Family Law Reform in Australia, 1992 and Beyond

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A. Introduction

In an earlier article, this author wrote[1] that, in many respects, family law is an unrewarding area for the reformer because it is rarely, if ever, possible to provide solutions which are acceptable to all parties or bodies of opinion. At the same time, he wrote[2] that the pace of family law reform showed no sign of slowing down, with the Family Law Act 1975 as the major piece of legislation, being placed under continual scrutiny from such bodies as the Family Law Council[3] and the Institute of Family Studies.[4] The year 1992 is an appropriate starting point for this present article for two reasons. First, it was the year which the earlier article left off, and, secondly, it was the year in which a report appeared which was to be of central significance for the most important area of family law in Australia – that is, the law relating to children.

One should note the jurisdictional problems which have made Australian family law more disparate than it need be: by reason of Chapter 1 Section 51 (xxii) of the Constitution of Australia Act 1900, the Government of the Commonwealth of Australia is empowered to make laws in respect of 'Divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants ...'. This means the Federal Government may not legislate in respect of such matters as the legal relationship of couples who live together without marriage or adoption of children. Although some developments have occurred in these areas,[5] this article

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1 F. Bates, 'Ten Years of Australian Family Law Reform: 1982–1992' in (1993) 2 *Asia Pacific LR* 43, at p. 45.

2 Ibid. at p. 55.

3 Family Law Act 1975 s. 115.

4 Ibid. Part XIVA.

5 Particularly in respect of the former, see Property (Relationships) Act 1984 (NSW) as amended in 2000; Property Law Act 1974 (QLD) as amended in 2000; Domestic Relationships Act 1994 (ACT).

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will concentrate on recent Commonwealth legislative change as there have been radical recent developments and light may be cast on the law reform processes which have taken place in Australia.

B. The Child and the Law

I. The Report

In April 1992, the Family Law Council produced its report *Patterns of Parenting After Separation*.[6] The council had initially been given the following six terms of reference: First, to evaluate relevant research studies to identify patterns of parenting within both pre-separation and post-separation families in Australia. Secondly, to examine relevant research studies and literature relating to the effects on children of current practices in Family Law in Australia relating to custody and access, and to indicate the extent, if any, that these practices affect parenting practices carried out prior to separation. Thirdly, to study literature described in overseas family practice. Fourthly, to develop models of co-operative parenting to identify their relevance, if any, to Australian children and their families. Fifthly, to develop models for instituting co-operative parenting after separation with a view to relating them to the various models of dispute resolution. Finally, to indicate the legislative, and as far as possible, other changes, necessary to ensure that pre-existing patterns of parenting prior to separation of the parents continue. As it ultimately transpired, the first three of the terms formed the basis for the conclusions and the last three the basis for the detailed recommendations.

The study of the literature as was required in the second term of reference caused the Council to conclude[7] that:

> Most children want and need contact with both parents. Their long term development, education and capacity to adjust and self esteem can be detrimentally affected by the long term or permanent absence of a parent from their maintaining links with both parents as much as possible.

That conclusion was to form the policy basis of the resulting legislation.[8] Yet, of course, as the report noted,[9] there are clearly situations where contact between a child and a particular parent would not be sensible and one such matter, which was

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[6] For more detailed comment on the Report, see F. Bates, 'New Views of Parenting' (1994) 19:4 *Children Australia* 15.

[7] Family Law Council, *Patterns of Parenting After Separation* (1992) (hereinafter POPAS) para 2.39.

[8] See *infra* notes 27 et seq.

[9] POPAS, *supra* note 7, at para 2.33.

to prove of critical importance,[10] relates to the exposure of children to violence in the home, whether directed towards them or not.[11]

A further matter with which the Report was concerned was assisting parents to find their own solutions to the problems in particular cases. It notes[12] that, generally, post-separation parenting decisions are most likely to be made in the interests of children if, first, parents feel in control of their own futures. Secondly, that will also normally be the case where parents are guided in their discussions by consideration of their ongoing responsibilities as parents and, thirdly, where they are encouraged to conduct these discussions within relatively informal surroundings. In that context, what might be the likely influence of the legal profession who, in general by reason of their training, tend not to be informal people or at home in informal situations? However, the Council noted[13] that only a very small number of parents who had sought legal advice found themselves in court hearings, which, in turn, seems to suggest that lawyers may have a significant role to play, regardless of any tensions which may exist between them and other professionals and in the law itself. That last is of special importance as the Report emphatically points out:[14]

> ... the duty of the lawyer is to serve and promote the interests of his or her clients, whereas the Family Law Act directs that the welfare of the child is to be the paramount consideration. The lawyer faces a dilemma where the desires of the client and the welfare of the child do not coincide.

