

THE FUNCTIONS OF FAMILY COURTS

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Summary

The functions of family courts in England and Wales in making decisions about children are identified as processing disputes and protecting vulnerable individuals, with latent functions of applying and influencing social policy. The thesis explores why family courts have been singled out for particular criticism in undertaking these functions. Two issues are examined: complaints that family court proceedings are held in secret and that a court is not the appropriate place for resolving disputes about children. The methods used are historical analysis, a comparison with courts in Australia, and applying the theories of Habermas.

According to Habermas, when systems are maintained for their own sake without being anchored in people's values and needs, or operate without rational discourse, institutions can lose their legitimacy. The historical analysis shows that as social policy developed over the past 60 years, court structures were trapped in a dual jurisdiction which made it difficult to adapt to changing expectations. Since the 1970s, there have been calls for a unified family court to better meet families' requirements. However, a comparison with such a court, the Family Court of Australia, reveals another set of dualities which undermine its legitimacy.

The claim that family courts do not function effectively because they are closed and secret is examined. The law is set out in the context of concepts of secrecy, privacy, openness and transparency. It is argued that children have a particular right to privacy which is marginalised in the current debate, and that a recent consultation process undertaken to reform the law on media access to court proceedings was not undertaken in a transparent manner.

Attempts to introduce alternative dispute resolution and remove disputes about child care and upbringing to mediation and other non-legal alternatives are also shown as likely to fail unless formulated through rational discourse.

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The law is stated as at 30 June 2011.

THE FUNCTIONS OF FAMILY COURTS

CONTENTS

LEGISLATION CITED	i
CASES CITED	v
ABBREVIATIONS AND ACRONYMS	ix
CHAPTER ONE: INTRODUCTION	1
DUALITY IN THE HISTORY OF FAMILY COURTS	5
RESEARCH QUESTIONS	8
METHODOLOGY AND STRUCTURE OF THESIS	10
CURRENT FUNCTIONS OF THE FAMILY COURTS	13
<i>FUNCTIONS OF A COURT</i>	14
<i>FUNCTIONS OF FAMILY COURTS</i>	15
Lawyers' views	21
Courts users' views	25
Policy views	27
CONCLUSIONS	29
CHAPTER TWO: THEORETICAL FRAMEWORK	33
SOCIAL THEORY AND THE PROBLEM OF FAMILY COURTS	36
HABERMAS' CRITICAL THEORY	34
THE PUBLIC AND PRIVATE SPHERES	38
THE LEGITIMACY CRISIS – LIFEWORLD AND SYSTEMS	44
JURIDIFICATION	48
RESPONSES TO <i>THE THEORY OF COMMUNICATIVE ACTION</i>	51
THE IDEAL SPEECH SITUATION	53
THE PUBLIC/PRIVATE DISTINCTION AND FAMILY COURTS	55
JURIDIFICATION OR DELEGALISATION?	56
LIFEWORLD, SYSTEM AND SOCIAL POLICY	61

CONCLUSIONS	62
CHAPTER THREE: HISTORY OF FAMILY COURTS	
Part One: Before the welfare state	64
EARLY JURISDICTION IN FAMILY CASES	65
ECCLESIASTICAL COURTS: ORIGINS	66
JUSTICES OF THE PEACE: ORIGINS	69
CHURCH COURTS, PARLIAMENT AND DIVORCE	71
<i>MARITAL SEPARATION AND THE ECCLESIASTICAL COURTS - DIVORTIUM A MENSA ET THORO (SEPARATION FROM BED AND BOARD)</i>	74
<i>MARITAL SEPARATION AND PARLIAMENT – DIVORTIUM A VINCULO MATRIMONII (FREEDOM FROM THE BOND OF MARRIAGE)</i>	77
<i>ACTIONS FOR DAMAGES AT COMMON LAW – CRIMINAL CONVERSATION</i>	80
<i>PROCEDURAL REFORM – MATRIMONIAL CAUSES ACT 1857</i>	83
THE GROWTH OF THE JURISDICTION OF THE JUSTICES OF THE PEACE: 16th – 19th CENTURIES	88
<i>THE POOR LAWS</i>	88
<i>JPs' OTHER POWERS TO REGULATE AND PROTECT THE FAMILY</i>	90
THE FURTHER ENTRENCHMENT OF THE DIVISION	94
<i>THE HIGH COURT: 19th – 20th CENTURY</i>	94
Children in the High Court	97
<i>MAGISTRATES COURTS: 19th – 20th CENTURY</i>	100
Children in the magistrates courts	105
The Probation Service	108
CONCLUSIONS	110

CHAPTER FOUR: HISTORY OF FAMILY COURTS	
Part Two: from post-war to the present	113
SOCIAL POLICY AND CHILDREN	115
THE POST-WAR PERIOD: SOCIAL POLICY AND THE COURTS	117
<i>THE DUAL JURISDICTION: HIGH COURT</i>	118
The Denning Report and Divorce	118
Divorce and legal aid	121
<i>THE DUAL JURISDICTION: MAGISTRATES COURTS</i>	123
Families in the Magistrates courts – domestic jurisdiction	123
Magistrates – Juvenile courts	125
<i>POST-WAR PERIOD - CONCLUSIONS</i>	126
1960s AND 1970s: PROGRESS AND REFORM	127
<i>DIVORCE REFORM</i>	127
<i>THE FINER REPORT: A 'FAMILY COURT'</i>	129
<i>THE MAGISTRATES' FAMILY JURISDICTION AFTER DIVORCE REFORM</i>	133
<i>PROTECTING CHILDREN BEFORE THE CHILDREN ACT 1989</i>	136
Divorce court welfare	136
Wardship	137
Magistrates: Domestic proceedings and juvenile courts	138
<i>1960s AND 1970s – CONCLUSIONS</i>	141
1980s AND 1990s: 'PRIVATISATION' OF FAMILY LAW?	142
<i>SUCCESSFUL REFORM? CHILDREN ACT 1989</i>	142
<i>FAILED REFORM? CHILD SUPPORT</i>	144
<i>DISAPPEARING REFORM? DIVORCE AND THE FAMILY LAW ACT 1996</i>	146
<i>RUSHED REFORM? UNIFICATION OF COURT WELFARE SERVICES</i>	147
<i>1980s AND 1990s – CONCLUSIONS</i>	149

FAMILY COURTS AND SOCIAL POLICY IN THE 21st CENTURY	150
<i>TOWARDS A FAMILY COURT</i>	152
<i>FUNCTIONS OF FAMILY COURTS 2011</i>	153
CONCLUSIONS	155
CHAPTER FIVE: FAMILY COURTS IN AUSTRALIA	157
THE COURTS' JURISDICTION REGARDING CHILDREN IN AUSTRALIAN FAMILY LAW	160
<i>SEPARATION BETWEEN FEDERAL AND STATE COURTS: PRIVATE AND PUBLIC LAW</i>	165
<i>FURTHER FRAGMENTATION WITH THE INTRODUCTION OF THE FEDERAL MAGISTRATES COURT</i>	167
<i>CHILDRENS COURTS OPERATING IN AUSTRALIAN STATES AND TERRITORIES</i>	168
<i>FAMILY VIOLENCE AND CHILD ABUSE</i>	169
WHY DID THE FAMILY COURT OF AUSTRALIA FAIL TO GAIN LEGITIMACY?	172
<i>THE INFORMAL COURT – IDENTITY CRISIS</i>	174
<i>THE FAMILY LAW REFORM ACT 1995</i>	177
<i>'EVERY PICTURE TELLS A STORY'</i> <i>THE PARLIAMENTARY ENQUIRY 2003</i>	178
<i>THE FAMILY COURT AND THE 2006 ACT</i>	181
The Children's Cases Project and Less Adversarial Trials	183
From family counsellors to family consultants	188
CHILD PROTECTION IN AUSTRALIA	191
THE MAGELLAN PROJECT: 'Where public and private intersect'	198
<i>THE FAMILY LAW COUNCIL REPORT: 'FAMILY LAW AND CHILD PROTECTION'</i>	198
<i>FROM MAGELLAN LIST TO MAGELLAN PROJECT</i>	203

<i>IS MAGELLAN AN END TO FRAGMENTATION?</i>	205
CONCLUSIONS	206
CHAPTER SIX: PUBLICITY AND PRIVACY IN FAMILY COURTS	211
THE PROBLEM OF SECRECY	212
DEVELOPMENT OF THE LAW IN ENGLAND AND WALES	213
<i>ATTENDING COURT HEARINGS</i>	214
<i>PUBLICITY ABOUT COURT PROCEEDINGS</i>	217
Judicial Proceedings (Regulation of Reports) Act 1926	218
Children and Young Persons Act 1933	218
Magistrates Courts Act 1980	219
Administration of Justice Act 1960	219
Children Act 1989	221
<i>ACCESS TO DOCUMENTS AND SHARING INFORMATION RELATING TO FAMILY PROCEEDINGS</i>	223
<i>THE IMPACT OF HUMAN RIGHTS LEGISLATION</i>	225
PRIVACY, SECRECY, OPENNESS AND TRANSPARENCY	230
<i>PRIVACY</i>	230
<i>SECRECY</i>	234
<i>CONFIDENTIALITY</i>	237
<i>OPENNESS</i>	238
<i>TRANSPARENCY</i>	241
CHILDREN'S RIGHTS TO PRIVACY	243
CONSULTATION ON LEGAL REFORM	248
1989 – 2005	248
2006 – 2010	252
OTHER JURISDICTIONS	257
CONCLUSIONS	258

CHAPTER SEVEN: DIVERSION FROM COURT	261
ALTERNATIVE DISPUTE RESOLUTION	262
THE COURT AS LAST RESORT	263
ADVERSARIALISM	266
CONCILIATION AND MEDIATION IN PARENTING DISPUTES	269
<i>CONCILIATION AND MEDIATION: THEORY AND PRACTICE</i>	270
<i>EARLY HISTORY OF CONCILIATION</i>	272
<i>THE ESTABLISHMENT OF IN-COURT CONCILIATION</i>	276
<i>AFTER FINER: OUT-OF-COURT MEDIATION</i>	290
<i>CONVERGENCE OF COURT WELFARE SERVICES 2001-2011</i>	282
ALTERNATIVE DISPUTE RESOLUTION IN AUSTRALIA	283
<i>WELFARE SERVICES IN THE FAMILY COURT OF AUSTRALIA</i>	284
<i>FAMILY DISPUTE RESOLUTION AND FAMILY RELATIONSHIP CENTRES</i>	288
CONCILIATION/MEDIATION AND THE COURTS' PROTECTIVE FUNCTION	293
CONCLUSIONS	295
CHAPTER EIGHT: CONCLUSIONS	297
THE FUNCTIONS OF FAMILY COURTS – A HISTORY OF DUALITIES	298
DUAL COURT STRUCTURES	301
FUNCTIONS OF DISPUTE PROCESSING AND PROTECTION	303
LAW AND WELFARE	304
SECRECY AND OPENNESS	305
ADJUDICATION AND ADR	306
DISPUTE PROCESSING AND PROTECTION; PRIVACY AND ADR: CONCLUSION	307
BIBLIOGRAPHY	308

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AUSTRALIA

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ACRONYMS AND ABBREVIATIONS

ADR	Alternative dispute resolution
AIFS	Australian Institute of Family Studies
CAFCASS/Cafcass	Children and Families Court Advisory and Support Service
DCA	Department for Constitutional Affairs (Government department in England and Wales that succeeded the Lord Chancellor's Department and preceded the Ministry of Justice)
FCtA	Family Court of Australia
FCWA	Family Court of Western Australia
FDR	Family Dispute Resolution
FLC	Family Law Council (Australia)
FMC	Federal Magistrates Court (Australia)
FPC	Family Proceedings Court (England and Wales)
FRC	Family Relationship Centre
HMCS	Her Majesty's Court Service
JP	Justice of the Peace
LAT	Less Adversarial Trial
LCD	Lord Chancellor's Department
PDA	Probate Divorce and Admiralty Division of the High Court

CHAPTER ONE INTRODUCTION

Contents

DUALITY IN THE HISTORY OF FAMILY COURTS	5
RESEARCH QUESTIONS	8
METHODOLOGY AND STRUCTURE OF THESIS	10
CURRENT FUNCTIONS OF FAMILY COURTS	13
<i>FUNCTIONS OF A COURT</i>	14
<i>FUNCTIONS OF FAMILY COURTS</i>	15
Lawyers' views	21
Courts users' views	25
Policy views	27
CONCLUSIONS	29

This thesis explores the functions of the family courts in England and Wales, with regard to decisions made about children. It starts from the observation that these courts have become subject to particular criticism, additional to dissatisfaction that is expressed with judicial systems in general. This study will show how our current system struggles to accomplish new tasks without having escaped from those of the past, because courts that deal with family matters have operated within a series of categorisations supported by false assumptions and conceptual divisions which continually work against public comprehension and acceptance.

