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## Introduction

Scholars, legislators, courts, and advocates have dedicated significant attention to the fields of violence and abuse, divorce, and children's well-being. Although the scholarly literature in each area has grown dramatically over the past forty years, these fields are poorly integrated at the levels of research, policy, and practice (Dragiewicz, 2014; Hardesty, 2002; Fineman, 1987; Graycar, 2000; Graycar, 2012; Rathus, 2014). This is perhaps especially true of the literatures relevant to divorce in the context of domestic violence.

Family court staff, politicians, scholars, lawyers, and advocates make frequent, putatively research-based, references to best practices for promoting the best interest of the child following divorce. However, the family studies scholarship upon which these claims are ostensibly based virtually ignores violence against women and children. To date, there has been little social science research on the experiences of abused women or their children in family law systems.

The prevalence of domestic violence is well documented in Australia. The last national study of violence against women in Australia was conducted by the Australian Bureau of Statistics in 1996. *Women's Safety Australia 1996* found that 8% of women who were married or in a de facto relationship at the time of the study had experienced an incident of violence by their partner during the relationship. 2.6% of these women had experienced an incident of violence in the past 12 months. 1% reported an incident of sexual violence during the relationship. Of the women who had experienced violence from current partners, half reported that there had been more than one incident (McLennan, 1996, p, 7).

Of particular interest in relation to family law are the rates of domestic violence by former partners, violence against pregnant women, and violence in the presence of children. Australian women were much more likely to report violence by former partners than current

partners. 3.3% of women responding to the survey reported an incident of violence from a previous partner during the past 12 months. 42% of women who had been in a previous relationship reported at least one incident of physical violence by a previous partner during that relationship, however. 10% reported sexual violence by a former partner (McLennan, 1996, p. 8). Many of the women's partners used violence against them while they were pregnant. 42% of women whose partners had used violence against them and who been pregnant during the relationship reported their partner had used violence against them while they were pregnant. For 20% of these women, the violence began when they became pregnant (McLennan, 1996, p. 8). 68% of women whose former partners had been violent to them cared for children during that relationship. 46% of these women said the children had witnessed the violence (McLellan, 1996, p. 8). These numbers indicate that domestic violence does not stop when a woman separates from the man abusing her. They also indicate that children are often affected by domestic violence.

While legal changes have been made in attempts to better deal with domestic violence as well as child custody determination, there have been only limited efforts to ascertain their impact on one another. Nonetheless, it is increasingly clear that conflicting paradigms create problems for abused mothers in the family courts as they attempt to leave their abusers. For example, criminal prosecution, civil orders for protection, child protection agencies, and shelters for battered women often seek to assist women in securing safety by separating from violent partners. However, family law prioritizes children's contact with both parents, regardless of the presence of domestic violence. As a result, Apprehended Domestic Violence Orders (ADVO- the New South Wales term for a protection or no-contact order) often contain exceptions to the no-contact direction for the exercise of child contact orders (Kaye, Stubbs, & Tolmie, 2003, p. 7-8).

This means that every time abusers violate ADVOs, they can claim they are engaging in court ordered child contact, rendering the ADVO practically unenforceable and mandating ongoing exposure to abusers. While a minority of family law professionals stress the seriousness of violence against women and children following divorce, many assume that father contact is the single most important factor in children's well-being after divorce, minimize the prevalence and seriousness of abuse, and systematically discredit reports of it when they are introduced into family law processes (Dragiewicz, 2014; Hardesty, 2002; Hardesty & Chung, 2006; Hardesty & Ganong, 2006; Miller & Smolter, 2011; Parkinson, 2013; Rathus, 2014; Rhoades, 2008; Saunders, 1994).

Australian scholars have led the way in efforts to study the functioning of family law systems around domestic violence. This chapter reviews recent Australian efforts to assess the outcomes of family law reforms, emphasizing implications for domestic violence cases. The exceptional Australian research base, and the legal reforms for which that research has at times been the catalyst, provide a cautionary tale for other countries contemplating family law reform.

### **Definition of Domestic Violence**

I use the term domestic violence to refer to the type of abuse it has become popular to describe as “coercive control.” Stark has described coercive control as “a course of calculated malevolent conduct employed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control” (2007, p. 5). Domestic violence is the popular term for those focused on intimate partner violence in Australia, as reflected in the names service providers in the field apply to themselves.