Yet that is not the only peculiarly legal difficulty discussed in the Report: another related to the terminology in use at the time of the Report's appearance. Legal advice was, at that time,[15] couched in terms of 'custody', 'access' and 'guardianship', all of which were familiar to lawyers, but less so to parties caught up in the dispute. In addition, the terms themselves may carry opprobrious influences; this in the words of the Report,[16] the term 'custody':

> ... can be synonymous with incarceration and is also used to describe conversion of property or goods. When used to describe the status of children of divorce, the term inevitably carries overtones of ownership. Moreover, we speak of winning, gaining or being awarded custody. We speak of a custody battle as if 'it' were a prize only one partner can win.

Similarly, the word 'access' may also have connotations of ownership such as, for instance, the right to enter and pass our adjoining land without hindrance. Hence,

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[10] See *infra* note 54.
[11] POPAS, *supra* note 7, at para 2.35.
[12] Ibid. para 3.05.
[13] Ibid. para 3.36.
[14] Ibid. para 3.38.
[15] This is not how the case; see *infra* note 38.
[16] POPAS, *supra* note 7, at para 4.11.

the Report concluded[17] that co-operative parenting after separation was a sensible goal which would be enhanced by the use of terminology which discouraged ideas which suggested ownership of children.[18]

However, if change of that kind was to be made, effective implementation was also necessary and the model which the Report urged[19] was the *parenting plan*.[20] The aim of that document is to ensure that parents have a well-considered document with which to address children's future needs.[21] The Report states[22] that the;

> ... use of a well-structured and clear parenting plan guide will assist parents in the focusing on how to meet the needs of their children after separation. In time of emotional upheaval, the plans offer a structure on which the parents can rely, while ideally, avoiding the formality of proceeding to litigation.

Further, the Report took the view[23] that such plans had the ability to move the focus of negotiations away from criticism of the other spouse's parenting capabilities, which had been based on previous behaviour, to present and future issues as to how each former spouse intends to fulfil her or his parental role. The plans would also give parties an opportunity to consider the nature of their parenting responsibilities.

It is not, of course, every case which will be amenable to the use of agreed parenting plans: in cases of that kind, where, for instance, there is an extreme degree of hostility between the parents, it will be necessary for the Court to devise a parenting plan for the parents.[24] Plans devised by the Court are likely to be quite different from those devised by parents themselves in that they would be likely to be more specific. In cases, for example, where the safety of the child might be compromised, plans which were similar to existing court orders could well be devised.

Finally, the Report suggests[25] the parenting plans should be set out in a manner which allows the parents ability to choose the level of responsibility they intend to adopt for their children after separation. They ought also to be flexible and to be capable of easy alteration so as to meet the needs of the child. The Report also emphatically rejected[26] any suggestion that the law ought not to be changed because

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[17] Ibid. para 4.51.
[18] See F. Bates, 'Children as Property: Hindsight and Foresight' (1988) 13:2 *Australian Child and Family Welfare* 3; J. Montgomery, 'Children as Property?' (1988) 51 MLR 323.
[19] POPAS, *supra* note 7, at para 5.01ff.
[20] The model which the Report regarded, ibid. para 5.06, as being appropriate for Australia, was derived from the Parenting Act 1987 of the State of Washington in the US.
[21] Ibid. para 5.05.
[22] Ibid. para 5.07.
[23] Ibid. para 5.08.
[24] Ibid. para 5.19.
[25] Ibid. paras 5.22, 5.23.
[26] Ibid. para 6.16.

the vast majority of cases were not contested. This link is clearly correct as it encompasses the massive change which has taken place in the common law, regardless of statutory intervention, in respect of the legal position of children.

II. The Legislation

The ultimate result of this Report was the Family Law Reform Act 1995, which introduced a new Part VII into the Family Law Act 1975, which replaced the existing law relating to children as applicable to the Family Law Act. It should be said initially that much is derived from the UK Children Act 1989, to which considerable influence was made in the *Patterns of Parenting After Separation* Report. Section 60B(1) of the Family Law Act 1975, as amended, provides that the object of the new part is:

> ... to insure that children receive adequate and proper parenting to help them achieve their full potential, and to insure that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Section 60B(2) goes on to set out the principles which underlie that object, of which there are four.[27] First, children have the right to know and to be cared for by both parents, regardless of whether their parents are married, separated, have ever married or have ever lived together. Secondly, children have a right of contact, on a regular basis, with both of their parents and with other people significant to their care, welfare and development. Thirdly, parents share duties and responsibilities concerning the care, welfare and development of their children. Fourthly, parents should agree about the future parenting of their children. The influence of the *Patterns of Parenting After Separation* Report will be readily apparent.

Section 61B refers to 'parental responsibility', which it defines as '... all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. This is extremely redolent of Section 3(1) of the UK Children Act 1989[28] and, although both definitions appear to be circular, both have to be read in connection with the decision of the House of Lords in *Gillick v. Wisbech and West Norfolk Area Health Authority*[29] and the High Court of Australia's decision in *Secretary, Department of Health and Social Security v. JWB and Anor*,[30] which declared that *Gillick* (whatever it may have decided) was a part of the law of

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[27] These principles to not apply when they would be contrary to a child's best interests.