In this thesis I will argue that the further the distance between the policy-making process and open, accessible and fully-informed debate, the less likely the result is to reflect people's understanding of the values they attribute to social relationships. The less an institution operates according to consensus in the public sphere, the less legitimate, and more despised, it becomes. The concepts of 'communicative action' and the 'ideal speech situation', developed by Habermas, suggest that a conversation where all participants express themselves to genuinely reflect their motivations contributes to decisions that are based on reason, and hence more likely to be workable and accepted.

The way family courts operate has been characterised as problematic and in need of reform for at least four decades. The thesis presented here is that this is because the courts fail to achieve 'legitimacy', in a particular sense that is used by Habermas. I will show how numerous attempts at reform and review have been undertaken to address the problems identified at different times, but how none has adequately tackled them because opportunities for open, informed public debate are continually reduced to polarised over-simplification.

In 2011, the year that this thesis was completed, observers of the family courts could reasonably anticipate some radical changes to the way these institutions exercise their functions. A comprehensive review of family justice was published, by way of an interim report in March and a final report in November.¹ In parallel, a Parliamentary committee undertook its third inquiry in ten years into family courts, reporting in July.² Unlike earlier initiatives, cited in this thesis, these two investigations concentrated on almost all aspects of the family courts' functions relating to children. It appeared that, at last, issues were being discussed openly and seriously, still influenced, but not dominated, by gender politics, vested

¹ Family Justice Review, *Interim Report; Final Report* (Ministry of Justice, 2011) (hereafter 'FJR')

² HC Justice Committee *Operation of the Family Courts* (2010-12 HC 518-1) (hereafter 'Parliamentary report')

interests, short-term economic gains and media distortion. Disappointingly, the product of the serious work put in by both groups has been lost amidst allegations of gender bias, self-interest, incompetence, and scorn for the very professionals on whom the future of the family justice system depends.³ One of the concerns noted by the FJR was that current structures are so fragmented they cannot truthfully be described as ‘a system’.⁴ Its report therefore strives to draw together the disparate parts into a coherent vision.

However, rather than take an overview, the overwhelming reaction to the FJR is a preoccupation with a single issue. The media and politicians have seized on just one aspect of the comprehensive reports. This is the question of substantive change in the law to enforce a ‘50:50’ parenting arrangement for children of separated couples.⁵ It is remarkable that amongst a list of recommendations that fills 11 pages of the FJR *Final Report*, just this one features in hundreds of news stories, some of which describe it as the ‘main’ recommendation’.⁶ This is a classic example of distorted communication. Although ‘shared parenting’ was thoroughly scrutinised and evaluated by both the FJR and the Parliamentary report, it now seems that the government is reluctant to follow their recommendations.

Secondly, the Government has, irrespective of the reports, introduced a bill in Parliament⁷ which will largely remove access to legal representation in family cases, with a predicted loss of specialist lawyers, leaving judges to cope with increased numbers of litigants in person. Many court buildings are being closed and access to the public restricted in others.⁸ These actions are all being taken explicitly within the political claim of necessity to reduce public expenditure for macro-economic reasons, unrelated to the interests of children. It therefore seems unlikely that there will be funding for the investment in IT, research and training on which the FJR recommendations for an integrated service are premised.⁹ The Bill is being

³ See, for example, O Bowcott, ‘Family justice report author criticises plan to change divorce and custody law’ *Guardian* 3 February 2012; Interview with K Clarke, Lord Chancellor, given to the International Bar Association <http://ilegal.org.uk/index.cgi?board=reformnews&action=display&thread=4061> <Accessed 25 November 2011>

⁴ Family Justice Review *Final Report* (Ministry of Justice, 2011) 3; 6

⁵ An internet search on press coverage of the FJR on 3 February 2012 revealed 222 news items, all on this one point.

⁶ For example, D Pearse, ‘Divorced fathers to get more contact with their children’ *Guardian* 3 February 2012

⁷ Legal Aid, Sentencing and Punishment of Offenders Bill 2011 Schedule Part 1

⁸ *The Vale of Glamorgan Council v The Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin); *Robin Murray & Co, R (on the application of) v The Lord Chancellor* [2011] EWHC 1528 (Admin)

⁹ Family Justice Review *Final Report* (Ministry of Justice, 2011) 179-181

pushed through Parliament at speed despite considerable opposition and even doubts that it will reduce public expenditure.¹⁰ Cookson writes of the Bill:

Releasing the underlying assumptions and analysis which has been used to inform the projections in the Government's Impact Assessments would be particularly useful. It would increase transparency and allow the public to understand the question the basis of these assumptions.¹¹

This illustrates the risks Habermas identifies, that policies developed in a closed circle are less likely to be accepted by the wider public. If reducing access to justice by restricting legal is not a genuine cost-saving exercise, this must raise suspicions of underlying ideological motives to reduce the role of the State in supporting the least powerful individuals, those who fail to be self-sufficient, whether through bad luck or bad judgment. Families are expected to find private solutions, in a society which disparages the public interest in nurturing children and young people, while paradoxically valuing childhood as an investment in the future of the economy.

It is symptomatic of the nature of the discourse on family courts that the economic and ideological power of the popular media and successive governments combine to repress the interests of children in the pretence of 'fairness'. Recourse to court is 'unfair' on the taxpayer; the well-behaved citizen can sort out his/her own domestic life. Imposing an artificial notion of equal parenting is 'fair' to fathers. One might ask how policies based on notions of 'fairness' can require the subordination of the welfare of children to the wishes of fathers, and jealously guard the courts' dispute resolution function as a precious resource.

The government elected in 2010 is not the first to try to reduce public spending. Complaints that courts are insufficiently funded are not new. My contention is that the closer the agreement on family courts' functions, the stronger the mandate for planned investment. Family courts are subject to unique criticisms and pressures, in addition to those shared with other systems of civil and criminal justice. Applying theories on the public sphere and communicative action, I suggest that the courts could enjoy more popular support, which would justify increased funding, if their operations were perceived as being grounded in consensus reached through rational discussion in the public sphere that connects values to

¹⁰ G Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms* (Law Society of England and Wales 2011)

¹¹ G Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms* (Law Society of England and Wales 2011) para 9.4.6

systems. A glimmer of this possibility is found in the new Modernisation Programme arising from the FJR: change ‘will need a strong consensus.’¹² It remains to be seen whether such a consensus will emerge.

DUALITY IN THE HISTORY OF FAMILY COURTS

Language is important; the categorisation of aspects of family law and policy as ‘public’ or ‘private’ is a fundamental barrier to improvement. Discussion on the extent to which the state is mandated to intervene in private lives in the public interest is characteristic of a democratic society and Habermas’ theories help to show why ‘public’ cannot be completely separated from ‘private’. Recognising the interaction between public and private would be helpful in leading to objectives that set criteria for promoting children’s safety and well-being, so that the family justice system¹³ could be re-built to manage specialised resources to address the needs of those children who become involved in disputes at the right levels of support and intervention.

This false dichotomy between public and private is not the only instance of the complexity of family courts being misleadingly divided into two alternatives. This study will show that a series of ‘either/or’ definitions and dual systems has predominated over time and place. Individuals experience a fragmented and dispersed patchwork in which they are directed into a ‘system polarised by pathways.’¹⁴ Such a reductionist approach hampers debate.

The UK was traditionally seen as different from other western European countries by not having a ‘family policy’, unless it was implicitly one of non-intervention.¹⁵ This changed in the late 1990s with the incoming Labour government taking a more pro-active approach,¹⁶ which is now reflected across the political spectrum.¹⁷ However, state interference in family life remains circumscribed, and has to be justified according to a consensus of values and

¹² Ryder J ‘The Family Justice Modernisation Programme: First Update’ (Ministry of Justice 2012) 2

¹³ This term, now widely used to include families; practitioners and the courts themselves, originated in M Murch and D Hooper, *The Family Justice System* (Family Law, Bristol 1992)

¹⁴ J Dewar, ‘Can the Centre Hold? Reflections on two decades of family law reform in Australia’ (2010) 24 *Australian Journal of Family Law* 139

¹⁵ F Wasoff and I Dey, *Family Policy* (Gildredge Press, Eastbourne 2000)

¹⁶ S Day Sclater and C Piper, ‘Re-moralising the family? – Family, policy, family law and youth culture’ (2000) 12 *Child and Family Law Quarterly* 135

¹⁷ The Coalition: Our Programme for Government p 20

<http://www.conservatives.com/News/News_stories/2010/05/The_Coalitions_Programme_for_Government.asp
x> Last accessed 19 April 2011

norms.¹⁸ The criteria for such intervention are reflected in the functions of the family courts which reflect the relationship between families and the state. Confusion between the state/family boundary and the public/private boundary underlies the ongoing problem of our expectations of the family courts. As discussed below, the regulation of family relationships is legitimate if it tries to balance the public interest with respect for privacy. The language of ‘public’ and ‘private’ dominates family law discourse but should not be equated with ‘state’ and ‘family’.

Applications to court involving children are customarily categorised as either ‘public law’ or ‘private law’ cases. A public law case is one where parental care has failed to the extent that the State takes action through local authority children’s services. It is defined as such because a public sector agency is involved as a party in the case. However, protecting children is in the public interest, while the court is acting to protect private individuals. A private law case relates to disputes between family members, usually between parents who cannot agree post-separation parenting arrangements. They therefore approach state agencies for help, but the extent to which such help is a matter of public interest is less clear-cut than in public law cases, because there is variation in how the adults here are perceived: from reasonable and competent parents who may deserve some assistance to dangerous litigants who have lost sight of their children’s best interests. The number of court applications by parents greatly outnumbers those by local authorities.¹⁹ The predominance of private law cases accounts for another distinguishing characteristic of family courts, that they are the site of gender-based conflict (although mothers are more likely to be parties in care proceedings than fathers.²⁰) This stratification means that those involved in family courts can become enmeshed in power relations that differ from less gendercentric proceedings, despite the way legislation attempts to be gender neutral,²¹ and they may suffer the impact of ideological battles between groups with which they do not even identify. It follows that research questions necessarily raise feminist issues.

¹⁸ As discussed in studies such as R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn Avebury, Aldershot 1995) and L Fox Harding, *Perspectives in Child Care Policy* (Longman, London 1991) Ch 6, and reiterated recently for example by C Piper, *Investing in Children: Policy, law and practice in context* (Willan, Cullompton 2008) Ch 4

¹⁹ 53,000 children in contact applications and 17,000 in care applications, estimated by the Family Justice Review *Interim Report* (2011) on the basis of data it received from the Ministry of Justice.

²⁰ J Masson, ‘Controlling costs and maintaining services — the reform of legal aid fees for care proceedings’ (2008) 20 *Child and Family Law Quarterly* 425

²¹ So that its protective aspects do not apply differential treatment for women, see K O’Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, London 1985) 163

The terminology of public and private in the family courts suggests that there are different functions being undertaken between public law and private law cases. Under the current law, applications by local authorities and by family members are differentiated by the provisions of the Children Act 1989, although the terms public and private do not appear in the legislation. However, the fundamental principles of the Act apply to both types of case, in which the court can consider a range of orders. This unification of some aspects of public and private law came about through consensus reached during open policy discussions during the 1980s.²² It was recognised that all children's welfare and rights were of public concern, not just those where local authorities became involved.²³ The Act encourages courts to apply the same normative model of family life in both public and private applications. Of course, different families experience court processes differently, but these will depend on a complex network of power relations and structural inequalities, not literally on whether the application is made by the local authority or an individual. Arguments for substantive legal reform will not be made here, because there is scope under the Act to deconstruct the boundary between public and private law when necessary in the child's best interests. It is the way the courts function to meet policy that maintains that boundary and produces problems unique to family courts.