To fully understand the nature of domestic violence and identify the factors that contribute to it, prevent it, and enable survivors to leave safely, it is necessary to consider the multiple social and structural factors that influence women's and men's experiences of domestic violence in their specific historical and cultural contexts (Dobash & Dobash, 1979). The term domestic violence continues to evoke this essential context and the oppressive domestic roles imposed on women throughout history.

The term intimate partner violence has often been adopted in the United States in imitation of language used in federal funding streams for research. This change in language reflects the disproportionate emphasis on treating domestic violence as if it were not a gendered phenomenon in the specific political context of the United States. Accordingly, the term intimate partner violence has been applied in well-funded positivist research that radically decontextualizes violence. Much of this research has been conducted by scholars with no expertise or apparent interest in violence against women before the call for funding. Due in part to Australia's different mechanisms for research funding, this usage has not similarly permeated the Australian milieu and this chapter reflects that reality.

### **Australia's Family Law Research Infrastructure**

Australia has an exceptional body of family law research due in large part to the federal infrastructure for research on families and family law. Establishment of a federally funded institute for family research and a council to monitor the implementation of family law have contributed to the breadth and depth of research in Australia.

#### ***The Australian Institute of Family Studies***

The Australian Institute of Family Studies (AIFS) was established in a 1980 amendment to Part XIVA of the *Family Law Act 1975*. Section 114B(a) describes the primary role of the Director of the Institute,

to promote, by the conduct, encouragement and co-ordination of research and other appropriate means, the identification of, and development of understanding of, the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society. (p. 560 ComLaw Authoritative Act C2013C00639)

AIFS is an independent statutory authority which coordinates research on different aspects of families in Australia. It has conducted reviews of the research pertinent to child custody and coordinated evaluation of revisions to the Family Law Act.

### ***The Family Law Council***

Another amendment to section 115 of the Family Law Act allowed the Attorney General to establish a Family Law Council (FLC):

The Council shall consist of a Judge of the Family Court and such other judges, persons appointed or engaged under the *Public Service Act 1999*, officers of the Public Service of a State, family counsellors, family dispute resolution practitioners and other persons as the Attorney-General thinks fit. (p.565)

(3) It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law. (p.565 ComLaw Authoritative Act C2013C00639)

The Family Law Council, comprised of a judge from the federal family court and family law practitioners, was thus tasked with monitoring the functioning of family law in Australia.

No other country has a parallel research or monitoring infrastructure intended to directly inform government policy and practice on family law. Indeed, most countries have no mechanism for data collection on custody arrangements or other aspects of family law, much less their impact over time. As a result, Australia's family law research is a unique resource. Despite legal differences between countries, the underlying issues regarding the overlap of domestic violence and family law, assumptions about the best interests of the child, and implications of mandating "non-adversarial" approaches to child custody are not unique. As a result, Australia's assessment of recent reforms offers valuable lessons for jurisdictions considering changes to family law around child custody.

### **Family Law in Australia**

Like many other countries, Australia has undertaken multiple major family law reforms since the 1970s. In Australia, as in Canada (Boyd, 2003), the United Kingdom (Collier, 2009), and the United States (Behre, 2014; Fineman, 1991), reforms have resulted from the convergence

of multiple interrelated and often contradictory factors. Lobbying by anti-feminist “father’s rights” groups, neoliberal calls for gender-blindness in family law, retrenchment of welfare programs, anti-violence research and advocacy, ramping up of child support collection, privatization of fact finding in family law, and the ideology of “non-adversarial” law have all shaped family law reform. Accordingly, reform can be viewed as taking place in the context of competing cultural concerns about gender politics, justice, and the role of law in society. Just as marriage and the family are heavily invested with cultural and political symbolism, family law is a site of contest over these and other concerns which ebb and flow in response to shifting cultural conditions.

Family law in Australia is governed by The *Family Law Act 1975*, a federal law which addresses “most aspects of family law including divorce, property, spousal maintenance, and the law of parenting” (Parkinson, 2005, p. 508). The *Family Law Act* replaced The *Matrimonial Causes Act 1959*, which was the first major codification of federal family law in Australia. It also repealed the *Matrimonial Causes Act 1965* and *1966* (Nicholson & Harrison, 2000, p. 757). The *Family Law Act* introduced no-fault divorce in Australia and established the Family Court of Australia, which is “a superior court of record” (Parkinson, 2005, p. 509-510). At the same time, it allowed for the creation of state and territorial family courts which handle certain cases. Federal Magistrates Courts introduced later also handle certain family law cases. While the Australian states and territories have responsibility for some aspects of family law, Australian child custody law is effectively similar nationwide.