[28] Which defines the motion as meaning, '... all the rights, duties, powers, responsibilities and which by the law a parent of a child has in reaction to a child and his property'.

[29] [1986] AC 112. For comment, see J.M. Eekelaar, 'The Emergence of Children's Rights' in (1986) 6 *Oxf J Legal Studies* 161.

[30] (1992) 175 CLR 218. For comment, see P. Parkinson, 'Children's Rights and Doctors' Immunities: The Implications of the High Court's Decision in *Re Marion*' in (1992) 6 *Aust J Fam L* 101.

Australia.[31] However, in congruence with the Report, the Act continues[32] by stating that each of the parents of a child who has not reached the age of eighteen has parental responsibility for the child. That state of affairs is not affected by any changes in the relationship of the child's parents.[33]

The Act then goes on to describe the effect of parenting orders[34] or parental responsibility and provides[35] that a parenting order confines parental responsibility only to the extent that the order confines duties, powers, responsibilities or authority in relation to the child. Similarly, the legislation provides[36] that a parenting order does not remove or diminish any aspects of parental responsibility unless it is expressly provided for in the order or is necessary to give effect to the order. As regards parenting orders themselves, the new amendments have adopted[37] the terminology to be found in the UK Children Act 1989[38] by referring to residence, contact and specific issues orders. The first two are self explanatory, but Section 64B(6) of the Act states that:

> A specific issues order may, for example, confer on a person (whether alone or jointly with another person) responsibility for the long term care, welfare and development of the child or for the day-to-day care, welfare and development of the child.

Further, the amendments provide[39] for parenting plans as urged in the originating report: there are provisions which relate to the registration of such plans[40] and, also, a rather curious provision[41] that plans may be revoked, but not varied, by future agreement. In addition, the Family Law Council, together with the National Alternative Dispute Resolution Advisory Council, sent in June 2000 a letter of advice to the Commonwealth Attorney General urging[42] that the legislation should be amended to encourage the use of parenting plans and constant orders. The letter also recommended that the registration provisions be repealed. The bodies also suggested that the use of an integrated parenting plan/consent orders package should be encouraged through information and education using existing services including counseling and mediation services, legal aid bodies and community legal services and other appropriate means.[43] The Act ought also to be amended to assist parties to

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[31] Ibid. at 238 *per* Mason CJ, Dawson, Toohey and Gaudron JJ.
[32] *Family Law Act* 1975 s. 61C(1).
[33] Ibid. s. 61C(2).
[34] See *infra* note 37.
[35] *Family Law Act* 1975 s. 61D(1).
[36] Ibid. s. 61D (2).
[37] Ibid. ss. 64B.
[38] Children Act 1989 s. 8.
[39] Family Law Act 1975 Part VII, Div 4.
[40] Ibid. s. 63E.
[41] Ibid. s. 63D.
[42] See, Family Law Council, Annual Report 1999–2000 at p. 49.
[43] Including clinical legal education.

develop parenting plans and obtain constant orders by reviewing and modifying the existing kits to reflect the newly recommended approach. The Attorney-General advised that he would give these recommendations detailed consideration.

Another major amendment to the legislation may be found in Section 68F(2), which sets out the matters which courts must consider in deciding what are the child's best interests.[44] These considerations are set out in considerably more detail than had been the case in the past and are directed especially at family violence. This is to be expected as Section 43 sets out the principles by which courts exercising jurisdiction under the legislation had been amended to include a new Section 43(ca) which requires courts to have regard to the '... need to insure safety from family violence'. To this writer, this inclusion is more than faintly paradoxical in that Section 43(b) refers to the family as '... the natural and fundamental group unit of society ...'. It seems to say that the natural and fundamental group unit of Australian society is innately violent!

Section 68F(2) provides that the court must consider first any wishes expressed by the child and any features which the court thinks are relevant to the weight it should give to those wishes, including the child's maturity or level of understanding.[45] It does now seem as though the wishes of children will now definitely, in view of these provisions, be subordinated to their best interests.[46] Secondly, the court must consider the nature of the relationship of the child with each of the child's parents and with other persons.[47] This provision will, of course, be of particular relevance where parents have a new partner. Thirdly, account must be taken of the likely effect of any changes in the child's circumstances including the likely effect of any separation from either parent or any other child, or other person, with whom she or he has been living.[48] Fourthly, the court must consider the practical difficulty of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis.[49] This provision is of particular importance because of the decision of the Full Court of the Family Court in *B and B: Family Law Reform Act*[50] and the cases on parental relocation which followed it.[51] Australia is a

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[44] s. 65E provides that courts must regard the best interests of the child as the paramount consideration.

[45] Family Law Act 1975 s. 68F (2)(a).

