

RESPONSIBLE FAMILIES

**A CRITICAL APPRAISAL OF
THE FEDERAL
GOVERNMENT'S REFORMS**

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SYNOPSIS

In this thesis, I critically appraise the latest reforms of the Australian family law system and assess the underlying philosophy of these measures.¹ I specifically analyse the introduction of shared parenting and mandatory family dispute resolution.

My starting point is that legislative changes alone cannot be used as a means of social change. Legal models cannot function correctly if they reflect an ideal rather than social reality, and in light of the current reforms, the Australian family law system risks such a fate. The system, which presumes that parents share parental responsibility upon separation (and therefore during the intact family), does not represent social truth. It appears to make an assumption that shared parenting is the societal practice, but I believe the law is really being used to impose such an ideal. If the reforms are to be successful, I argue that substantial social and economic structural change is required, in order to break down the dichotomy between men's and women's roles, which continue to define the male role as economic and public and the female responsibility as caregiving and private. This is particularly important if the Government is genuine about its aim to make parenting gender neutral in practice and not just in theory.

This thesis demonstrates that the reform measures are a response to the perceived rather than real problems identified in the family law system, and that they are largely issues raised under the influence of fathers' rights groups. The response of the Government to remedy the system is therefore flawed as it is based on misconceived notions about the family law system. It incorrectly identifies judicial discretion as a fundamental cause of the problems and tries to replace it with a more rules-based

¹ My thesis was largely written while these amendments to the system were mere proposals, however, the fact that they are now being implemented does not change the core of my argument in any way.

approach to determining children's matters. I suggest that the real problems can be found in the continuance of deeply entrenched customs and gendered role constructions, and the remedies lie in their overhaul.

The social culture that makes the mother the primary caregiver and allocates to the father diminished parental responsibility from the time the child is born needs to be transformed. A suitable legal response to the current impasse would be to begin by educating the public about the way the system works and provide counselling to families on how to structure their united life well before they reach the breakdown point. Assisting families while they are still functional, as opposed to when they are dysfunctional, would arguably make a large difference in how the family law system is understood. Moreover, it would be able to facilitate ongoing communication for separating couples and, most importantly, thereby uphold the best interests of the child.

STATEMENT OF CANDIDATE

This work has not been submitted for a higher degree to any other university or institution.

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While undertaking my Masters I have been residing in Cambridge, UK, and I wish to thank the University of Cambridge, specifically the Centre for Family Research, for inviting me to attend lectures. They have provided useful information on the family laws and policies of other countries, exposed me to recently published research and findings on roles of mothers and fathers in various cultures and challenged my critical thinking.

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CHAPTER 1: INTRODUCTION

The Australian family law system (“the system”) has increasingly come under attack by the Government and certain lobby groups, notably fathers’ rights groups, for being biased against men in contact and residence disputes and for its adversarial process, which is said to exacerbate rather than alleviate the stress associated with divorce. These criticisms have been the subject of parliamentary investigation and are the driving force for major reforms of the system currently being implemented by the Government.¹

The purpose of this thesis is to critique the major reforms presently being introduced to the family law system and to suggest an alternative way to improve the way parenting arrangements are dealt with after separation. The two main changes – the presumption of shared parenting and mandatory family dispute resolution – will be the main focus of this analysis and will be addressed separately in this order.

My argument is that the Government’s response to the problems with the system is flawed, as it has misidentified the real problems and because it intends to use legislative change as a means of social change. If the Government genuinely wishes to implement a family law system that promotes the best interests of the child, and simultaneously upholds a formal equality model of parental responsibility, it needs to make some fundamental changes elsewhere. I assert that the real solution to the perceived problems

¹ In June 2003 the Government announced that it was establishing an inquiry into “child custody” arrangements in the event of family separation together with child support and grandparents’ rights of contact. The Standing Committee on Family and Community Affairs of the House of Representatives (“the Committee”) was asked to examine a number of issues, including 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. The Report of the Inquiry was published in December 2003: House of Representatives Standing Committee on Family and Community Affairs, *Every Picture tells a Story: Report of the Inquiry into child custody arrangements in the event of family separation*, Parliament of Australia, December 2003. This Report is discussed in some detail in this thesis. It can be found at www.apf.gov.au/house/committee/fca/childcustody/report/htm. Many of the Government’s proposals for

with the system lies in a culture change that requires economic and social restructuring. I also argue that more assistance must be provided to families before they reach breakdown point. I ask how legislative changes can be made to de-gender parenting when in reality we live in a culture that upholds a gendered notion of parenting and does not promote a mentality of shared domestic responsibility. I identify a major problem being the Government's tendency to encourage joint parenting only in theory; and I wish to assess the practical problems with a formal equality model for parental responsibility when it is not a social reality. I will substantiate my argument with the help of feminist legal theory and sociological literature, and use both primary and secondary material. I aim to challenge the way the Government is in fact using the law to maintain a gender hierarchy in society, and I intend to present a new set of ideas that move and change with the times.

Given the subject of my thesis is essentially the criticisms faced by the system and the Government's attempts to resolve them, I start, in chapter 2, by discussing in detail the perceived problems with the system and the Government's response to those problems – the current reforms. Amongst the changes is the introduction of Family Relationship Centres, the concept of shared parenting, compulsory family dispute resolution, changes to the court system and community education campaigns. I state what I view are the problems with the Government's response, notably, that it has misidentified the real issues, neglected to make certain practical considerations in its big plans and, in some ways, seeks to make changes to the law that would simply repeat what it already stipulates.

changes to the system are currently being implemented and therefore my thesis has become a response to these changes, rather than to mere proposals: www.australia.gov.au/familyrelationships.