### **Australian Family Law Reform and Domestic Violence**

Changes to the *Family Law Act 1975* have been a familiar feature of the Australian legal landscape. Major changes pertinent to domestic violence and child custody occurred in 1995,



2006, and 2011, with much debate surrounding each round of reform (Kaspiew, 2012; Nicholson & Harrison, 2000). These rounds of reform sequentially introduced a “shared parenting” regime, sought to more vigorously enforce that regime when it didn’t have the results intended, and repealed and revised aspects of the previous changes based on undeniable harms to children and domestic violence survivors.

### ***1995 Family Law Act Amendments***

The 1995 family law reform implemented substantial changes in the handling of family law matters in Australia. According to Rhoades and Boyd, “Their key feature was the replacement of the former custody and access division of roles with a scheme designed to encourage parents who live apart to raise their children collaboratively” (2004, p. 121). While the default disposition in the absence of an order to the contrary was for joint custody and guardianship, most families opted to continue a caregiving division of labor roughly similar to the situation before separation, with mothers doing the majority of care. The 1995 reform was intended to alter this pattern of parenting post-separation (Graycar, 2000). The 1995 reform eliminated the terms “custody” and “access” as a means to minimize recognition that most children continue to have mothers as primary caregivers and emphasize the symbolic importance of fathers post-divorce. The reforms renamed access and custody, which were subsequently termed “care” (which roughly equates to physical custody) and “responsibility” (which roughly equates to legal custody) in Australia (Rathus, 2014). Graycar (2000) noted that “unlike most exercises in law reform, it did not address any particular problem or respond to some identified ‘mischief’ that apparently flowed from the practice of children being raised predominantly by one parent” (p. 746). Instead, the reforms were based on unsubstantiated complaints and anecdotes by groups lobbying for “fathers’ rights” and alleging “bias” against men in family court

(Graycar, 2000; Graycar 2012; Kaye & Tolmie 1998 a & b). These lobbying groups demanded presumptive 50/50 physical custody, an associated decrease or elimination of child support liability, and a number of punitive measures meant to discourage reporting of abuse, undermine the credibility of abuse reports, and object to recognition of domestic violence as a pervasive, serious, and highly gendered social problem (Kaye & Tolmie 1998 a & b). For example, Kaye and Tolmie documented men's groups making these recommendations to discredit reports of abuse:

- suggestions that prioritise the prevention of false allegations of child abuse over safeguards put in place for genuine victims of such abuse;
  - suggestions that if children decide that they don't want access to the noncustodial parent, then there should be an assumption that they have been brainwashed by the custodial parent, whereby automatic reversal of custody should ensue; and
  - expressions of sympathy for men who are so distressed by their loss of access to the children they purportedly love that they murder the objects of their affection.
- (internal citations omitted Kaye & Tolmie, 1998b, p. 181, internal citations omitted)

Kaye & Tolmie also found these punitive recommendations from men's groups in their study:

- the suggestion that women who obstruct court ordered access should be [jailed];
- the suggestion that women who allege domestic violence and cannot produce physical injuries, photographic or medical evidence and witnesses, should be automatically charged with false complaint;
- the suggestion that the custodial parent should be required to pay tax on their child support payments;

- and the suggestion that custodial parents on social security should have their pension payments reduced by a dollar for every dollar they receive in child support (Kaye & Tolmie, 1998b, p. 189-190, internal citations omitted).

In addition to these suggestions, the groups also recommended that welfare payments to single mothers should be eliminated while employment support to men should be prioritized. Kaye & Tolmie note that these measures would push women to stay in unsatisfactory marriages out of financial necessity (Kaye & Tolmie, 1998b, p. 190).

Despite hopes that denoting children as equally shared would “alleviate the distress of non-custodial parents, the majority of whom are fathers” (Graycar, 2000, p. 746) and appease lobbying groups, it had the opposite effect. Harrison (1999) noted that,

The implementation of the reforms in mid-1996 was associated with a huge increase in activity – 33,304 applications for residence [roughly equivalent to physical custody] were made in the year 1996–97, and 38,411 in the following 12-month period.