[46] See *R and R: Children's Wishes* (2000) FLC 93–000; *Re G: Children's Schooling* (2000) FLC 93–025.

[47] Family Law Act 1975 s. 68F(2)(b).

[48] Ibid. s. 68F(2)(c).

[49] Ibid. s. 68F(2)(d).

[50] (1997) FLC 92–755. For comment on this case, see R. Kaspiew, 'B and B and the Family Law Reform Act' in (1998) *12 Aust J Fam L* 69.

[51] See, for example, *R v. R* (1998) FLC 92–820; *AMS & AIF* (1999) FLC 92–852; *Paskandy v. Paskandy* (1999) FLC 92–852; *SMG v. RAM* (2000) FLC 93–020; *A v. A: Relocation Approach* (2000) FLC 93–035; *H v. L* (2000) FLC 93–036.

very large country with a relatively small population so that if a parent seeks to relocate, say, from Melbourne in the south of the country to Perth in the far west, it will not be easy to maintain contact if the other parent is still resident in Melbourne.

Fifthly, the court must consider the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs. Sixthly, account must be taken of the child's maturity, sex and background, which included any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders, and any other characteristics of the child which the court thinks are relevant. The reference to Aboriginal and Torres Strait Islander peoples is of special relevance because of the statements made by the Governor General of Australia[52] on the Centenary of Federation on 1 January 2001. 'At the same time', he said:[53]

> let us be honest and courageous about the fairness and flaws which mar [our] achievements and which together we can address and overcome ... How far we still have to travel on our journey towards genuine reconciliation between Australia's indigenous people and the nation of which they form such a vital part.

There are also specific provisions, following on from Section 43(ca), to be found in Section 68F(2). The court is thus required to take account of the need to protect children from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour;[54] as being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.[55] It will be apparent that this is an extremely widely drafted provision and it is one of which the Family Court of Australia has sought to take advantage; although it should be said that the provision was very much in the mainstream of Australian judicial thought at the time when it came into effect.[56] Since the legislation the Family Court of Australia, in both cases relating to child law[57] and property law,[58] have emphasized the central nature of the provision. On that issue, courts are also required to take into account any family violence involving the child or a member of the child's family,[59] and any family violence order which applies to the child or a member of the child's family.[60]

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[52] Sir William Deane, a former judge of the High Court of Australia.
[53] As quoted in (2001) *The Sydney Morning Herald*, 2 January, at p. 10.
[54] Family Law Act 1975 s. 68F(2)(g)(i).
[55] Ibid. s. 68F(2)(g)(ii).
[56] See *JG and BG* (1994) FLC 92–515; *Patsalou and Patsalou* (1995) FLC 92–580. For comment, See F. Bates, 'Domestic Violence and Children – Some New Developments' in (1995) 10:4 *Aust Family Lawyer* 24.
[57] See *Blanch v. Blanch and Crawford* (1999) FLC 92–837; *K v. Z* (1997) FLC 92–783; *M v. M* (2000) FLC 93–006.
[58] See *Marando v. Marando* (1997) FLC 92–754; *Kennon v. Kennon* (1997) FLC 92–757.
[59] Family Law Act 1975 s. 68F(2)(i).
[60] Ibid. s. 68F(2)(j).

Finally, the courts must consider the attitude to the child and to the responsibilities of parenthood, as demonstrated by each of the child's parents.[61] The court must consider whether it would be preferable to make the order which would be least likely to lead to the institution of further proceedings in relation to the child[62] and any other fact or circumstance which court thinks is relevant.[63]

How have these reforms been received? In the leasing case of *B and B: Family Law Reform Act*[64] the Full Court of the Family Court of Australia stated that:

> It is now well accepted that in most cases meaningful contact by children with both of their parents is important to their welfare in both the short and the long term. That principle has been established in Australia and comparable overseas countries for many years ....

B and B is as important for what it did not decide as for what it did: it did not seek to undermine the reforms of 1995, as its opponents have suggested.[65] In reality, it is apparent that the Court took the view[66] that it directly perceived the amendments as providing for a new norm for orders involving children.

The 1995 amendments have received a rather more mixed reception from academic commentators: the legislation received an especially hostile reception from Ingleby who wrote[67] that:

> Practitioners who spend much of their professional lives trying to explain to their clients why counselling facilities are not available for eight weeks ... would be more impressed by a commitment on the part of the legislative to proper funding of the court and its services, rather than the stained-glass platitudes of [the amendments].