Having detailed the Government's amendments to the system, in chapter 3 I look at what the system relating to children's issues was before the introduction of these changes and at the long-standing fundamental principles of the system. I discuss what the framework for children's matters has been until today, and specifically, its defining features. I briefly examine its history to see how we have arrived at the law that deals with contemporary children's matters and procedural issues concerning these matters. I also look at existing initiatives made by the Family Court of Australia ("the FCA") to improve the system. A discussion of the results of the limited but useful research undertaken into the effects of the *Family Law Reform Act 1995* is used to determine the potential impact the Government's current reforms would have in practice. In this discussion, it becomes evident that the law has been used to push a formal equality model of parental responsibility, which is only further emphasised by the current changes. Hence, I go on to discuss various problems with the formal equality model of parental responsibility, notably, that it is quite unrealistic in our culture that makes the mother the primary caregiver to the children, and allocates diminished responsibility to the father from birth.

This leads me to a discussion, in chapter 4, of the institution of the family and how it is regulated in Australia. I look at how the traditional notion of the family is reinforced in contemporary society, for example, with the lack of availability of child care and poor parental leave laws. I research how other countries use their family policies in the workplace to encourage a more equal delegation of domestic roles in order to demonstrate that there must be willingness amongst the population for equal parental responsibility and to assess whether or not a change in that direction in Australia would be feasible in practice.

In short, to obtain equal parental responsibility in reality, changes must be made to external structures that indirectly affect the family, as well as within the private realm of the family. Legislative changes ought not to be made until practices of parenting catch up to the current law, as the dividing line between the ideal and practice will simply grow. This is where the Government should be concentrating on initiating change, through counselling and education programs for each family while they are still intact, and preferably before children are born into the family. As family law is linked to wider structures such as the workforce and labour laws, and families are often affected by workplace policies on the family, employment conditions for men and women must undergo a transformation. These changes should have ideally occurred before the Government's reforms were introduced. Laws encouraging the exercise of shared parental responsibility, by means of part-time work and flexible working time for both men and women would be useful in aligning social reality with current family laws. My argument is that the current law reform and changes to the system could only be the answer if the law and the system were the problems.

Having stressed the importance of encouraging equally shared parental responsibility in everyday life, I analyse, in chapter 5, theories of equality in order to assess the best way (if there is one) in which to achieve gender justice both in the public and private spheres. I compare the formal equality or gender-neutral approach with the differences approach and the subordination or dominance approach to gender equality. I aim to demonstrate that the formal equality approach is a simplistic response to a complex issue.

The current reforms are arguably intended to appease men's groups. However, the problem here is that the demands of men's groups deploy the simplistic (and incorrect)

model of equality. In chapter 6, I look at the rise of men's movements and their tendency to misidentify the real issues. A popular idea amongst the men's groups is the introduction of a rebuttable presumption of shared parenting. The Government's reforms are based on these misconceptions and they are therefore flawed and will simply fail. The main emphasis is on curtailing judicial discretion.

Chapter 7 examines the distinction between the concepts of shared parenting and shared parental responsibility. In doing so, I rely on the views of the judiciary and children, who have been the subject of studies. After the discussion in the previous chapters of our culture of unequal shared parenting that continues to delegate the role of primary caregiver to the mother, I ask here how fathers' rights lobby groups can rationally allege that the family law system is biased against them in the determination of children's matters. At the conclusion of this chapter, I propose a way to mend the misconceptions of the system.

In chapter 8, I analyse the second component of the Government's answer to what it perceives are the problems with the family law system – mandatory family dispute resolution.² I assert that the Government has somewhat reluctantly recognised the need for a culture change, however, it believes the way to make that change is through the establishment of a less litigious society. In my view, this is not enough of a change to rectify what it sees as problematic in the system. I look at the various types of dispute resolution and whether or not the Government is heading in the right direction. I also argue that, taking into account the nature of family law disputes regarding parenting

² It is important to note here that the new terminology, when discussing alternative dispute resolution in the context of family law, is "family dispute resolution" – see Parts II, III, IIIA and IIIB of the *Family Law Act 1975*. However, in my discussions with members of the profession (family lawyers and mediators), the terms "alternative dispute resolution", "primary dispute resolution" and "family dispute resolution" are still used interchangeably. As a result, although I recognise the changes in the terminology, this thesis also uses the above terms interchangeably. In light of the rapidity of the changes in the terminology, it could change again before final submission of this thesis.

after separation and the way the large majority of families are structured in reality, it is far better to devise a policy of early intervention into family life and a culture that truly encourages a mentality of equal shared parenting.

I am embarking on this project after having spent three years working specifically in the area of family law. While working in private practice, I also devoted my time as a Duty Solicitor at the FCA and as a volunteer Solicitor at the Inner City Legal Centre in Darlinghurst, NSW, a community-based centre offering free legal advice. I have had the conduct of a variety of my own family law files, with an emphasis on children's matters. I made frequent court appearances in the FCA, the Local Court Family Matters and the Federal Magistrates Court. In October 2003, I also undertook the training course required to become a separate representative for children (now referred to as an independent children's lawyer). I am passionate about family law and an advocate of the fundamental principles behind the Australian family law system, which prioritises the rights of the child and makes the best interests of the child the paramount consideration. With the right support from the Government, I believe our system would make a very sound system and accordingly, face far fewer criticisms.