Large increases in application numbers were also apparent in relation to access and contact (where, the law remains essentially unchanged, despite the change in terminology). Access applications totalled 14,144 in 1994–95, they amounted to 13,814 in 1995–96, and increased to 21,897 in 1996–97 and 23,958 in 1997–98. (Harrison 1999, p. 63)

Child-related court orders continued to increase from 1996-1998, suggesting that “families are becoming more litigious” (Harrison, 1999, p. 63) rather than less so. The reforms had the effect

of increasing the load on the family law system rather than reducing it. As of 1999, the time from filing to hearing in these cases was 70 weeks in 5 of 11 registries (Harrison, 1999, p. 63). Despite the fact that the changes in the 1995 reform were intended to appease non-custodial fathers, complaints about Australian family law around child custody and support continued throughout the 1990s and intensified into the 2000s. This led the government to consider major changes to family law and associated processes.

Australia's research program on family law was further reinforced in 2001 when the Family Law Pathways Advisory Group presented *Out of the maze: Pathways to the future for families experiencing separation*. This report, outlining a sweeping reorganization of the Australian family law and family services system, recommended

That a comprehensive research strategy be developed recognising the unique characteristics of Australia's social, geographic and constitutional environment to:

- a monitor and evaluate the future system;
- b develop a coherent national research agenda in family law and separation issues;
- and
- c target specific high-priority issues. (2001, p. 22)

Despite the fact that no federally supported research had been published yet, Prime Minister John Howard established an inquiry into child custody arrangements in the event of family separation in 2003. "In making the announcement the Prime Minister stressed that no one legislative change or pronouncement can alter the concerns, dealing with the matter is a national responsibility, and implied that it is important to the greatest extent possible, children have the benefit of regular

and meaningful contact with both their parents” (House of Representatives Standing Committee on Family and Community Affairs, 2003, p. 1-2).

This inquiry charged the House of Representatives Standing Committee on Family and Community Affairs with

Inquir[ing] into, report[ing] on and mak[ing] recommendations for action:

(a) given that the best interests of the child are the paramount consideration:

(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and

(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

(b) Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children. (2003, p. 2)

The committee published *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation* in 2003. As foreshadowed by the committee’s understanding of Howard’s preference to promote co-parenting following separation, the report included numerous recommendations to further reinforce the practice. However, this report also reveals the undeniable importance of violence and abuse for family law.

The first recommendation of *Every picture tells a story* was to impose a rebuttable presumption of “equal shared parental responsibility, as the first tier in post-separation decision making.” The second recommendation was to “create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse” (*Every picture tells a story*, 2003, p. 2). The report contained numerous other recommendations. However, these two recommendations strongly influenced the 2006 Amendments to the Family Law Act and were two of the most significant points for survivors of domestic violence. The implications and implementation of these contradictory priorities are discussed in the next section.

### ***The Shared Parental Responsibility Act 2006***

With a major report on the effects of the previous round of reforms due from the Australian Institute of Family Studies in 2007, the Howard government moved forward with *The Shared Parental Responsibility Act* in 2006 (Rhoades, 2008). This amendment to the *Family Law Act* imposed a variation of the *Every Picture Tells A Story* report’s first two recommendations as the “two pillars” guiding child custody determination in Australia. It pushed the 1995 reforms even further, introducing a rebuttable presumption of “equal shared parental responsibility” (Rhoades, 2008, p. 279). As the title indicates, this set of reforms was intended to promote substantial if not equal involvement in child care by both parents following separation, a result intended but not fully achieved by the 1995 reforms. Rhoades noted in 2008 that even the earliest research suggested that

the reforms have been successful in producing an increase in substantially shared care arrangements since the legislation came into force. At the same time, however, the

research indicates that a significant number of these arrangements are characterised by intense parental conflict, and that shared care of children is a key variable affecting poor emotional outcomes for children. (internal citations omitted, p. 280)

The prioritization of shared responsibility and instruction for courts to consider 50/50 care as the starting point for custody determinations, and consider substantially shared care where equitable custody arrangements were clearly not in the child's best interest, effectively marginalized the safety concerns embedded in the second pillar. The 2006 reform also included a "friendly parent" provision, requiring the court to consider each parent's willingness to promote a close and continuing relationship between their child and the other parent as a factor in deciding custody (Graycar 2012). This exacerbated the negative unintended outcomes of the 2006 reforms by discouraging reporting of violence and abuse (Bagshaw et al, 2011; Graycar, 2012; Hart & Bagshaw 2008).

Rhoades notes that there was general acknowledgement that the family law reform was the *cause* of increasing numbers of inappropriate shared care arrangements, such as those imposed against the will of parents or children, on parents who had reported abuse, and in families where there was ongoing conflict. However, many family studies scholars and family law practitioners did not suggest undoing the harmful legal changes that had caused the problem. Instead, they recommended that family lawyers and personnel like mediators become experts in child development and discern when substantial contact would be in the best interest of the child and when it would not and advise the parties accordingly (Rhoades, 2008). However, evidence of the harmful unintended outcomes of the 2006 family law reform continued to mount.