The above comment also refers to the 'sophistry' of the amendments at large. Another interesting point has been raised by Chisholm, a judge of the Family Court of Australia writing extrajudicially,[68] which is especially germane to this article. He comments that the Act did not appear to have any *law reform* base, as such. With respect, this is a hard argument to sustain, given the extraordinary record of the Family Law Council in respect of its recommendations being adopted by Government.[69]

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[61] Ibid. s. 68F(2)(l).
[62] Ibid. s. 68F(2)(l).
[63] Ibid. s. 68F(2)(l).
[64] (1997) FLC 92–755 at 84,213 *per* Nicholson CJ, Fogarty and Lindenmayer JJ.
[65] For comment on the activities of such opponents, see M. Kaye and J. Tolmie, 'Fathers' Rights Groups in Australia' in (1998) 12 *Aust J Fam L* 19.
[66] Particularly at (1997) FLC 92–755 at 84,213.
[67] R. Ingleby, 'The Family Law Reform Act – A Practitioner's Perspective' in (1996) 10 *Aust J Fam L* 48, at p. 52.
[68] R. Chisholm, 'Assessing the Impact of the Family Law Reform Act 1995' in (1996) 10 *Aust J Fam L* 177, at p. 184.
[69] See B. Hughes, *The Family Law Council 1976–1996: A Record of Achievement* (1996) at p. 60. compare J.H. Farrar, *Law Reform and the Law Commission* (1974) at p. 123.

In the end, though, Chisholm may well be correct when he concluded[70] that:

> The major variable in determining the success of the Act ... will be the enthusiasm, open-mindedness and skill of those who work most directly with parents, notably lawyers, registrars, and community and court based counselors and mediators.

To date, judicial exegesis on the amendments has been relatively small, which does suggest that many of the people to whom Chisholm referred are approaching the new Part VII of the Family Law Act in an appropriate way.

III. Enforcement of the Legislation

Although it may be that those people who are responsible for the application and implementation of the 1995 amendments may well have an appropriate attitude towards it, it is equally clear that many parents may not. Intractable contact cases have been a feature of Australian family law proceedings for many years.[71] Hence, various provisions contained in the Family Law Amendment Act 2000 are aimed at seeking to resolve these matters. At the outset, it should be said that these provisions are, in this writer's view, far from satisfactory and demonstrate the dangers of *ad hoc* legislation in quite graphic form. There can be little doubt that the provisions were the product of political pressure from male interest groups[72] who have complained consistently that former wives are denying them contact with their children.[73]

As regards the new provisions: first, failure to comply with orders effecting children is to be dealt with separately from failure to comply with other orders. Compliance with orders affecting children is contained in a new Division 13A of Part VII of the Family Law Act 1975.[74] In essence, the new Division contains a three stage 'parenting compliance regime' in respect of contravention of orders in affecting children. This involves *prevention*,[75] *mediation*,[76] and *sanctions*.

Under Stage 1 of this regime, parents entering into parenting plans and persons who are affected by parenting orders must be provided with information regarding the obligations which the parenting plan or order creates and the possible implications of failure to comply with them. Thus, people entering into parenting plans must be given information about the availability of programmes to assist people to understand their responsibilities under parenting orders, as well as the way

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[70] R. Chisholm, *supra* note 68, at p. 197.

[71] See H.A. Findlay, R.J. Bailey-Harris and M.F.A. Otlowski,, *Family Law in Australia* (1997, 5th ed.) at pp. 430 et seq.

[72] *Supra* note 65.

[73] They have also sought that contact be tied to the payment of child support. This, it is submitted, is a hard proposition to maintain as the two issues are scarcely connected.

[74] Failure to comply with other orders is contained in Part XIIIA and provisions relating to contempt of court will now be contained in a new Part XIIB.

[75] Ibid. Division 13A, Subdivision B.

[76] Ibid. Division 13A, Subdivision C.

in which location and recovery orders are used to ensure that parenting orders are enforced.

Although that aim might, *prima facie*, be both desirable and straightforward, it would be wrong to suggest that problems do not exist.

First, the explanatory information required by the new legislation[77] to be included in a parenting order must be in a language which is likely to be understood readily by the person to whom the order is directed. It goes without saying that Australia is an immigrant community,[78] and it is very far from unlikely that an order might be directed to someone who does not read English. It is far from clear whether the provision means that the order itself will be in English and the explanatory memorandum which accompanies it will be in a language that the person can read, or whether the whole order should be translated into the appropriate language. In turn, that raises the issues of the costs of the translation and the possibility (or likelihood) of delay in obtaining a translation of an urgent order.

Furthermore, when the court makes a parenting order, the court must include in the order particulars of the obligations created by the order,[79] and the consequences which may follow if the order is contravened.[80] However, it is further provided[81] that the court is enabled to request that a party's legal representatives assist in explaining the latter provision to their clients. Strangely, the section does not require the court to explain these matters to anyone as they are required to be contained in the order.[82] Even more peculiar is the power in the same provision which enables the court to request that legal representatives to clients the availability of programmes which seek to help people understand their responsibilities under parenting orders and the availability of location and recovery orders aimed at following that parenting orders are complied with.[83] That provision only applies to unrepresented parties!