The appropriation of the terms public and private in these proceedings conjures up a theoretical public-private distinction which keeps the family home and relationships within the private realm. The nature and effects of this distinction have been subject to much critical review because of its implicit (or even explicit) subjugation of women and children.²⁴ The prevailing view now is that mothers and, increasingly, children are separate rights-holders in the public realm. The tensions are instead between citizens and the state, with courts facing a crisis of legitimacy, not because families are private, in the sense of separated from civil society, but private in questioning or resisting regulation. Such regulation, like the law in general, is legitimate only if it is in the public interest. 'Crisis of legitimacy' means the

²² S Cretney *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 710-723. Although Carol Smart has suggested that the discussions were predominated by professional rather than public opinion – C Smart, 'Wishful Thinking and Harmful Tinkering: Sociological Reflections on Public Policy' (1997) 26(3) *Journal of Social Policy* 301-321 at 319

²³ Although see A Bainham, 'The Privatisation of the Public Interest in Children' (1990) 53(2) *Modern Law Review* 206-221 who argues the opposite.

²⁴ For example, M Freeman (ed) *Introduction to Family, State and Law Volume I* (Ashgate, Aldershot 1999) xi-xxxii

questioning of authority to the extent that acceptance of government and its institutions begins to be undermined. This is a concept developed by Habermas from Weber's theories of the legitimation of domination and power. A state can exercise dominance over individuals if they generally accept that this is in their interests; this acceptance legitimates the actions taken on behalf of its institutions.²⁵

Popular usage of the terms 'public law' for legal intervention in child protection matters and 'private law' for inter-parental disputes makes their use as descriptors unavoidable. Therefore they will be used here in that context, although they do not reflect a valid distinction between these categories of legal proceedings. Galanter and Lande observe that, in civil justice, courts cannot be divided between public and private by the nature of the cases they hear, but all have varying 'dimensions of publicness and privateness'.²⁶ These dimensions become more complex in family courts.

RESEARCH QUESTIONS

Two broad questions can be identified. Firstly, why are family courts widely criticised? Secondly, what alternative systems are proposed?

The first step requires analysis of the current system. Initially, we might see a problem articulated in the level of complaints, but some of these reflect wider discontent about expense, delay and injustice, and can be ascribed to economic factors and/or perceptions of the rightness of one's own case, and are not unique to family courts. The emotive nature of private family disputes and public discourse on family values makes it difficult to cut through the rhetoric to identify whether there is anything uniquely dysfunctional in family courts.²⁷ In the absence of large-scale empirical research into the experiences of families,²⁸ one cannot judge the validity of a claim that the courts do not satisfy most users, or whether the minority

²⁵ As explained in Chapter Two.

²⁶ M Galanter and J Lande, 'Private Courts and Public Authority' (1992) 12 *Studies in Law, Politics and Society* 393-415 at 394

²⁷ Although the polarity of gender-based arguments may be seen as a duality, the question of sharing responsibility for parenting is universal, and far too wide to consider here in detail.

²⁸ J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: a review of research* (Family Justice Council, London 2010)

of chronic litigators²⁹ dominate the discourse, or whether the courts' failings are a popular myth, encouraged by publicity seekers.³⁰ I therefore start from the premise that whichever is true, the negative *perception* of these courts is damaging.

For the FJR, 'delay' was the first and foremost problem, to which it either subordinates others or cites them as contributors to delay.³¹ However, this is an inadequate basis for analysis. Lengthy processes reflect a rationing of resources because there is no agreement for investment in the system. Conversely, one could predict that unlimited resources would indulge more scope for delay, but most delay at present is caused by inactivity and waiting, not generated by over-activity. Either way, an objective that engages public support and investment cannot be based on opaque or obsolete policies. If the courts cannot fully escape from the series of conceptual boundaries that have perpetuated throughout the courts' history, at least acknowledging them would be a step toward rational policies.

The FJR also identified the use of adjudication rather than other forms of dispute resolution as problematic. This is a more complex claim because it may contribute to delay but has other features which are pursued in Chapter Seven. It will be shown that this theme that family matters are by their nature unsuited to a court process has recurred throughout the development of family courts, with an accompanying assumption that taking responsibility for resolving these privately, through some form of alternative dispute resolution must be better.³² But how 'private' is mediation when it is an enforced, not voluntary, process? And how can it fulfil the protective functions of the law, described below? It will be argued that the very fact that it is presented as a cost-saving exercise undermines its legitimacy.

Secondly, the most loudly declared complaint in the 2000s has been that family courts operate in secret, in denial of principles of open justice. This issue was excluded from the

²⁹ J Hunt and L Trinder, *Chronically Litigated Contact Cases: How Many Are There and What Works?* (Family Justice Council 2011)

³⁰ See for example, oral evidence given by J Hemming MP and M Narey to HC Education Committee Inquiry into the Child Protection System in England, 13 December 2011
<<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeduc/uc1514iv/uc1514iv.htm>> Last accessed 5 January 2012

³¹ Family Justice Review, *Final Report* (Ministry of Justice, 2011) 42

³² The idea of disputants in criminal law reclaiming their conflicts from the lawyers and behavioural scientists who have stolen them is advanced in N Christie, 'Conflicts as Property' (1977) 17(1) *The Journal of Criminology* (1977) 115, and subsists in the concept of restorative justice.

remit of the FJR but was examined by the Parliamentary inquiry. It is usually presented as another polarisation – between ‘secrecy’ and ‘openness’.

I therefore want to follow two key questions: How did courts become the ‘wrong’ place’ for family cases? Why are courts ‘secret’ and should they be open? I will examine how these questions arose, alternatives that have been proposed and whether analysis of the relevant history and the way alternatives were produced can help us to evaluate the options.

The thesis suggests that if these complaints about process were resolved, then, arguably, issues such as delay could also be remedied because the public, being confident in a legitimate court system, would accept sufficient resources being applied to it. Although complaints of miscarriages of justice and gender bias may never disappear a system that enjoyed stronger public support would be more resilient to these endemic to family policy.

Concepts of public and private are highly relevant to both these questions. The objective to divert families from the court arena is usually couched in terms of their being enabled to make private decisions. However, we need to ask whether alternative processes are in truth more legitimate than a court and whether they will serve the public interest by achieving the best outcomes for children. With regard to secrecy, the nature of publicity and privacy must be addressed to ensure the public interest in protecting the privacy of individuals within legitimate processes.

These two most pressing issues for family courts produce an interesting paradox: more privacy (in the sense of freedom from state control) for families who can be persuaded to come to their own agreements; less privacy (protection from the public gaze) for those who cannot.

METHODOLOGY AND STRUCTURE OF THESIS

It is suggested here that the two issues of the drive to avoid proceedings and allegations of secrecy both stem from a lack of legitimacy. I will argue that they can be addressed by examining the ways in which categorising aspects of family courts as either public or private have distracted us from coherent policy and practice. The theoretical framework is set out in Chapter Two.

Awareness of our place in history is essential to an understanding of social problems.³³ A study of family courts in the 21st century should be informed by an understanding of the historical context. When social policy emerged with welfare state provision in the 1940s, the only explicit connection to family courts was the provision of legal aid, which enabled the divorce rate to escalate. There is however an earlier link between social policy and the family courts, from the poor laws of the 17th century and the origins of the magistrates courts' family jurisdiction in the 19th century.³⁴ The National Assistance Act 1948, replacing the poor laws, formed a new relationship between citizen and state. Since the late 1970s, successive UK governments have pursued policies of reducing direct state control of most institutions, by 'rolling back the welfare state'.³⁵ The present government shows little sign of conceding its plans to remove legal aid from large proportions of the population and, more widely, reducing welfare benefits.³⁶ Social policy is therefore now more about rationing than provision.

The development of the court system will be set out in two sections, before and since the 1940s. Chapter Three explains the legacy that had to be adapted to the new relationship between citizen and state. Chapter Four relates the courts to social policy and the ideological and economic reasons for the move toward alternatives to court. Court systems inherited from the pre-war period, hardly changed since the mid 19th century, were not adapting to social change, and by the late 1960s the call for a unified specialist family court was strong.³⁷ The Finer Report, published in 1974, explains how the dual jurisdiction based on courts' pre-war functions, was failing.³⁸ This dichotomy stemmed from the different functions of a High Court with divorce jurisdiction, and the magistrates courts which dealt with crime and destitution.

This will be followed by a comparative case study of the family courts in Australia in Chapter Five. Aspects of the Australian system have been cited as worthy of emulation, often

³³ C W Mills *The Sociological Imagination* (Penguin, Harmondsworth 1970) 12-14

³⁴ M Hill, *Understanding Social Policy* (7th edn, Blackwell, Oxford 2003) 14-15; Department of Health and Social Security, *Report of the Committee on One Parent Families Volume 1* (Cmnd 5629, 1974) App 5; T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) 186-193

³⁵ M Hill, *Understanding Social Policy* (7th edn, Blackwell, Oxford 2003) 35-46

³⁶ Legal Aid, Sentencing and Punishment of Offenders Bill 2011; Welfare Reform Bill 2011

³⁷ Now recurring in the Family Justice Review *Interim Report* (Ministry of Justice, 2011) paras 3.146-3.152

³⁸ Department of Health and Social Security, *Report of the Committee on One Parent Families* (Cmnd 5629, 1974)

uncritically, over the past 35 years. A radical community-based model, which appears to have potential to remove parental disputes from courts to a better-received system, has recently been introduced. However, the Australian courts perpetuate a public/private structural division with greater disparity than English courts between dispute resolution and protection. The similar legal culture between the two countries make this a valid comparative study: there are differences in institutions, but values and systems inherited from a shared history mean that patterns of social behaviour relating to the law are recognisable in both the UK and Australia. Issues of openness and formality have also figured in the history of Australian courts, so it is useful to consider these in a comparative context. In 2011 both the FJR and the Parliamentary Committee were greatly assisted by evidence from Australia about the unintended consequences of parts of the Family Law (Shared Parental Responsibility) Act 2006.³⁹ Subsequently, it appears that even this evidence has failed to get the two reports taken seriously by media and politicians obsessed by ‘shared parenting’ and thus it becomes even more important to follow the outcomes in Australia closely.

Having set the courts’ functions in their policy context, the argument will then move on to consider the problem of secrecy in Chapter Six. This is approached by examining the values and rights of secrecy, privacy, openness and transparency and how these relate to the law on privacy and publicity. It will be seen here that theories of open communication to achieve an agreed understanding of law and policy can help explain why this problem has become intractable.

Chapter Seven returns to the topic of court being ‘the wrong place’, by pulling together the historical and current themes of informal justice and alternative dispute resolution.

A range of sources from legal, social sciences, and philosophical disciplines has been reviewed for this thesis. The application of family law by the courts has to be seen in historical and sociological context, in order to arrive at an understanding and critical evaluation of the connections between law and social policy. Policy on both publicity in courts and on alternative dispute resolution has been subject to considerable change during the period this thesis was written (2004-2011), alongside an incremental conflation of public and private aspects of the work of family courts.

³⁹ Family Justice Review *Final Report* (Ministry of Justice, 2011) 215-224; HC Justice Committee *Operation of the Family Courts* (2010-12 HC 518-1) 18-23

The theories of Jurgen Habermas (1929-) help with the theoretical framework. As will be explained, the work of Habermas has not previously been used in socio-legal studies of decision-making about children. It is used here mainly in terms of his ideas about reaching agreement in the public sphere through undistorted communication. Habermas argues that institutions lose legitimacy if they are driven by systems of money and power to the extent that they lose touch with the values and norms of society. Legitimacy can be maintained if the rationale for systems is openly argued in the public sphere, with those who wish to contribute feeling they have an opportunity to fully participate, whatever their status.