The release of three major research reviews and studies commissioned by the Australian Attorney General in 2010 was the catalyst for even more family law reforms, which rolled back some of the most harmful parts of *The Shared Parental Responsibility Act 2006*. The Australian Institute of Family Studies *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009); the *Family Courts Violence Review* (Chisholm, 2009); and the *Improving Responses to Family Violence in the Family Law System* report (Family Law Council, 2009), in combination with independent legal and social science research, legitimated concerns about the family law system's capacity for dealing with domestic violence. These concerns about adequately addressing domestic violence and the 2011 reform are described in the next section.

#### ***Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011***

Following the 2006 Family Law Reform, independent and government-commissioned scholarship continued to document and reinforce the concerns raised by domestic violence scholars and anti-violence advocates. Another round of law reform followed a change of government. This reform took place during the tenure of Australia's first female Prime Minister, Julia Gillard. The 2011 Amendments attempted to ameliorate the harms caused by the previous reforms without dislodging the idealization of shared parenting post-separation. Among other changes, the Amendments stressed that "protection from harm" should be prioritized over "meaningful relationships with both parents"; expanded the definition of family violence to reflect the inclusion of multiple forms of abuse including emotional abuse and exposing children to adult violence; increased reporting requirements for family law professionals; eliminated the "friendly parent" clause; and eliminated sections requiring "courts to make costs orders against a party found to have 'knowingly made a false statement' in court proceedings" (Kaspeiw, 2012, p. 4).



The Frequently Asked Questions sheet about this round of reform says, “The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*

(‘Family Violence Act’) amends the *Family Law Act 1975* (Cth) (‘Family Law Act’) to provide better protection for children and families at risk of violence and abuse”.

The Attorney General’s Department stressed that the 2011 reform was evidence based:

The Family Violence Act was developed in response to three key reports received by the Government into the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (‘2006 Family Law Reforms’) and how the family law system deals with family violence. These reports are the:

- *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS)
- *Family Courts Violence Review* by the Honourable Professor Richard Chisholm AM
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council.

These reports and other research on the issues of family violence, shared care and infant development, provide a strong evidence base for reform. The reports indicate that the Family Law Act fails to adequately protect children and other family members from family violence and child abuse. (Attorney General’s Department, 2011a)

At the same time, nearly half of the Fact Sheet about the 2011 reform is focused on assuaging the concerns of the fathers’ rights lobby. A cautionary yellow box on the fact sheet reads,

### **What the Family Violence Act does not do**

The Family Violence Act does not ‘roll back’ the 2006 shared parenting reforms. Parenting arrangements will continue to be made in a way that promotes a child’s right to have a meaningful relationship with both parents where this is safe.

The Family Violence Act will not impact outcomes for separating families where there are no family violence or child abuse concerns. For those cases where there is no risk of violence or abuse and it is in the child’s best interests, the courts will continue to apply the presumption of equal shared parental responsibility and consider equal time or, as the case requires, substantial and significant time.

The family courts will not lose the ability to award costs where a party knowingly makes false statements. The family courts will retain a broad power to make costs orders. In addition, it remains a criminal offence to knowingly make a false statement during court proceedings. (Attorney General’s Department, 2011b)

This document demonstrates the government’s attempt to walk the line between ameliorating the harms to children and survivors of abuse and validating the complaints of disgruntled men’s groups. This balancing act was driven by an ideological and disproportionate focus on substantially shared parenting post-separation, despite the fact that the men’s groups complaints had been empirically disproven. At least, in this instance, the research base was presented to reinforce the concerns about domestic violence.

### **Key Findings from the Australian Research**

Dozens of studies and literature reviews have been conducted and considered under the auspices of Australian family law reform process (see for example Wilcox 2012). These studies have mixed findings on the experiences of parents and children in the family law system and reinforce the diversity of experiences of family members. However, significant findings on domestic violence and the harms to children of compelling co-parenting have perhaps gained more credence in this context than in other countries because of their status as official government knowledge. Key findings from the evaluations include:

- violence is common in families that come into contact with the family law system (Kaspiew et al, 2009)
- the presence of violence rarely affects the division of parenting via family law processes (Kaspiew et al, 2009)
- domestic violence is often minimized in the family court system (Hart & Bagshaw, 2008)
- children in substantially shared residence arrangements fare worse than those in primary mother custody when there were safety concerns about ongoing contact (Weston et al , 2011)

These findings reflect the concerns that have been articulated by violence scholars and anti-violence advocates.