Section 63DA seems almost to be as greatly disorganized as Section 65DA: it, first, requires counselors, mediators and legal practitioners, who give assistance to people in relation to the making of a parenting plan, to explain the obligations which such a plan creates. Unfortunately, parenting plans to do not appear to create any legal obligations (as opposed to moral obligations, with which the legislation is, presumably, not concerned).[84] It is also unclear as to the effect of a failure to comply with the provisions of Section 63DA on the validity of a parenting plan. Although

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[77] Ibid. s. 65DA.
[78] See, for example, R Hartley, *Families and Cultural Diversity in Australia* (1995).
[79] *Family Law Act* 1975 s. 65DS(1).
[80] Ibid. s. 65DA(2).
[81] Ibid. s. 65DA(5).
[82] Ibid. s. 65DA(2).
[83] Ibid. s. 65DA(3).
[84] If a parenting plan is registered under ibid. s. 63E, particular consequences may arise under ss. 63F and 63G from the fact of registration, but s. 63D is silent on obligations arising from registration.

Section 65DA provides that failure to comply with these provisions will not affect a plan's validity, is no equivalent provision in Section 63DA.

As regards Stage 2 of the process, this is as follows. Section 70NF(1) provides generally that if a contravention of an order affecting children has occurred to the satisfaction of the court, and the person does not prove that he or she had a reasonable excuse for the contravention, and that no previous order has been made or the court determines that it is more appropriate that, notwithstanding the existence of a prior order, that contravention be dealt with under Stage 2, various orders may be made. One provision of particular note[85] is that Stage 2 will not apply if the court dealing with the *current contravention*[86] is satisfied that the person who contravened the *primary order*[87] had behaved in a way which demonstrated a serious disregard for his or her obligations under the Act.

There are a wide variety of orders available under the amendments.[88] The court may do all, or any, of the following: first, the court may order the person who has contravened the order (or another specified person) to attend before the provider of a specified, appropriate post-separation parenting programme. The purpose being that the provider can make an initial assessment as to the suitability of the person to attend such a programme; if the person is assessed as being suitable and the provider nominates a particular programme (or part of any such programmes), the court may direct the person so to attend. Second, the court may make a further parenting order which compensates for contact which has been foregone as the result of the current contravention. Additionally, the court is empowered to adjourn the proceedings to permit either party to apply for a further parenting order which discharges, varies or suspends the primary order or revives some or all of an earlier parenting order.[89] In deciding whether to adjourn the proceedings, courts must have regard to four matters.[90] First, whether the primary order was made by consent. Secondly, whether legal representation was available in the proceedings in which the primary order was made. Thirdly, the length of the period between the making of the primary order and the occurrence of the current contravention and, fifthly, other matters which the court considers relevant.

Further, courts must not order a[91] person other than the person who contravened the order to attend a post-separation parenting programme[92] unless that person is

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[85] Ibid. s. 70NF(2).
[86] So described at ibid. s. 70 NF(1)(b).
[87] So described at ibid. s. 70NF(1)(a).
[88] Ibid. s. 70 NG(1).
[89] Ibid. Part VII, Division 6.
[90] Ibid. s. 70NG(1A).
[91] Ibid. s. 70NG(2).
[92] A post-separation programme is described, ibid. s. 70NB, as a programme which is designed (including by providing counseling services or by teaching techniques to resolve disputes) to help people resolve problems that adversely affect the carrying into effect of their parenting responsibilities and is included in a list of such programmes compiled by the

the applicant or otherwise a party to the proceedings. Courts must also be satisfied that it is appropriate to make the order because of the current contravention and the carrying out by the person of his or her parental responsibilities in relation to any children to which the primary order relates. Although it is provided[93] that anything said, or any admission made, by a person attending at the provider of a programme for assessment or at the programme itself, the provider must advise courts of these matters. These are: First, whether a person who attends for assessment is considered unsuitable to attend any such programme.[94] Secondly, if a person fails to attend a programme or part of a programme which the person was required to attend,[95] thirdly, if the provider considers that the person is unsuitable to take any further part in the programme or part of the programme.[96] If it appears to the court that a person has not attended a programme or part of a programme which he or she was ordered to attend, the court may make further directions with respect to that person's attending the programme.[97]

There are very serious difficulties with this part of the legislation. Most obviously, the legislation makes no provision regarding what is to be done if a person ordered to attend a post-separation programme is assessed as being unsuitable to attend that programme or continuing to attend the programme. Hence, why is the provider required to inform the court? In turn, there is no provision[98] in respect to the manner in which the provider is to inform the court. In turn, it is unclear as to whether any such information will be admissible and, if so, under what conditions. Again, it will be remembered that[99] courts are empowered to make compensatory contact orders at Stage 2, but there is no provision for compensatory residence orders, so hence matters may turn solely on the manner in which a particular order is described. Finally, the position of a person who has contravened a previous order without reasonable excuse is generally uncertain.