CURRENT FUNCTIONS OF THE FAMILY COURTS

First, this Introduction will identify the current functions of the courts. If courts are ‘not working’, then we need to know what they can be observed to be doing. Family law is of course more than law about children. I am looking only at decision making about children’s future care, which has evolved to form a large part of the courts’ work relatively recently. Decisions about financial support were largely transferred to an administrative body 20 years ago.⁴⁰

A function is an observable task or action. In social theory, the term describes a contribution to society by one of its constituent parts. So for example, a court could be observed to function either as a means of processing applications, or, ideally, as resolving disputes between individuals for the greater benefit of society. In terms of functionalist theory, to be discussed in Chapter 2, Talcott Parsons saw all functions as empirically identifiable in terms of their effect on the integration of society. He analysed systems from the point of view of what they did, and how this contributed to the equilibrium of the greater system, that is, society as a whole.⁴¹ However, Robert Merton differentiated between ‘manifest’ and ‘latent’ functions, meaning respectively the surface and underlying nature of social actions. This concept distinguishes motivation from objective consequences, some of the latter often being unintended.⁴² Therefore, the manifest function of a court is to process cases on behalf of parties, which may reach the outcome of a court order or other settlement. Simultaneously,

⁴⁰ Child Support Act 1991

⁴¹ See J Habermas, *Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) Ch VII

⁴² R K Merton, *Social Theory and Social Structure* (Glencoe Free Press, New York 1957) 60-69

it performs a latent function of imposing norms of family life. Parsons would see the courts' functions in terms of their contribution to stabilising society, while Merton might identify a subjective intended function, in what participants believe they are doing, but attributing greater meaning to the objective consequences of social control.

FUNCTIONS OF A COURT

The manifest function of a civil court in our jurisdiction is applying the law to resolve disputes. Traditionally, this has been undertaken through adjudication, but increasingly through alternatives such as arbitration and conciliation. The English civil courts have seen substantial procedural reforms following the Woolf recommendations to avoid litigation where possible, reduce adversarialism and complexity of proceedings and enhance the role of alternative dispute resolution (ADR).⁴³ Similar ideas have existed for many years in family courts both here and Australia, as will be discussed.

Thus, the court's functions have been modified since Roger Cotterrell cited comparative functional studies⁴⁴ of judicial behaviour to produce a universal court model as: an impartial process, using legal doctrine to resolve disputes, with an independent judge applying pre-existing norms after adversarial proceedings to achieve a decision that finds one party right and one wrong.⁴⁵ These can be observed as manifest functions.

Cotterrell drew on a wider synthesis of views of a court's functions as: legitimisation of political authority and the rule of law; dispute processing (the five points listed above); developing legal doctrine to inform administration; and elaborating and maintaining ideology⁴⁶ All but the second item in this list could be described as the court's latent functions. Cotterrell concluded that almost all writers on the sociology of law saw dispute resolution as central to the law's integrative function, and equated this with the function of the courts.⁴⁷ He went on to argue, however, that only a small proportion of the court's work is active dispute resolution. Most court work is administrative processing and enforcement, with only a small number of cases reaching higher courts, and much bargaining going on 'in the

⁴³ Rt Hon the Lord Woolf MR 'Access to Justice Final Report' (Lord Chancellors Department, London 1996)

⁴⁴ Namely, TL Becker, *Comparative Judicial Politics: The Political Functioning of Courts* (Rand McNally, Chicago 1995) and M Shapiro, *Courts A Comparative and Political Analysis* (Chicago University Press, Chicago 1981) cited in R Cotterrell, *The Sociology of Law* (Oxford University Press, Oxford 1992) Ch 7

⁴⁵ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 206-208

⁴⁶ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 208

⁴⁷ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 208-209

shadow of the law'.⁴⁸ The court's adjudication function is only one facet of dispute resolution, and a great deal of regulation is going on throughout society in conscious or unconscious awareness of the existence of court processes, or 'juridification' (as discussed in Chapter Two).

Therefore, courts have a wider ideological function than dispute resolution. Rather than define courts by the explicit actions of judges, administrators or court users, Cotterrell suggested that they should be seen in terms of their contribution to the social and political progress of the state. Courts apply doctrine and maintain policy to regulate social order. Most litigated disputes are routinely processed through the lower courts, with no publicly declared judicial interpretation of the law. Despite this, he argued that they reaffirm shared understandings and publicly accepted definitions of the law, to maintain the stability of existing social and economic institutions and the equilibrium of the wider social system.⁴⁹ Therefore we can see that the courts are a sub-system that both validates and reflects social policy.

As will be explored in Chapters Four and Seven, adversarialism is often described as unsuited to family disputes.⁵⁰ The concept of parental responsibility, as introduced in legislation both here and in Australia, was an attempt to get away from the 'winner takes all' outcome of custody and access disputes.⁵¹ However, mothers usually exercise more day-to-day responsibility for children than fathers do, for social and economic reasons, so this change in the law has failed to impose norms of shared, co-operative parenting, and some parents still resort to court. As will be discussed, ADR is promoted, but perhaps only underwritten by the symbolic power of the adjudicatory adversarial court.

FUNCTIONS OF FAMILY COURTS

Family courts' dispute resolution processes therefore rely on the normative behaviour of their actors, as much as on the body of 'family law.' Applying a functionalist approach in 1978,

⁴⁸ R Mnookin and L Kornhauser 'Bargaining in the Shadow of the Law: The case of divorce' (1979) 888 *Yale Law Journal* 950

⁴⁹ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 214 - 226

⁵⁰ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 209

⁵¹ J Dewar, 'Can the Centre Hold? Reflections on two decades of family law reform in Australia' (2010) 24 *Australian Journal of Family Law* 139

John Eekelaar⁵² suggested that the functions of family law were: adjusting to family breakdown; protection from family violence,⁵³ and support for family life.

John Dewar's critique of 1998 reflected the subsequent falling into disfavour of functionalist theories; taking a functionalist approach was interesting in the 1970s but might not be taken seriously twenty years later.⁵⁴ Feminism and constructivism had exposed the conservatism of the functionalist model. This is exemplified by Fiona Williams' revision of social policy theory to pay attention to gender, race and class stratification.⁵⁵ Dewar drew on Beck's ideas of fragmentation and contradiction to locate family law in a permanent state of chaos, although not crisis.⁵⁶ As he put it: who is now in a position to describe or judge what the law's functions are? So Dewar thinks it may have been acceptable, and even radical, for Eekelaar to describe these three functions of family law in the 1970s, but by the end of the 20th century there were too many contradictions in ideas of family relations and how the law deals with them to analyse family law as an integrated system. In his second edition, Eekelaar does acknowledge that functionalism is open to criticism if it tries to turn empirical data into 'quasi biological truths.' However, he maintains that a functionalist framework that identifies the goals and objectives of laws must be valid in working toward an understanding of family law and policy, even if there are doubts about its application to the family as a social form.⁵⁷ Here, Eekelaar appears to be taking Merton's line on latent functions, examining the impact of policy on law, not just observing manifest functions that keep the processes moving. And we must acknowledge that Eekelaar was progressive in writing a book in the 1970s which promoted an argument for child-centred decision making in family law.

Dewar, I think, was looking less at the relationship between law and policy (Eekelaar's aim) and more at the relationship between law and practice (Cotterrell's idea of routine administration). He acknowledged a distinction between the 'chaos' of family law and the

⁵² J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984)

⁵³ 'Family violence' is the term used in Australian law for what is described in England and Wales as domestic violence or domestic abuse. In Eekelaar's text he refers to both domestic violence and child abuse as family violence.

⁵⁴ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485

⁵⁵ F Williams, *Social Policy: A Critical Introduction, Issues of Race Gender and Class* (Polity Press, Oxford 1989)

⁵⁶ Here Dewar uses the term 'crisis' in its usual meaning of reaching a turning point which compels change. In contrast, the term 'crisis' is used by Habermas as a less immediate sense of a threat to identity by the undermining of social integration (See Chapter Two).

⁵⁷ J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984) 16

‘stabilising practices’ of its exponents.⁵⁸ In other words, he separated substantive family law from law in action, whereas Eekelaar was trying to set law in a policy context.⁵⁹ If Dewar identified functions of the courts through empirical observation of routine practice, this does not displace Eekelaar’s three functions. Of course, Eekelaar’s findings have been modified by events in the intervening years, such as the court’s loss of a financial adjustment function when child support was transferred to an administrative process in the early 1990s.⁶⁰

Dewar argues that the inability of family law to guarantee certainty dissuades parties from exposing their position to public scrutiny (or at least to that of a judge). Thus,

The task of the modern law is to set the tone for private ordering, or alternative dispute resolution, rather than to confer reasonable entitlements that one might expect to see enforced in a court of law.⁶¹

In other words, the law has been adapted to recognise the ‘chaos’ of family life, and rather than adjust, protect and support family members solely through actions in the court arena, family law provides a context in which individuals pursue a range of different avenues toward settlement.

Uncertainty in the legal outcome is probably not the major disincentive to applying to court. The current furore around legislation aimed at minimising access to courts by excluding large numbers of people from access to legal aid indicates the extent to which the cost is inhibitory.⁶² Even in care cases where local authorities bear the brunt of expenditure, they are discouraged from using courts by statutory guidance.⁶³ Reluctance to apply for care orders is still bolstered by resource restrictions even despite an increase in the rate of applications since 2008.⁶⁴ Thus, courts are part of a family justice system which directs parties into a variety of methods of settlement. Although, symbolically, a ‘court’ may still be a building in which a judge sits, dispensing justice, all the professionals linked to it are in the

⁵⁸ J Dewar ‘The Normal Chaos of Family Law’ (1998) 61 *Modern Law Review* 467-485 at 469

⁵⁹ J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984) xvii

⁶⁰ Child Support Act 1991; now CMEC, the Child Maintenance Enforcement Commission, established under the Child Maintenance and Other Payments Act 2008, which promotes private agreements

⁶¹ J Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 *Modern Law Review* 467-485 at 474

⁶² ‘Sound off for Justice’ campaign < <http://soundoffforjustice.org/>> Last accessed 3 February 2012

⁶³ P Welbourne, ‘Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*’ (2008) 20 *Child and Family Law Quarterly* 335-358

⁶⁴ C Burgess, B Daniel, J Scott, K Mulley, D Derbyshire and M Downie, *Child Neglect in 2011* (Action for Children/ University of Stirling 2012)

odd position of having to ensure that the court's own participation in the process is kept to a minimum.⁶⁵ However, this is not to say that layers of different professionals and bureaucracies, as described by Donzelot,⁶⁶ are any less intrusive into family life than those within the court. Nevertheless, mediation is continually extolled as such.⁶⁷

In common with most Australian commentators on Anglo-Australian law, Dewar was writing in 1998 primarily on inter-parental disputes. He saw protection in English law as limited, because the Children Act 1989 ensures that children's welfare is only adjudicated on as a last resort, and thus 'constructs law as harmful to children'.⁶⁸ Dewar claimed that the protective function of the law, noted by Eekelaar, is minimal because the law only intervenes when a risk indicator of parental conflict is presented in a private law case. (This is arguably no longer the case, as all adults in private law proceedings now have personal data about them scrutinised in pre-court safeguarding procedures.⁶⁹) The law constructs a parent who is expected to be reasonable and mindful of others' interests, which minimises the need for law's powers to protect.⁷⁰ However this follows 'a logic of intervention/non-intervention that has more to do with the careful use of limited judicial resources than anything else.'⁷¹ In other words, the law follows the economic imperative of the court system; the court does not serve the law.⁷² This fits exactly with Habermas' theory, discussed in Chapter Two, that systems created to serve society lose touch with that function when they are quantified in self-referential terms.

Commenting on the increased diversion and delegalisation between 1998 and 2010, Dewar questions whether the state's withdrawal of courts in favour of a variety of other fora means that family law will cease to function, as the jurisprudence will fall away, with no provision for coherent and consistent interpretation of the law.⁷³ However, presumably family law will still function for children of the wealthy. In public law, Welbourne raised concerns about a

⁶⁵ To be developed in Chapter Seven.

⁶⁶ J Donzelot, *The Policing of Families: Welfare versus the State* (Hutchinson, London 1979) Ch 4

⁶⁷ As discussed in Chapter Seven.

⁶⁸ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485 at 479. See also A Bainham 'The Privatisation of the Public Interest in Children' (1990) 53(2) *Modern Law Review* 206-221, to be discussed in Chapter Two.

⁶⁹ C Pemberton, 'Cafcass: How we screen 200 private law cases a day' *Community Care* 11 January 2012

⁷⁰ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485 at 485

⁷¹ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485 at 480

⁷² As described in Chapter Two.