### **Issues for Same Sex Couples**

Part VII of The *Family Law Act* dealing with children includes de-facto, biological, and marriage relationships, so custody issues in same-sex relationships are not as affected by marriage as in the United States. Much of the state supported family studies research, such as that produced by Australian Institute of Family Studies, has been used to support pro-marriage rights campaigns. These campaigns stress the similarity of same-sex two-parent households as

just as good as heterosexual nuclear families, frequently trading on the stigmatisation of single mothers to align themselves with idealized family forms. To date there is no published research that specifically deals with domestic violence and family law in same sex couples in Australia.

### **Indigenous Issues**

Despite repeated assertions of the importance of culturally appropriate handling of family law in Indigenous families, the high rates of domestic violence in Indigenous families, and the recommendation for national tracking of Indigenous families in family law cases, there has been little research that specifically looks at the experiences of Aboriginal or Torres Strait Islanders in the family court. No study has examined the family law implications for Indigenous families experiencing domestic violence under the reforms. However, Indigenous culture is one of the factors to be considered in child custody cases according to the Family Law Act 1975. These cases also raise concerns about the application of an idealized nuclear family model to all family configurations and cultures.

Legal scholars have noted that the Australian family law paradigm of the nuclear family is inadequate and inappropriate for Aboriginal families that are more often extended in structure. As Ruska and Rathus argue, “This has been exacerbated over the last 15 years with reforms which have stressed the ongoing importance of both parents in the lives of their children after separation” (2010, p. 8). Indeed, the current family law on Indigenous families is embedded in the *Shared Parental Responsibility Act* 2006, which primarily stresses the importance of biological fathers in children’s lives (Ruska and Rathus, 2010). To date, the research on Indigenous families, domestic violence, and family law are poorly integrated. However, recognizing that the diverse kinship care systems more common in Indigenous families are at

least as good as nuclear heterosexual families poses an implicit threat to the foundational assumption embedded in the 2006 *Act*: that patriarchal nuclear families are superior.

### ***Ongoing Concerns***

Contrary to popular lore of an “adversarial” family court context which historically granted sole custody to mothers against the express wishes of fathers, Australian law has actively promoted conciliatory processes like private orders, mediation, and alternative dispute resolution since 1975. The *Family Law Act 1975* continues to articulate an ideal of the nuclear heterosexual family. For example, Section 43 articulated some foundational values enshrined in the law:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare: and
- d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children. (Nicholson & Harrison, 2000, p. 757-758)

Despite many amendments to family law since 1975 (71 of them), these core values are little changed. In fact, recent reforms may be seen as redoubling the imperative to reconcile and failing that, reinforce the supremacy of paternal demands at separation or divorce. Following the implementation of no-fault divorce in Australia, divorce rates temporarily increased sharply,

followed by a sharp decline and plateau (DeVaus, 2004, p. 211). Some commentators assumed that the fault-based court process itself was the cause of conflict between divorcing parties and hoped that removing the fault from divorce would make it less adversarial. However, long after the implementation of no-fault divorce and other “non-adversarial” approaches, couples continue to end up in court and a substantial minority continue to experience protracted legal conflict, suggesting that the conflict was the catalyst for the divorce rather than the opposite.

Efforts to reform family law to compel 50/50 custody have multiple contributing factors. Contrary to the hegemonic narrative of children’s best interests, however, family law reforms are only incidentally related to the evidence on the needs of children. As Hart and Bagshaw (2008) argue,

In order to improve court practices in cases of domestic violence, normative assumptions about all children needing to spend time with their fathers must be challenged. Dominant 'truths' about children and their needs and interests ignore contemporary research findings, inappropriately regulate the subjectivities and rights of children, and misconstrue their needs in cases where domestic violence is an issue. (305)

## **Conclusion**

Discussion here has focused on recent family law reforms concerning domestic violence. As the Australian experience shows, the adoption of a formal presumption in favor of “shared parental responsibility” has been one of the most problematic aspects of family law for adult and child survivors of domestic violence. However, the existence of a growing body of applied

research on the outcomes of family law reforms in domestic violence and “conflict” cases has been a key factor in repealing some of the Family Law Act’s most harmful sections.