Stage 3 of the parenting compliance regime[100] applies in the same circumstances as Stage 2.[101] Unless courts are satisfied that it is more appropriate for the matter to be dealt with under Stage 3[102] and, if Stage 3 does apply, courts *must*[103] make an order

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cont.

Federal Attorney-General and consists of lectures, discussions (including group discussions) and other activities.

[93] Ibid. s. 70NI.

[94] Ibid. s. 70NH(1).

[95] Ibid. s. 70NH(2)(a).

[96] Ibid. s. 70NH(2)(b).

[97] Ibid. s. 70NIA

[98] Presumably the Rules of Court will ultimately do so.

[99] See *supra* text to note 88.

[100] Family Law Act 1975 Division 13A, Subdivision C.

[101] See *supra* text to note 85.

[102] Family Law Act 1975 s. 70NJ(1), (2).

[103] Author's emphasis.

under the relevant subdivision.[104] Thus, courts must make[105] one or more of the following orders: a community service order; an order requiring the respondent to enter into a bond; if the order is a parenting order, then an order varying that order may be varied[106] an order imposing a fine of not more than 60 penalty units,[107] an order imposing a sentence of imprisonment not exceeding 12 months. When making any of those orders, courts may make any other order that is considered necessary to ensure compliance with the order which was contravened.

Despite the apparent simplicity of Stage 3 provisions, there are, inevitably, problems which arise. Thus, for instance, despite the apparently mandatory nature of that stage,[108] courts retain the power to find that a particular case is more appropriately dealt with under Stage 2.[109] Again, it is unclear as to whether a breach of a different order will bring Stage 3 into operation: thus, if the current contravention is of a contact order and the prior contravention is of a specific issues order, then Stage 3 may very well not be able to be utilised. Likewise, it does not appear that Stage 3, unlike Stage 2, permits courts to make compensatory contact orders.[110] It may be that it was considered that, once Stage 3 had been reached, compensatory orders were not of any real value. However, the contradictory nature of this part of the legislation will be readily apparent.

As regards, the practical application of the parenting compliance regime, there are evidential issues which arise. At the hearing of the contravention application, initially courts will be required to decide whether it is satisfied that the applicant has, in fact, contravened the order – the burden of proof resting on the applicant. The standard of proof will be on the balance of probabilities, having regard to the gravity of the issue.[111] Courts will then be required to determine whether the respondent had a reasonable excuse for the contravention; again, the standard of proof will be the balance of probabilities,[112] and the onus of proof will be on the respondent. If courts are satisfied that the contravention has taken place and there is a reasonable excuse, or that the respondent's behaviour showed a similar disregard for his or her obligations under the relevant order. It would seem likely (though not certain) that the onus would rest on the applicant, to the civil standard of proof. Courts which are satisfied of those matters *must*[113] make an order under

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[104] *Supra* note 100.
[105] Family Law Act 1975 s. 70NJ(3), (8).
[106] If the order is an order affecting children which is not a parenting order, it cannot be varied.
[107] 'Penalty Unit' is defined in s4AA of the Crimes Act 1914 (Cth) as meaning AD110. Thus, the maximum fine would be AD6,600.
[108] See *supra* text to note 103.
[109] *Family Law Act* 1975 s. 70NJ(2).
[110] See *supra* text to note 88.
[111] See *Evidence Act* 1995 (Cth) s. 140. At common law, *Briginshaw v. Briginshaw* (1938) 60 CLR 336.
[112] Family Law Act 1975 s. 70NEA.
[113] Author's emphasis.

Stage 3, unless they are satisfied that it is more appropriate to make an order under Stage 2.

These latest amendments are, it is suggested, ill-considered (even though their political base is quite clear) and will not make the administration of the law relating to children any the easier.

C. Financial Agreements

The Family Law Amendment Act 2000 introduces a new Part VIIIA into the Act which deals with financial agreements when ever they have been made.[114] Thus, Section 90B provides that such agreements may be made before marriage; Section 90C provides that they be made during marriage and Section 90D provides that they be made after the decree absolute.[115] There are no real differences regarding the procedures governing these kinds of agreements. This presents an immediate problem: prenuptial agreements are treated no differently from those which are entered into as part of a divorce settlement. This, it is submitted, is absurd, in that a prenuptial agreement, which seeks to anticipate a marital breakdown, say, 25 years before the event, since the parties' financial circumstances normally cannot be known. In the latter situation, of course, usually all the relevant circumstances will be known which are necessary for a proper determination.

Given all of that, it will readily be apparent that the kind of legal advice which parties are obliged to receive is likely to be a central issue. In particular, this is of special importance, given the rather limited grounds on which these agreements can be set aside. Section 90G of the Family Law Act 1975 now sets out the kind of advice which practitioners are required to provide. The agreement must contain, in relation to each party, a statement to the effect that the relevant party has had independent legal advice from a legal practitioner prior to signing the agreement, relating to, first, the legal effect of the agreement; secondly, whether or not the agreement is to the advantage of the party; thirdly, whether or not it was prudent for the party to enter into the agreement and, finally, whether or not the provisions of the agreement were fair and reasonable in the light of such circumstances as were reasonably foreseeable. An annexure to the agreement must contain appropriate certificates signed by the person who has provided the advice which state that the advice has been provided. Once again, a problem exists: the legislation merely requires that there must be a *statement*[116] to the effect that the advice has been received, not that the parties have actually received the advice. The

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[114] The New Part VIIIA takes the place of the pre-existing ss. 86 and 87 of the Family Law Act 1975.