⁷³ J Dewar, 'Can the Centre Hold? Reflections on two decades of family law reform in Australia' (2010) 24 *Australian Journal of Family Law* 139

move toward a two-tier system in care cases, with planning only for families in the most extreme situations coming within judicial scrutiny.⁷⁴ One might now predict a split system with courts' functioning to make decisions about only the most and least financially advantaged children, replicating the historical distance between wardship and the poor laws.⁷⁵

Eekelaar's definitions of the functions of family law were reviewed by Dey and Wasoff in 2006 as: protection; dispute resolution; regulation and guidance of conduct; and reflecting and creating public norms for private relationships.⁷⁶ His adjustive and supportive functions, according legal status and re-ordering relationships and enabling families to adapt to change, can be seen as a framework for dispute resolution, as well as regulation. The fourth function underlies the first three and, according to Dey and Wasoff, relies on a high degree of consensus in social attitudes. This need for consensus chimes with Habermas' theory that common understanding can be reached when individuals collaboratively interpret and define their situation through communicative rationality.⁷⁷ The danger is that it is not always easy to know if the law is the moral compass of the community or just a means of controlling behaviour.⁷⁸ Eekelaar's own later work argues strongly against using family law to impose approved behaviour.⁷⁹ The thesis argues that these dangers can be guarded against when policies relating public norms to private relationships are more likely to be accepted because of the degree of transparency and extent of participation in their formulation. Only then is it right for them to be enforced by a court.⁸⁰

With reference to Cotterrell's manifest court functions,⁸¹ a family court would need to be seen objectively as impartial, with an independent judge, to be accepted as legitimate. The other elements in his list are less applicable. The adversarial approach is discouraged and application of legal doctrine may also be scarce. A winner-loser outcome is often inappropriate where family members, or families and agencies, need to work together in the

⁷⁴ P Welbourne, 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System*, *Care Matters* and the *Carter Review of Legal Aid*' (2008) 20(3) *Child and Family Law Quarterly* 335-358

⁷⁵ Discussed in Chapter Three

⁷⁶ I Dey and F Wasoff, 'Mixed messages: Parental responsibilities, public opinion and the reforms of family law' (2006) 20 *International Journal of Law, Policy and the Family* 225

⁷⁷ J Sitton, *Habermas and Contemporary Society* (Palgrave MacMillan, New York 2003) 45-56

⁷⁸ C Lasch, *Haven in a Heartless World: the family besieged* (Norton & Co, New York 1995) 187

⁷⁹ For example, J Eekelaar 'Family Law: Keeping Us "On Message"' (1999) 11 *Child and Family Law Quarterly* 387

⁸⁰ J Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (MIT Press, Cambridge, Mass. 1998) 151-168

⁸¹ R Cotterrell, *The Sociology of Law An Introduction* (OUP, Oxford 1992) 206-209, discussed above.

future. Even contact with the independent judge and his or her view of normative behaviour is being replaced by contact with social work professionals.⁸²

Dispute resolution is arguably a *purpose* for a court, rather than an observable *function*. It is more accurate to describe the function as dispute processing. The outcomes of the process might be agreement or adjudication within an adversarial framework. The court also has a latent function here as an influence on the decisions made by disputants who stop short of going to court – fearing the potential outcomes, delay, or cost.⁸³ Whether the arrangements that ensue are truly a resolution is open to question. Although family courts have been driven by a settlement culture for many years, settlement is not synonymous with resolution.⁸⁴ Short-term resolution to address risk with protective action, such as a non-molestation or emergency protection order, may be achieved by a court, but the exercise of this protective function is easier to identify than long-term resolution.

One function of family law is to protect, but the mere existence of family law cannot protect rights and welfare of family members; this requires a mechanism that assures that protection. In the worst cases, protection is obtained through the criminal courts, but family courts routinely make orders intended to protect individuals, at least in the short term. These include remedies for domestic violence and asserting rights to safely occupy the family home.⁸⁵ Public law cases are always about protection, although dispute resolution regarding care plans is also negotiated.⁸⁶ Somewhat confusingly, the courts' social work advisory service, Cafcass, now sees itself as primarily a child protection agency in private law,⁸⁷ while reducing its input in public law cases.⁸⁸

⁸² See Chapters Five and Seven

⁸³ R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The case of divorce' (1979) 888 *Yale Law Journal* 950

⁸⁴ G Davis and J Pearce, 'A View from the Trenches – Practice and Procedure in Section 8 Applications' (1999) 29 *Family Law* 457. The central role of the solicitor in negotiating settlement in care cases has more recently been documented: J Pearce, J Masson and K Bader, *Just Following Instructions? The representation of parents in care proceedings* (University of Bristol, 2011)

⁸⁵ Although relief from domestic violence is now increasingly sought through the criminal law: M Burton, 'The Civil Law Remedies for Domestic Violence: Why are applications for non-molestation orders declining?' (2009) 31 *Journal of Social Welfare and Family Law* 109-120

⁸⁶ J Pearce, J Masson and K Bader, *Just Following Instructions? The representation of parents in care proceedings* (University of Bristol, 2011)

⁸⁷ C Pemberton, 'Cafcass: How we screen 200 private law cases a day' *Community Care* 11 January 2012

⁸⁸ Family Justice Review *Final Report* (Ministry of Justice, 2011) 128

Nevertheless, courts do have both private and public functions in a wider sense. When the court applies the law to the cases before it, this reaffirms the legitimacy of policies that will apply more generally across the population, supporting their ideological basis. In this way, courts, as agencies of the state, are regulating both the private outcome for the family and the public outcome of a result to accord with society's expectations.

It can therefore be concluded that the courts' manifest functions relate to private lives in dispute processing and protection, and their latent, public, function to integrate policy. This analysis can be applied to particular examples, as in Smart's description of the idealised post-separation family, where the private dispute is resolved in the context of the public need to reproduce the intact family into a post-divorce family form.⁸⁹ In another example, where a court enforces a contact order against a parent, the action confirms policies that promote post-separation contact. However, there is a high incidence of risk to individuals in this type of case.⁹⁰ This raises a question as to whether the desirability to be seen to promote contact (for the public good) jeopardises private safety. The potential conflicts between resolution and protection lie at the heart of the ambiguity of the family courts.

Lawyers' views

Practising lawyers rarely adopt an adversarial position in cases about children.⁹¹ In 2003, Mr Justice Wilson (as he then was) produced a list of the functions of the family court, including the 'conventional' forensic exercise (reflecting Cotterrell's description) but emphasising 11 extra dimensions when deciding cases about the future of children, such as educating parents and allowing family members who are 'losers' to feel they have been heard. He concluded that the family court had a quasi-therapeutic role.⁹² His detailed breakdown of characteristics of a proactive inquisitorial judicial model clearly reflects the latent function of incorporating social policy, but his attention to respect for the welfare as well as rights of individual family members, and his exhaustive list, appear unfashionable in the light of the recommendations by the FJR for ADR and time limited adjudication.⁹³

⁸⁹ C Smart 'Wishful thinking and harmful tinkering? Sociological reflections on family policy' (1997) 26 *Journal of Social Policy* 301

⁹⁰ S Day Sclater and C Piper, 'Re-moralising the family? – Family, policy, family law and youth culture' (2000) 12 *Child and Family Law Quarterly* 135

⁹¹ R Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156-176

⁹² Mr Justice Wilson, 'The Misnomer of Family Law' (2003) 33 *Family Law* 29

⁹³ Family Justice Review *Final Report* (Ministry of Justice, 2011) Part 3

More recently, in the context of increased pressure on resources, some members of the judiciary appear to be withdrawing from this interventionist model. In 2008, Mr Justice Ryder listed the functions of family courts as: protecting individual freedoms and rights; righting wrongs perpetrated against the individual; protecting the most vulnerable and making decisions relating to family life ‘by reference to the established or developing legal policy.’⁹⁴

This suggests an even closer relationship between courts and policy, with courts having to take on board policies while they are still being formulated. In another speech a few months later, he explicitly described courts as representing state intervention in family life in three ‘distinct’ types of case: public law proceedings where the state is mandated to protect children by taking them into care; ‘public interest’ proceedings for declaration of status such as a divorce decree; and private law proceedings between parents ‘where the state voluntarily intervenes in the guise of the court or occasionally a welfare agency, and at the request of one or both parties, to determine disputes which cannot be resolved by the individuals themselves.’⁹⁵

These may be different types of procedural applications, but they are not distinct from each other as they all relate to the ‘established and developing legal policy’ he mentioned earlier. In the third category, the state may have initially intervened at the request of a party, but the court then acquires a duty to safeguard children.⁹⁶ However Ryder J wants the state to withdraw the courts from the third category, because this would promote individual autonomy. Such a proposal, ignoring the court’s protective function, surely contradicts his earlier claims that courts ‘right wrongs’. Ryder J has now been appointed as ‘Judge in Charge of the Modernisation of Family Justice’ within an administrative committee, the Family Business Authority. His *First Update*⁹⁷ in response to the FJR deals with compliance and management of resources. It contains no reference to functions.

⁹⁴ Mr Justice Ryder, ‘The Family Courts of the Future’, Speech given at the 25th Anniversary of the Butterworth’s Family Law Service, 27 July 2008

⁹⁵ Mr Justice Ryder, ‘The Autonomy of the Citizen in Family Law Disputes’, Conkerton Memorial Lecture, 20 October 2008

⁹⁶ Children Act 1989 s 16A

⁹⁷ Mr Justice Ryder ‘The Family Justice Modernisation Programme: First Update’ (Ministry of Justice 2012)

Writing in *Family Law* a few months later than Wilson J, Cretney doubted that even such a non-adversarial approach countered the fact that courts were inappropriately involved in family relationships. He acknowledged that practice in family courts served a conciliation and possibly therapeutic function, but felt this failed to address the common perception of courts' association with crime and punishment: 'Statute provides that the courts' defining function is to deploy the coercive power of the state.'⁹⁸

It can be argued that coercion is no more a *defining* function of a court than of any other state body. One can see Cretney's point about a disparity between the personal nature of relationship breakdown and a law-enforcement institution but, as Habermas points out, even democratic societies depend on our routine interaction with institutions that exercise state power.⁹⁹ Citizens' acceptance of the legitimacy of state power involves compromise and exchange, meaning that we view state agencies (including courts) as coercive only inasmuch as we want them to maintain social order. Habermas sees a danger in this leading to passivity and therefore welcomes social movements in resistance. The point here is that all the state's agencies are part of systems of regulation, and out-sourcing dispute resolution from the courts to other processes does not mean a loss of coercive power.¹⁰⁰ Ultimately, as Lord Neuberger reminds us, although the courts are part of the state, civil justice is not a service, in the same way as the NHS, but is part of the judicial branch of the constitutional separation of powers and can therefore never become completely replaced by mediation.¹⁰¹

If one could redesign the system overnight, it would be logical to process both marriage/civil partnership and dissolution in a Registry Office. However, a function akin to the present family court in processing disputes about children, where the coercive element was unavoidable, would still be required. Cretney marginalises the courts' protective function in this short article, assuming that parents are the best judges of their children's welfare. He wrote this in the context of lawyers' frustration with the government's decision to abandon no-fault divorce in 2000. It is interesting that his objections to a court-based dispute resolution process were based on a dissonance between the perception in the public sphere of

⁹⁸ S Cretney, 'Private ordering and divorce. How far can we go?' (2003) 33 *Family Law* 399, repeated in 'Conciliation, Reconciliation and Mediation: The Historical Context' in J Westcott (ed) *Family Mediation: Past present and Future* (Jordans, Bristol 2004)

⁹⁹ J Sitton, *Habermas and Contemporary Society* (Palgrave Macmillan, New York 2003) 76-77

¹⁰⁰ J Crowe and R Field, 'The Problem of Legitimacy in Mediation' (2007) *Contemporary Issues in Law* 48-60

¹⁰¹ Lord Neuberger of Abbotsbury MR 'Has mediation had its day?' The Gordon Slynn Memorial Lecture, 16 November 2010

adult relationship breakdown as a private tragedy and a court as a place of punishment. Although it may appear that Ryder J follows a similar theme, he is basing his argument on economic necessity, not moral autonomy.