The promotion of friendly parenting and conciliation ideologies has been equally harmful. While Australia’s unique research base has facilitated the repeal of some of the most damaging sections of the *Family Law Act*, informal assumptions have proved more resistant to the influence of research evidence (Rathus, 2014). The assumption that maximum contact with fathers is the preeminent factor in the best interest of the child and persistent discrediting of reports of abuse present ongoing difficulties for mothers trying to safely separate from abusers. However, research on the *Family Law Amendments 2011* has already been commissioned and funded by the government. Australian legal scholars continue to monitor the implementation of family law in domestic violence cases under the most recent reforms. Regardless of the political nature of knowledge production and policy implementation, the existence of ongoing research on the implications of family law is a valuable asset that can benefit other countries. The Australian experience demonstrates the harms caused to abused mothers and children by ideologically driven fatherhood promotion campaigns. The focus on the preservation of patriarchal authority and relations rather than family members’ rights to safety is not an accident.

As the Australian experience shows, family studies, domestic violence, legal, and public health scholarship on abuse can inform policy under certain political conditions. However, critical scholars must continue to challenge the ideology of familial patriarchy which provides the scaffold for domestic violence for substantive change to occur in the family law system. It is notable that calls for shared parenting in intact couples before separation are absent from most discussions of parenting, divorce, and family law. Substantive changes in family care responsibilities were at the core of early feminist campaigns for gender equality, but pervasively

gendered divisions of household labor persist. Beyond individual families, structural changes in a range of institutions, from law to policies around family leave, child protection, child care, housing, policing, and welfare are necessary to secure the right, enshrined in human rights law, to live free from violence.



## References

- Attorney General's Department. (2011a). Family Violence Act Fact Sheet. Retrieved April 2, 2014, from <http://www.ag.gov.au/familyviolenceact>
- Attorney General's Department. (2011b). Family Violence Act Frequently Asked Questions. Retrieved April 2, 2014, from <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Violence%20Act%20FAQ.pdf>
- Attorney General's Department. (2003). *Government response to the Family Law Pathways Advisory Group report*. Canberra, Australia: Attorney-General's Department, Commonwealth of Australia.
- Attorney General's Department. (January 28, 2010). *Release of Family Law Reviews..* Canberra, Australia
- Australian Law Reform Commission & New South Wales Law Reform Commission. (2010). *Family Violence - A National Legal Response: Summary Report*. Canberra, Australia: Australian Law Reform Commission.
- Bagshaw, D., Brown, T., Wendt, S., Campbell, A., McInnes, E., Tinning, B., ... Baker, J. (2011). The effect of family violence on post-separation parenting arrangements: the experiences and views of children and adults from families who separated post-1995 and post-2006. *Family Matters*, 86, 49–61.
- Behre, K. A. (2014). Digging beneath the equality language: The influence of the fathers' rights movement on intimate partner violence public policy debates and family law reform. *WVU Law Research Paper No. 2014-1*.

- Boyd, S. B. (2003). *Child custody, law, and women's work*. Toronto, ON: Oxford University Press.
- Family Law Council. (2009). *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*. Canberra: Family Law Council - Family Violence Committee.
- Chisholm, R. (2009). *Family Courts Violence Review*. Australian Government, Attorney General.
- Collier, R. S. (2009). The fathers' rights movement, law reform, and the new politics of fatherhood: Some reflections on the UK experience. *University of Florida Journal of Law and Public Policy*, 20, 65.
- DeVaus, D. (2004). *Diversity and change in Australian families*. Melbourne: Australian Institute of Family Studies.
- Dobash, R. E., & Dobash, R. P. (1979). *Violence against wives: A case against the patriarchy*. New York: Free Press.
- Dragiewicz, M. (2014). Domestic violence and family law: Criminological concerns. *International Journal for Crime, Justice and Social Democracy*, 3(1), 121-134.
- Dragiewicz, M. (2009). Why sex and gender matter in domestic violence research and advocacy. In E. Stark & E. Buzawa (Eds.), *Violence against women in families and relationships: Vol. 3 Criminal justice and the law* (pp. 201–215). Santa Barbara, CA: Praeger.
- Dragiewicz, M., & Lindgren, Y. (2009). The gendered nature of domestic violence: Statistical data for lawyers considering equal protection analysis. *American University Journal of Gender, Social Policy & the Law*, 17(2), 229–268.
- Family Law Act 1975*

*Family Law Amendment (Shared Parental Responsibility) Act 2006*

*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*

Family Law Pathways Advisory Group. (2001). *Out of the maze: Pathways to the future for families experiencing separation Report of the Family Law Pathways Advisory Group*. Canberra.