[115] Section 71A of the Act provides that Part VIII, which deals with the discretionary aspects of family property law, does not apply to property which is the object of an agreement.

[116] Author's emphasis.

question thus arises as to whether the courts may look behind the certificate to see whether appropriate advice was given.[117] Whatever the strict legalities, evidentiary problems are likely to be considerable and there may be significant reluctance on the part of legal practitioners to sign Section 90G(1) certificates.[118]

The grounds on which agreements can be set aside are set out in Section 90K. There are five of these, largely derived[119] from previous legislation. A court may make an order setting aside a relevant agreement. First, if the agreement was obtained by fraud, including non-disclosure of a marital matter. Secondly, if the agreement is void, voidable or unenforceable or, thirdly, if in the circumstances which have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out. Fourthly, that, since the making of the agreement, if a marital change has occurred, being circumstances which relate to the care, welfare and development of a child of the marriage, and, as a result of the change, the child or (if the applicant has caring responsibility for the child) a party to the agreement will suffer hardship if the court does not set the agreement. Finally, an agreement may be set aside if, in respect of the making of such an agreement, a party to an agreement has engaged in conduct which was, in all the circumstances, unconscionable. In Family Law proceedings, Australia has not been happy in matters relating to fraud – in particular in relation to entry into marriage itself.[120] As regards the second ground, the relevance of unilateral mistake and estoppel is unclear and many of the same considerations are likely to be applicable to the last ground.

By way of conclusion; in an earlier article,[121] the author of this article was critical of a Report[122] which urged the introduction of prenuptial agreements on the grounds of their likely complexity and their potential to generate unhappy and unproductive litigation. The changes effected by the Family Law Reform Act 2000 may produce those consequences and more.

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[117] There is conflicting authority: in cases involving family companies, that is a reluctance to look behind the corporate veil, see *Ascot Investments v. Harper* (1981) 148 CLR 337. On the other hand, in procedural matters there may be a greater willingness so to do; see *In the Marriage of Garlick* (1993) FLC 92–428.

[118] The author has anecdotal evidence that that might be the case.

[119] The first two paragraphs are derived from s. 87(8) of the Act which concerned the setting aside of s. 87 agreements. The third would have been sound in both s. 87(8) and s. 79A, which deals with the setting aside of property orders. The fourth is substantially derived from s. 79A, thought the change of circumstances which relates to welfare of the child do not have to be exceptional, as is the case with s. 79A. The last paragraph is new.

[120] See *In the Marriage of Deniz* (1977) 31 FLR 114; *In the Marriage of Otway* (1987) FLC 91–807; *In the Marriage of El Soukmani and Al Soukmani* (1990) FLC 92–107; *In the Marriage of Osman and Mouralli* (1990) FLC 92–111; *Najjarin v. Houlace* (1991) FLC 92–246.

[121] F. Bates, 'Reforming Australian Matrimonial Property Law' in (1989) 17 *Anglo-Am L R* 46, at p. 64.

[122] Australian Law Reform Commission, *Matrimonial Property* (Report No 39, 1987) at pp. 192 et seq.

D. Conclusions

It will be apparent that the period since 1992 has seen radical change in key areas of Australian family law. These changes are of a fundamental nature. As regards the 1995 amendments to the Family Law Act 1975 in relation to children, it is essentially difficult to predict how they will ultimately affect the law because, even at the time of writing,[123] there had been relatively little in the way of reported case law. However, this commentator is relatively sanguine about both the philosophy which underpins the amendments and the general way in which it has been implemented.

The same cannot, it is feared, be said of the 2000 amendments; unlike the 1995 legislation there does not appear to have been any policy orientated discussion leading up to them, as there was in the *Patterns of Parenting After Separation* Report.[124] Likewise, not all of the societal implications of the provisions relating to financial agreements have been properly explored.

Thus, recent family law reform in Australia is a curious mixture; some areas have been properly considered before being put into effect whereas others have not. At the same time, though, one must bear the comments of Nygh[125] generally in mind when he wrote of the 1995 amendments that:

> No doubt what will happen is that which follows reform. The danger we feared will not eventuate and the provisions which we thought would create no problems will become nightmares!

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[123] February 2001.
[124] See *supra* text to notes 6 et seq.
[125] P.E. Nygh, 'The New Part VIII – An Overview' in (1996) 10 *Aust J Fam L* 4, at p. 17.