A more compelling argument about coercion belying respect for family privacy was made by Day Sclater and Piper, who called the courts' power to imprison mothers in contact disputes an 'explicitly coercive strategy' pursued within the ideology that children's interests are best served by having contact with both parents.¹⁰² They argued that although courts may rarely threaten or impose imprisonment in these circumstances, their power to do so reinforces their function in maintaining this particular policy. This contradicts the courts' protective function and resonates today in the light of enforcement provisions in the Children and Adoption Act 2006. These provisions are held out as coercing reluctant mothers into allowing contact, not reluctant fathers into maintaining contact. The power of the judge to punish is surely more visible here than in granting a divorce decree. The test would be whether parents see judicial power as more than symbolic.

Mr Justice Ryder's task to modernise the system was set by the President of the Family Division, Sir Nicholas Wall. The contemporary judicial view may therefore be sought in the President's recent speech on case management.¹⁰³ He emphasises the limitations placed by the rules of evidence on an inquisitorial approach and that the function of removing a child from their parents into state care or adoption can only be a judicial one. He rejects the FJR recommendation for a new Family Justice Service and instead suggests that an administrative committee within the court service can assume responsibility for the 'operational functions listed in the FJR'.¹⁰⁴ These include the social work advisory services provided by Cafcass and, in due course, mediation; expert witnesses and children's representation. The function of judge as independent arbiter is now combined with that of case manager. This emphasis on throughput supports my contention that the court's function is dispute processing rather than dispute resolution.

¹⁰² S Day Sclater and C Piper, 'Re-moralising the family? – Family, policy, family law and youth culture' (2000) 12 *Child and Family Law Quarterly* 135

¹⁰³ Sir N Wall, 'Changing the culture: The role of the Bar and Bench in the management of cases involving children' Speech to the Law Reform Committee of the Bar Council, 29 November 2011

¹⁰⁴ Sir N Wall, 'Changing the culture: The role of the Bar and Bench in the management of cases involving children' Speech to the Law Reform Committee of the Bar Council, 29 November 2011 para 33

Courts users' views

The President observes in his November 2011 speech that family courts are 'quasi-inquisitorial'.¹⁰⁵ However, the image painted in an Australian policy document, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings*,¹⁰⁶ is of a traditional adversarial court (from which the Australian court is now claimed to be breaking away) where the judge weighs up the quality of untrammelled legal argument. A polarised 'winner-loser' scenario may well exacerbate feelings of powerlessness against the state machine that has condoned injustice. In this sense, the 'loser' may not accept the court as legitimate. In care proceedings, the likelihood of a parent 'winning' is remote; cases are almost always brought to court at a stage when all prospects of parental care have failed.¹⁰⁷ Parents here are very likely to feel punished and alienated by a perceived collusion of state agencies.¹⁰⁸ Recent research suggests that lawyers have an essential function in enabling parents to accept that the outcome is fair.¹⁰⁹ In private law cases, parents can become exhausted with the system or run out of money before reaching an adjudicated outcome, so may still feel aggrieved after what may appear as a settlement.¹¹⁰

The small proportion of separating parents¹¹¹ who come to court may not be Dewar's 'reasonable' parents,¹¹² and those in child protection proceedings tend to have multiple problems.¹¹³ It falls to the court to persist in maintaining the construct of the reasonable parent until a point where coercive measures are the only option. Alternatively, parties may feel that a court should function to enforce reasonable entitlements. Disappointment when it does not, leads to a loss of legitimacy.¹¹⁴

¹⁰⁵ Sir N Wall, 'Changing the culture: The role of the Bar and Bench in the management of cases involving children' Speech to the Law Reform Committee of the Bar Council, 29 November 2011 para 11

¹⁰⁶ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra 2007)

¹⁰⁷ J Masson J Pearce and K Bader, *Care Profiling Study* (Ministry of Justice, 2008)

¹⁰⁸ J Brophy, *Child care proceedings under the Children Act 1989: A Research Review* (Ministry of Justice Research Series 5/06, 2007)

¹⁰⁹ J Pearce, J Masson and K Bader, *Just Following Instructions? The representation of parents in care proceedings* (University of Bristol, 2011)

¹¹⁰ G Davis and J Pearce, 'A View from the Trenches – Practice and Procedure in Section 8 Applications' (1999) 29 *Family Law* 457

¹¹¹ Ten per cent of separating couples, according to Eekelaar in *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984) at 68 and continually repeated since, most recently in the Family Justice Review *Interim Report* (2011) para 5.3

¹¹² J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485 at 485

¹¹³ J Masson, J Pearce and K Bader, *Care Profiling Study* (Ministry of Justice, 2008)

¹¹⁴ As seen in C Smart, V May A Wade and C Furniss, *Residence and Contact Disputes in Court Volume 1* (DCA Research Series 6/03, 2003)

The Ministry of Justice has published statistics that state that between 37% and 47% of court users (including professionals) in child and family cases in 2009-2010 were ‘very satisfied’ with their experience.¹¹⁵ Empirical research on parents’ and children’s experiences of court is limited. A recent comprehensive review of parents’ perspectives on their experiences in court found that a general response of feeling traumatised and alienated by family court proceedings and the associated agencies was not necessarily ameliorated by the use of conciliation processes. However it was notable that poor experiences of the process were not always linked to ‘losing’ the case. The court environment was simply experienced as formal and forbidding, and some parents did not accept the legitimacy of the local authority and/or the pervading settlement culture.¹¹⁶

There are a number of campaigns claiming that family courts are inherently dysfunctional, rather than just taking place in unsuitable buildings. Some of these claims are driven by aggrieved individuals, but there is a certain amount of bandwagon-jumping by politicians and the media. In particular, coverage of the fathers’ rights movement has had a significant impact on the law.¹¹⁷ As Smart points out, it is currently difficult to identify a genuinely positive shift on fatherhood amidst the problematic patriarchal attitudes toward women and children expressed in this movement.¹¹⁸ As will be shown in Chapter Six, changes in the law regarding media access have been almost entirely attributable to a small number of campaigners, rather than the number of court users they represent.

In the absence of hard data, it is difficult to argue against claims that public confidence in the family court system in England and Wales is low, especially as these are promulgated in the Ministry’s own publications.¹¹⁹ ‘Secrecy’ and the inappropriateness of the court as a venue are complaints that get considerable exposure as reasons that flawed decision making flourishes. In the following chapters I will show that throughout history the interface between family members and the courts is subject to processes that have grown, not through

¹¹⁵ HM Courts Service, *Court User Survey 2009-2010 Statistics Bulletin* (Ministry of Justice, 2010) 15

¹¹⁶ J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: a review of research* (Family Justice Council, London 2010)

¹¹⁷ R Collier, ‘“The Outlaw Fathers Fight Back”: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform – Reflections on the UK Experience’ in R Collier and S Sheldon (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006)

¹¹⁸ C Smart, ‘The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood’ in A Diduck and K O’Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, London 2006), 136

¹¹⁹ See for example, Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (CP 11/06, 2006) discussed in Chapter Six.

engagement with informed public opinion and societal values, but from distorted communication. The discourse is too often dominated by the forces of money and power. This lack of consensus on the functions of the courts means that the wider issue of delay, identified by the FJR as so central to the crisis in the system, and which is primarily resource-based, has little chance of resolution, as public support for expenditure will not be forthcoming.

Policy views

The most worrying current example of distorted communication is the way in which all rational arguments made against the removal of legal aid from vulnerable people are batted away by a political claim that the country cannot afford it.¹²⁰ This sabotages any chance of arriving at a fully-informed policy.

Unlike the Australian court,¹²¹ the family court system here has not always been subject to opprobrium. In the 1970s, the Finer Committee attributed all problems to the operation of magistrates courts, specifically commenting that it had received no evidence of complaints from other levels of court, apart from the expense of lawyers.¹²² The fathers' rights movement had not materialised; the mother was valued as the primary carer. Institutions were less subject to demands for transparency of process. Wider unpopularity has been articulated over the last 40 years and this debate in the public sphere indicates social problems to which we expect the state to respond. Changes in the lifeworld necessitate adaptation of systems. Increasingly, this has taken the form of deflecting disputes from court. The UK may have had explicit family policies since 1997 but statements emanating from the Ministry of Justice and its predecessors consistently marginalise the role of courts in settling family disputes.¹²³ There is no statement on the functions of family courts available on the websites of the Ministry of Justice or its agency, HM Courts and Tribunal Service. The government information portal, 'directgov', rather than describing what family courts do, provides links

¹²⁰ For example, J Djanogly MP, Hansard HC Vol. 534 Col 637 (31 October 2011)

¹²¹ See Chapter Five

¹²² Department of Health and Social Security *Report of the Committee on One Parent Families Volume 1* (Cm 5629, 1974) para 4.424. The Committee's criteria for a unified family court are discussed in Chapter Four.

¹²³ See for example, Department for Constitutional Affairs, *Parental Separation: Children's Needs and Parental Responsibilities: Next Steps* (Cm 6452, 2005); P Welbourne, 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*' (2008) 20(3) *Child and Family Law Quarterly* 335-358

to several advice resources such as ADR, guidance on completing a divorce petition and so on.¹²⁴

Neither does the Family Justice Council website¹²⁵ define the courts' functions but states that the aims of the family justice system are: (1) to provide ways to resolve family disputes and (2) to protect family members, in accordance with three principles: children's welfare; justice and fairness; and respect for human rights. The FJR report also consciously addresses the family justice system rather than identifying specific functions for courts.¹²⁶ Similarly, the latest Parliamentary Committee enquiry, despite being entitled: 'Operation of the Family Courts' begins its report with analysis of the family justice system.¹²⁷ This reflects the inter-disciplinarity identified by Murch and Hooper in 1992,¹²⁸ and ensures that the relationships between law and social policy are integral to the debate.

It will disappoint some, therefore, to now find the recommendations from the FJR being referred to a committee of lawyers and civil servants.¹²⁹ At the same time, Cafcass is publicising the way it has extended its remit in private law from advising the court into one of wholesale child protection.¹³⁰ It therefore seems that the historical tensions between law and social work described in this thesis are due to return.

However, the FJR concludes that the system is so haphazard as to 'not be a system at all'¹³¹ and the Committee complains that its primary difficulty was to 'form a clear picture of trends and changes' and that government has disappointingly had no 'robust evidence base for the formulation of policy' for the past 15 years.¹³² The Committee reported in July 2011, welcoming the FJR interim report, in anticipation of the FJR final report. Rather than address the Committee's conclusions and recommendations, Government merely responded that the outcome of the FJR was awaited.

¹²⁴ <http://www.direct.gov.uk/en/Parents/FamilyIssuesAndTheLaw/DG_4002963> Last accessed 26 April 2011

¹²⁵ <http://www.family-justice-council.org.uk/system_aims.htm> Last accessed 26 April 2011

¹²⁶ Family Justice Review *Final Report* (Ministry of Justice 2011)

¹²⁷ HC Justice Committee *Operation of the Family Courts* (2010-12 HC 518-1) 6-11

¹²⁸ M Murch and D Hooper, *The Family Justice System* (Family Law, Bristol 1992)

¹²⁹ Ryder J 'The Family Justice Modernisation Programme: First Update' (Ministry of Justice 2012)

¹³⁰ C Pemberton, 'Cafcass: How we screen 200 private law cases a day' *Community Care* 11 January 2012

¹³¹ Family Justice Review *Final Report* (Ministry of Justice 2011) para 2.22

¹³² Family Justice Review *Interim Report* (Ministry of Justice 2011) paras 2.11; 2.13.

The FJR emphasises the protective function of the courts in both public and private law through recommendations, on the one hand, to ensure that children's and adults' voices are heard in decision making and, on the other, to enable and encourage out-of-court resolution.¹³³ Unsurprisingly, it fails to synthesise these aims by explaining how the courts' protective function can be enforced by mediation providers in the private and voluntary sectors. At the time of writing, the government is yet to publish its formal response to the FJR, but its recommendations have already been undermined by the drastic reductions in access to legal aid in family cases already referred to. Whatever the government thinks the courts do, it could hardly be clearer that it believes that their role must be minimised.

