alignment between family law and social science evidence, particularly related to child development, is a major focus. In Chapter 18, Parkinson examines the indissolubility of parenthood, first providing an overview of the historical shifts in the ways in which parenting following separation and divorce has been viewed in family law, as successive legislative reforms have sought to improve the situation for children, their parents and extended families.

Two essays follow that consider the tensions between ethical obligations to ensure the confidentiality of matters disclosed to those who provide support to children and their parents and the challenges that confront judicial officers in seeking to get to the heart of complex matters, especially involving allegations of family violence of child protection concerns. Chisholm (Chapter 19) explores the complexities of precisely who can be considered to be a family counsellor and what are the constraints of confidentiality that attend counselling. Then Altobelli and Bryant (Chapter 20) argue that existing

approaches to confidentiality are in the best interests of victims of violence and abuse—be they children or parents.

Family violence is the focus of the next five essays (Chapter 21–25). Croucher explores the gulf between the courts and the systems focused on family violence and child protection, advocating the need for greater complementarity of jurisdictions, policies and service systems. Kaspiew, De Maio, Deblaquiere, and Horsfall (Chapter 22) then address the challenges of complex families, using analyses of data from the evaluation of a pilot program for family dispute resolution involving coordination between lawyers and family dispute resolution practitioners. They highlight the need for closer collaboration between sectors within a complex family law system. In Chapter 23, Kaspiew, De Maio, Qu, and Deblaquiere explore the nexus between a history of family dysfunction and the amount of time spent with one parent, focusing particularly on parents who have minimal contact (typically, though not exclusively, fathers). Fehllberg and Millward (Chapter 24) provide an examination of the effects of family violence on parenting arrangement and financial settlements in family disputes. While violence may cease following separation and divorce, its effects can still be seen in the hesitance of the “victim” to pursue legal remedies related to financial rights and child support. Part C ends with a further consideration by Moloney (Chapter 25) of the current state of family law within the historical context of the passing of the *Family Law Act 1975*, and the continuing desire to seek higher levels of cooperation between separating couples.

Part D, “Social Science and Developments in Australian Criminal and Family Law” (Chapters 26–28), includes three essays that explore the place of social science knowledge in the operation of the law. Quadara (Chapter 26) focuses on child sexual assault and the place of social science in informing the process, from first responses to final judicial determination. Kearney (Chapter 27) provides a discussion of legal principles that might improve the use of social science knowledge and that could be used to ensure that parenting determinations are in the best interests of children and their families. In the final essay in this section, Hayes (Chapter 28) discusses some of the common misunderstandings and pitfalls that attend the use of social science “evidence” in family law matters involving children.

The volume ends with a summary chapter that focuses on the sources of complexity at the intersections of social policy and the law in the Australian federation. The private and public nature of family life is considered as another key contributor to the tensions that surround both policy and the law. Finally, there is a brief consideration of some of the recent drivers of reform in family policy and Australian legal systems.

Brought together in one volume, the essays provide, if not a single voice, then at least an orchestrated harmony that narrates not only historical perspectives and current views, but points to some of the challenges for future directions in policy and law relating to the protection and wellbeing of children and their families in Australia.