Fineman, M. A. (1987). The uses of social science data in legal policymaking: Custody determinations at divorce. *Wisconsin Law Review*, 1, 107–58.

Fineman, M. A. (1991). *The illusion of equality: The rhetoric and reality of divorce reform*. Chicago: University of Chicago Press.

Graycar, R. (2012). Family law reform in Australia, or frozen chooks revisited again? *Theoretical Inquiries in Law*, 13(1), 241–270.

Graycar, R. (2000). Law reform by frozen chook: Family law reform for the new millennium? *Melbourne University Law Review*, 24(3), 737–755.

Hardesty, J. L. (2002). Separation assault in the context of postdivorce parenting: An integrative review of the literature. *Violence Against Women*, 8 (5), 597-625.

Hardesty, J. L., & Chung, G. H. (2006). Intimate partner violence, parental divorce, and child custody: Directions for intervention and future research. *Family Relations*, 55(2), 200–210.

Hardesty, J. L., & Ganong, L. H. (2006). How women make custody decisions and manage co-parenting with abusive former husbands. *Journal of Social and Personal Relationships*, 23(4), 543–563.

Harrison, M. (1999). *Family law: Recent issues and initiatives* (pp. 61–64). Canberra, Australia: Australian Institute of Family Studies.

- Hart, A. S., & Bagshaw, D. (2008). The idealised post-separation family in Australian family law: A dangerous paradigm in cases of domestic violence. *Journal of Family Studies*, 14(2/3), 291–309.
- House of Representatives Standing Committee on Family and Community Affairs. (2003). *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*. Canberra: The Parliament of the Commonwealth of Australia.
- Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., & Qu, L. (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies.
- Kaye, M., Stubbs, J., & Tolmie, J. (2003). Domestic violence and child contact arrangements. *Australian Journal of Family Law*, 17, 93–113.
- Kaye, M., & Tolmie, J. (1998a). Discoursing dads: The rhetorical devices of fathers' rights groups. *Melbourne University Law Review*, 22, 162–194.
- Kaye, M., & Tolmie, J. (1998b). Fathers' rights groups in Australia and their engagement with issues of family law. *Australian Journal of Family Law*, 12(1), 19–68.
- McLennan, W. (1996). Women's Safety Australia 1996. Canberra, Australia: Australian Bureau of Statistics. Retrieved from [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F16680629C465E03CA256980007C4A81/\\$File/41280\\_1996.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F16680629C465E03CA256980007C4A81/$File/41280_1996.pdf)
- Miller, S. L., & Smolter, N. L. (2011). "Paper abuse": When all else fails, batterers use procedural stalking. *Violence Against Women*, 17(5), 637–650.
- Neilsen, M. A. (2011). *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (No. 126 2010–11). Canberra, Australia: Parliament of Australia.

- Nicholson, A., & Harrison, M. (2000). Family law and the family court of Australia: Experiences of the first 25 years. *Melbourne University Law Review*, 24, 756-783.
- Parkinson, P. (2005). The law of postseparation parenting in Australia. *Family Law Quarterly*, 39, 507-525.
- Parkinson, P. (2013). Violence, abuse and the limits of shared parental responsibility. *Family Matters*, 92, 7-17.
- Rathus, Z. (2014). The role of social science in Australian family law: Collaborator, usurper or infiltrator? *Family Court Review*, 52(1), 69-89.
- Rhoades, H. (2008). Dangers of shared care legislation: Why Australia needs (yet more) family law reform. *Federal Law Review*, 36(3), 279-299.
- Rhoades, H., & Boyd, S. B. (2004). Reforming custody laws: A comparative study. *International Journal of Law, Policy and the Family*, 18, 119-146.
- Rhoades, H., Graycar, R., & Harrison, M. (2000). *The Family Law Reform Act 1995: The first three years*. University of Sydney & Family Court of Australia.
- Ruska, K., & Rathus, Z. (2010). The place of culture in family law proceedings: Moving beyond the dominant paradigm of the nuclear family. *Indigenous Law Bulletin*, 7(20), 8-12.
- Stark, E. (2007). *Coercive control: How men entrap women in personal life*. New York: Oxford University Press.
- Weston, R., Qu, L., Gray, M., Kaspiew, R., Moloney, L., & Hand, K. (2011). Care-time arrangements after the 2006 reforms: Implications for children and their parents. *Family Matters*, 86, 19-32.
- Wilcox, K. (2012). *Intersection of family law and family and domestic violence*. Sydney: Australian Domestic & Family Violence Clearinghouse.