CONCLUSIONS

One clear function of family courts is that they process disputes. Other functions are not easy to specify, and as Dewar asked: who is qualified to tell us?¹³⁴ A synthesis of the views outlined here suggests that family courts' functions regarding children incorporate public and private interests by:

1. Processing disputes
2. Making orders to protect vulnerable individuals
3. Influencing the behaviour of the wider community
4. Implementing social policy

Despite continual rhetoric by politicians about the need to dissuade people from litigation, it is evident that the court has long been the forum of last resort, not only for resolving parental disputes, but also for child protection.¹³⁵ Unfortunately, it is now impossible to separate the potential that ADR may hold for improving personal experiences or outcomes for families from the overwhelming message that it saves money. Values and norms have been colonised by the economic imperative. It is one thing to be stigmatised as deviant by resorting to court in a society where this is not deemed necessary for the 'reasonable parent', but another when

¹³³ Family Justice Review *Interim Report* (Ministry of Justice 2011)

¹³⁴ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467-485 at 467

¹³⁵ The latter was demonstrated by a study shortly after the introduction of the Children Act 1989: J Hunt, A Macleod and C Thomas, *The Last Resort* (TSO, London 1999), and the pressure to use alternatives to care proceedings became even greater ten years later, see P Welbourne, 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System*, *Care Matters* and the *Carter Review of Legal Aid*' 2008 20(3) *Child and Family Law Quarterly* 335-358

the path to court is cut off for blatantly systemic reasons, namely reducing access to professional legal representation and to judges' time.

Accepting a failure in parenting and handing over a decision to a court may feel unnatural but, once this happens, systems that are seen as attempting to reach a decision in the child's best interests, that a 'reasonable' parent would want, might meet expectations. In order for these systems to work, they must be based on policies formulated from principles and value commitments.¹³⁶ This applies equally to families caught up in private law and public law cases. Despite an increase in the rate of care applications since Welbourne's analysis in 2008,¹³⁷ it is pressure on local authorities' budgets that dominate their policies, rather than principles of non-intervention.¹³⁸

Family courts are part of the state apparatus that implements social policy to address perceived failures in parenting, but very much as a last resort. Parties who expect the court to adjudicate on who is right and wrong may be disappointed in their search for justice. This thesis argues that, when opportunities exist for the implications of private decisions to be brought into the public sphere for debate, there is more likelihood of broad agreement on the values of family life than when families are denied access to legal remedies. If the court's interpretation of family life does not resonate with court users and commentators, courts will struggle to have their decisions accepted as legitimate, because of the appearance that these decisions serve the system rather than families. The danger is that we are becoming aware that our chances of getting anywhere near the dispute processing function of a court depend on the system only. Access to justice is something we are told we cannot afford, despite serious doubts as to whether the new legal aid budget will actually reduce public expenditure.¹³⁹ At this stage, the impact of changes in family courts on children cannot be

¹³⁶ F Drake, *The Principles of Social Policy* (Palgrave Macmillan, Basingstoke 2001)

¹³⁷ P Welbourne, 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*' (2008) 20(3) *Child and Family Law Quarterly* 335-358

¹³⁸ C Burgess, B Daniel, J Scott, K Mulley, D Derbyshire and M Downie, *Child Neglect in 2011* (Action for Children/ University of Stirling 2012)

¹³⁹ G Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms* (Law Society of England and Wales 2011)

isolated from the wider picture of removing legal aid in areas such as education; welfare benefits; immigration; and clinical negligence.¹⁴⁰

There is therefore vocal opposition to the current legal aid changes, but insufficient groundswell to support existing systems in family courts. The common complaints made about courts are that they take too long to decide cases and decide them in the wrong way. These faults are attributed to under-resourcing, gender bias, secret professional agendas or to the claim that courts are just ‘the wrong place’. Under-resourcing and gender are of course major issues for family justice, but I examine these here only when money and power relations are the real driving forces behind policies and rhetoric that are dressed up as being ‘good for families’. I look at ‘secret courts’ and ADR to ask these questions: would courts have greater legitimacy if proceedings were better publicised, or if their sphere of activity was reduced by a further shift from adjudication to alternative non-legal models? This of course raises new concerns about how secretive or open out-of-court processes will be. Even if courts were not ‘secret’ and most matters were openly resolved elsewhere, would new complaints emerge, because economic and gender politics will continue to skew the discourse and prevent adequate resourcing and communication? The way the comprehensive FJR and Parliamentary Committee reports have been received by the media and politicians is not promising. Complaints that courts are secretive and the wrong forum may be symptoms of the loss of legitimacy, rather than the cause.

The thesis therefore seeks to examine how we have arrived at this position and what other options might be available. This will be done by tracing the courts’ historical development, their inter-action with social policy, and comparing them to the courts in Australia. Our family justice system has grown through a series of dualities; more are emerging and it is probably impossible for a democratic society to arrive at fixed decisions on the extent to which private family relationships should be brought into the public sphere. But this thesis will show how applying Habermas’ theories to the analysis of the key perceived problems of ‘secrecy’ and adversarialism of the family courts, supports the argument that policies reached through open and rational communication have more chance of being accepted than those driven by political expediency and economic motives.

¹⁴⁰ JustRights/Sound Off for Justice ‘Not Seen and Not Heard: How Children and Young People will Lose out from Cuts to Legal Aid’ (2011) <<http://www.justrights.org.uk/?q=resources/publications>> Last accessed 3 February 2012

CHAPTER TWO: THEORETICAL FRAMEWORK

SOCIAL THEORY AND THE PROBLEM OF FAMILY COURTS	33
HABERMAS' CRITICAL THEORY	34
THE PUBLIC AND PRIVATE SPHERES	38
THE LEGITIMACY CRISIS – LIFEWORLD AND SYSTEMS	44
JURIDIFICATION	48
RESPONSES TO <i>THE THEORY OF COMMUNICATIVE ACTION</i>	51
THE IDEAL SPEECH SITUATION	53
THE PUBLIC/PRIVATE DISTINCTION AND FAMILY COURTS	55
JURIDIFICATION OR DELEGALISATION?	56
LIFEWORLD, SYSTEM AND SOCIAL POLICY	61
CONCLUSIONS	62

SOCIAL THEORY AND THE PROBLEM OF FAMILY COURTS

Complaints are made about the operation of all types of court. Dissatisfaction with the outcome of an individual case or, more objectively, beliefs that courts are resource-starved can occur throughout the civil and criminal justice systems.¹ There is a separate set of complaints made about family courts because of their particular functions. In the Introduction, it was concluded that the manifest functions of family courts are (1) to process disputes and (2) to protect individual family members. If the traditional adjudication model produces a 'loser', then a substantial proportion of court users may be discontented. However, the extent to which ADR produces a higher satisfaction rate is arguable.² Something beyond the inevitable dissatisfaction and need for more investment in public services signifies a social problem. The high profile of allegations of secrecy, and the constant drive for ADR, are symptoms that the family court system has become pathologised.

In contemporary democracies, any public expenditure has to be justified by policy, so a more focused investigation is needed as to what might underlie under-resourcing of family courts. If social policy relating to family courts could be settled and prioritised, an economic solution would be sought and more resources would be applied to fulfil it. The Family Justice Council may say that the system follows principles of welfare, fairness and rights,³ but in the absence of public consensus on how courts should achieve these, it is impossible to justify a higher level of expenditure. Why then, is there so much disagreement about what family courts should do?

We can look to social theory to attempt to answer this question. The task of social theory is to explain how a society is organised, its historical context, and how its people form their identity.⁴ The characteristics of family justice reflect the importance society has attached to family life in different periods. Classical theorists such as Weber saw modernity as the age when individuals in Western society began to seek to interact with society to form a self-awareness of identity. Our expectations of family justice therefore now differ greatly from the

¹ Other aspects of the civil justice system and many of the criminal do of course attract their own respective sets of complaints, just two current examples being controversies about libel law and criminal sentencing.

² R Dingwall, 'Divorce mediation: should we change our mind?' (2010) 32(2) *Journal of Social Welfare and Family Law* 107-117

³ See Chapter One

⁴ CW Mills *The Sociological Imagination* (Penguin, Harmondsworth 1970) 13

period when the Church exercised control over legitimacy of family life and the relevant law. Regulation of the family is and always has been a means of social control, whether by Church or State. Weber and Marx saw the power of legal institutions as a form of domination, whereas post-Marxist and critical theorists such as Gramsci and Althusser saw them as a more covert form of coercion by the dominant classes. Foucault's ideas on the historical transformation of power relations are often deployed in attempts to analyse power relations between the state and family life, extended by Donzelot to the juridification of families. As has already been mentioned, Parsons analysed social structures, including the family, as functioning sub-systems, but the work of Beck, Bauman, Giddens, Parton and Smart saw systems as fragmented. All these theorists have something to offer in answering questions about family courts. Despite the contribution of postmodernists, the discourse is still dominated by the language of public and private. This chapter will explain why the work of Habermas is particularly helpful in studying the way such dualities emerge.

HABERMAS' CRITICAL THEORY

Habermas has produced a large amount of wide-ranging and densely-written work, which has generated an enormous range of responses, most often in the context of political theory.⁵ He has built on the work of earlier theorists to develop his ideas on the legitimacy of the post-welfare state. He takes issue with post-modernism, calling modernity an unfinished project. However, he believes Western society faces a crisis because of the failure of the welfare state to address the inequalities of capitalism.

The purpose of his early work was to explain late capitalism in western Europe from the viewpoint of critical theory, but he took a less fatalistic approach than the original Frankfurt school of Marxist theorists such as Horkheimer, Adorno and Marcuse. He returned to Weber's description of the secularisation of society and separation of the traditional and religious from the increasing influence of science and accounting, leading to an instrumental rationalisation of society. Weber saw law as becoming professionalised and value-free as it separated itself from morality (reflected in the loss of Church governance of the courts). Habermas believes that if rationality can be contained within its system boundaries, then progress from a primitive society regulated by myth to differentiation of our subjective,

⁵ J Sitton, *Habermas and Contemporary Society* (Palgrave Macmillan, New York 2003) xii-xiii

objective and social worlds is an emancipation, not a threat. In this way, his work is useful when examining the history of the courts and of social policy.

The title of a later work, *Between Facts and Norms*, reflects Habermas's view that while the 'fact' (the effectiveness) of law is a functioning system enforced by the state, it is only valid if it is ethically justified, coming from an accepted idea. As he expresses it, law's validity depends on ideas and values which give law capacity to make claims based on reasoned judgment.⁶

Habermas' only direct reference to family law is an example of 'juridification' by which the law extends into family arrangements and education to an extent that pathologises relations. He defined juridification in early work as the expansion of the law into formerly unregulated social matters.⁷ He later modified this position, in response to feminist critiques, recognising that law can assist women and children.⁸ Not all parts of his original argument stand up today, but they are reflected in the popular theories of Foucault and Donzelot on therapeutocracy, which have influenced a number of writers on state intervention and family law.⁹ Habermas complained that the replacement of the judge by the social worker is therapeutocracy and feels no more acceptable to us than being subject to positivist law.

Habermas first attempted to explain late western capitalist society from the position of Marxism and critical theory. This led him to explore the nature of the welfare state and what was causing conflict and crisis. Although he attributed the loss of freedom and loss of meaning experienced in modern society to the rationalisation of religion and the advance of science and bureaucracy, he distinguished Weber's concept of purposive rationality by separating instrumental from *communicative* rationality. He embraced the emancipating effects of science and technology. He went on to re-work Parsons' functionalist theories to explain differentiated structures in the sense of constant movement in a struggle to maintain stability. Like Durkheim, Parsons and Habermas both saw society as an organic solidarity. However, Parsons was concerned with social order, Habermas with legitimacy in the sense of

⁶ J Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (Polity Press, Oxford 1996)

⁷ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Oxford 1987) 357

⁸ J Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (Polity Press, Oxford 1996)

⁹ R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn, Avebury, Aldershot 1995)

citizens experiencing institutions as just, working in their best interests and deserving of loyalty.¹⁰ The formulation and implementation of social policy can be then be legitimated.

Parsons was one of the most dominant post-war theorists; he sought to explain the stability of social systems in terms of homeostasis, or maintaining equilibrium. This model has subsequently been applied to court systems,¹¹ and by Parsons himself to families. It has also been subject to considerable criticism of its conservatism, by post-Marxists and feminists.¹² Unsurprisingly, Parsons' concept of the family as a functioning system with assigned gender and age specific roles has been widely rejected. For example, Morgan argued that the struggles family members experience while they develop identities both within and outside the modern family could be termed 'contradictions' not 'dysfunctions'. Contradictions are built-in, a better description of the experience of continuous affirmation and negation, whereas a dysfunction connotes a pathogen that is to be removed. Contradictions are dynamic, indicative of change and development. They may not always be manifested as conflicts.¹³ Similarly, in other systems, contradictions can drive adaptation and growth as well as conflicts.

Habermas also tried to map integrative functions, but rather than confine these to stabilising functions, he used a theory of communicative rationality to examine discourse.¹⁴ Parsons did not question the *status quo*. In contrast, Habermas does not follow a functional analysis in pursuit of equilibrium, but acknowledges instabilities that can lead to breakdown and crises in society. He disagrees with systems theory developed by Luhman from Parsons, that society breaks down *only* because structures stop functioning in objective self-referential systems; for Habermas a crisis in systems is accompanied by a subjective loss of value and freedom.¹⁵

Habermas shows that the public/private distinction is a moveable construct, and the terminology conflates separate meanings. One way in which his theories assist is that he drew another distinction, between lifeworld and systems. The lifeworld is a philosophical concept

¹⁰ A W Frank, *Notes on Habermas: Lifeworld and System* <<http://www.ucalgary.ca/~frank/habermas.html>> Last accessed 26 April 2011

¹¹ See discussion in Chapter One

¹² See for example F Williams, *Social Policy: a critical introduction, issues of race, gender and class* (Polity Press, Cambridge 1989)

¹³ DHJ Morgan, *Social Theory and the Family* (Routledge, London 1975) 96-99

¹⁴ W Outhwaite, *Habermas: A Critical Introduction* (Polity Press, Cambridge 1994) 68-9

¹⁵ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 138

developed by Husserl in the 1930s, and refers to a shared unarticulated understanding of everyday life.¹⁶ The lifeworld consists of traditions, values and beliefs, which are latent or unsaid. Social integration is achieved in the lifeworld through people's experience of themselves and their relationships to each other.¹⁷ It has its origins in primitive belief and religion. In modernity, this common understanding has become dependent on social systems of the economy, controlled by money, and of administration, controlled by power. In other words, the lifeworld is supported by the system, not subservient to it. This system is needed to maintain a cohesive society but only exists as interdependent with the lifeworld.¹⁸

Discussion of levels of state intervention are often expressed in terms of public and private, but for Habermas, the extent of state and economic intervention into *both* our public *and* private lives must be justified by a democratic communicative process that is anchored in value commitments in the lifeworld. Communication is the core integrative function of society, but has become increasingly disabled and distorted.¹⁹

Although he describes his own work as empirical, Habermas's writing tends to be highly abstract. The concept of the lifeworld can appear hopelessly reactionary and incompatible with globalisation and individualisation. His work has been subject to critique, dialogue and subsequent revision, often in response to feminist commentaries. Nancy Fraser has been described as having '... done perhaps more than any other to open up productive lines of enquiry' on Habermas's work.²⁰ Although both *The Theory of Communicative Action* and a later work, *Between Facts and Norms*, consider the law in relation to lifeworld and systems, direct references to family law and policy are few, and his ideas do not commonly appear in studies on these subjects.²¹ Habermas' theories about the public and private spheres; juridification; communication; and the inherent conflicts of the welfare state, may not appear

¹⁶ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 114-152

¹⁷ J Habermas *The Theory of Communicative Action Volume Two : The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 119-126

¹⁸ J Habermas, *The Theory of Communicative Action Volume Two : The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 165

¹⁹ AW Frank, *Notes on Habermas: Lifeworld and System* <<http://www.ucalgary.ca/~frank/habermas.html>> Last accessed 26 April 2011

²⁰ L Goode, *Jurgen Habermas: Democracy and the Public Sphere* (Pluto Press, London 2005) 38

²¹ But see D Hayes and S Houston, ' "Lifeworld", "System" and Family Groups Conferences: Habermas's Contribution to Discourse in Child Protection' *British Journal of Social Work* 37(6) (2007) 987-1006 and T Sinclair, 'Mad, bad or sad? Ideology, distorted communication and child abuse prevention' (2005) 41(3) *Journal of Sociology* 41(3) 227-246

immediately attractive to the family lawyer. However, the following will inform the arguments about functions of family courts:

1. The relationship between the public and private spheres and the state
2. How the welfare state and its institutions attain or lose legitimacy
3. The theory of communicative action applied to policy-making and legitimacy of process.

THE PUBLIC AND PRIVATE SPHERES

Habermas developed his vision of the public sphere from the 18th century coffeehouses in Western Europe, which were a venue for public inter-action of ideas, further promoted by the establishment of the free press. Unsurprisingly, this somewhat romantic image has been criticised on the ground that it was an exclusive ‘public’ of wealthy European men which allowed the bourgeois to set themselves apart not only from the state but from the lower classes. Fraser suggests instead that there are ‘multiple publics’, including groups of campaigning women and workers.²² This can be seen in the groups (often women) who came together in social movements in the 19th century in philanthropic organisations in the early days of ‘child-saving’.²³

This ideal of rational informed discussion of public policy was initially suggested in *The Structural Transformation of the Public Sphere* (1989) where Habermas warned of the weakening of critical publicity as information-giving media expanded more into public life. His view was that the press were forming public opinion instead of mediating it.²⁴ As the state increased its activity, its organisation became both subject to, and manipulative of, publicity. We can see this argument reflected in much of the current debate about the globalisation of communications media, whether it be in the hands of multi-national corporations or non-accountable digital technology, and the acceptable level of state control. Technology now both enables and dis-empowers our understanding of, and contribution to,

²² N Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ in C Calhoun (ed) *Habermas and the Public Sphere* (MIT Press, Cambridge, Mass. 1992)

²³ See further Chapter Three

²⁴ J Habermas, *The Structural Transformation of the Public Sphere* (Polity Press, Cambridge 1989) 236-250

the public sphere. An obvious example is the extent to which the internet, with its relative freedom of access, is a public space.²⁵

The Habermasian public sphere was an arena of public discourse, separate from and often critical of the state. Participants set aside their respective statuses and inequalities to work toward an open consensus. The post-war welfare state forged more interdependence between civil society and the state, and public opinion became corrupted by public relations and manipulation.²⁶ The public sphere envisaged by Habermas is a discursive arena in which private persons come together to discuss public matters. Similarly, Mills had argued that social science required an engagement with the political public sphere to fulfil private needs and expectations.²⁷ To qualify as ‘public’, a question must be of concern to everyone and of common shared interest. The difficulty is in who decides what is of common concern. It is only possible to agree on what is public and private if minorities are allowed to participate in the discourse, which is free of domination and subordination.

Both Habermas’s public sphere and Rawls’ ‘original position’ as a basis for social justice are subject to criticism on their ignoring gender issues.²⁸ A fundamental argument of second wave feminism was that separating the public and private spheres subjugated women in a patriarchal society, for example in keeping domestic violence hidden within the privacy of the home. Arendt had reverted to classical societies to elevate the public arena, the Greek ‘polis’, the place where (male) citizens engaged with each other and developed civic society, while women, children and slaves were left at home. Feminists argued that ‘the personal is political’ to symbolise both a claim of recognition of women’s struggles in the public realm, and recognising that public policy affected women’s lives.²⁹ US feminists claim women’s reproductive rights under privacy rights,³⁰ but object to notions of privacy denying public support for victims of oppression within the home.³¹ For them, the term privacy has two very different meanings, one protective of bodily integrity and one oppressive, excluding women

²⁵ L Goode, *Jurgen Habermas: Democracy and the Public Sphere* (Pluto Press London, 2005) 38

²⁶ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 389-391

²⁷ CW Mills, *The Sociological Imagination* (Penguin, Harmondsworth 1959)

²⁸ S Benhabib, ‘The Debate over Women and Moral Theory Revisited’; N Fraser, ‘What’s Critical about Critical Theory: the case of Habermas and gender’ both in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995)

²⁹ R Gavison ‘Feminism and the Public/Private Distinction’ (1992) 45 *Stanford Law Review* 1-45

³⁰ J C Inness, *Privacy, Intimacy and Isolation* (New York, Oxford University Press 1992)

³¹ R Gavison, ‘Feminism and the Public/Private Distinction’ (1992) 45 *Stanford Law Review* 1-45

from public life. Conflict still exists between notions of privacy that justify non-interference by the state in domestic violence and others that respect the wishes of women to choose how they access help or pursue legal remedies against abuse.³²

Similarly, Olsen pointed out that to talk of policies of non-intervention in private family life is meaningless; that non-intervention is a conscious public decision to allow the state to define what a family is and what behaviour is acceptable. The popular belief, when she wrote in 1985 about the US, was that a policy of non-intervention in family privacy was being followed, subject to exceptional circumstances where state intervention was acceptable to remove abused children. However, it was not the principle of protective intervention that should be a matter of public concern, but the lack of public commitment to the state empowering children to assert their autonomy.³³

In a recent critique on the ethics of confidentiality, Clark tries to differentiate between 'private as secluded' and 'private as non-public'. He argues that a fundamental right to privacy (in the sense of not being overlooked) extends to rights of non-interference by the state in home and family life, essential to life in a non-totalitarian society.³⁴ But it is indeed that all-seeing state that may pose a threat to freedom, not the public sphere in which all of us have a right to participate.

With regard to the law regarding children, Bainham wrote of the Children Act 1989 'privatising' children's interests,³⁵ although he did not mean that child care was being outsourced to private enterprise. Rather, he was concerned that the Act symbolised a loss of public attention to children subject to private law disputes. He thought that fathers' rights would be better upheld if the courts were more interventionist.³⁶

These examples illustrate some of the confusion that arises from conflating 'public' with the state. Gavison³⁷ attempted to resolve the feminist dichotomy between privacy as both

³² A Diduck and F Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (2nd edn, Hart, Oxford 2006) 411-412

³³ F E Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835-864

³⁴ C Clark, 'Against Confidentiality? Privacy, Safety and the Public Good in Professional Communications' (2006) 6(2) *Journal of Social Work* 117-136

³⁵ A Bainham, 'The Privatisation of the Public Interest in Children' (1990) 53(2) *Modern Law Review* 206-221

³⁶ Discussed further below.

³⁷ R Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1-45

protecting and oppressing women by re-classifying the public/private distinction as merely descriptive, not normative, but the latter persists.

The state and its agencies have the potential to both promote and threaten the privacy of individuals and the quality of their family life. However, in all these situations, any state intervention required to enable individuals to flourish is mandated by the public interest in both protecting the individual and in enabling them to participate in society. For Habermas, private autonomy is only possible through democratic participation in the state through public autonomy.³⁸ There is therefore continuous movement between public and private in our engagement with society, and the state operates to support this process, underlying both the private and public spheres. The state is separate from but interdependent with the public and private spheres. Policy applied by the courts must therefore be based on the understanding reached in both private and public worlds about family life as it changes over time.

Although Fraser has actively engaged with Habermas' ideas, she is clear that the first stage in any critique of *The Transformation of the Public Sphere* or *The Theory Of Communicative Action* is addressing his exclusion of gender.³⁹ She does not conflate the state, the 'official' economy (of paid work), and arenas of public discourse all into a public sphere, from which women are excluded. She emphasises that there are no *natural* boundaries between the public and private spheres, but describes the designations as cultural classifications and rhetorical labels used to delegitimise some interests and value others. For example, she argues that child-rearing should not be 'enclaved from the rest of social labour'. Habermas argues that late capitalism has turned citizens into clients of the welfare state by buying their loyalty with compensations in the form of relative affluence and an illusion of power through the election process, but Fraser points out that most clients of the welfare state (in the US) are women, seen as 'domestic failures'.

Feminist arguments were supported in the 1990s by British scholars who objected to the effect of legal doctrine hiding family violence behind the principle of privacy. Freeman, and

³⁸ J Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (MIT Press, Cambridge Mass. 1999) 408

³⁹ N Fraser, 'What's Critical about Critical Theory: the case of Habermas and gender' in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995)

Rose, for example, wanted critical legal studies to transcend the public-private dichotomy.⁴⁰ The boundaries were not natural, but constructed by society. The state could not claim to be non-interventionist, because every decision on where to draw a boundary imposed the state's view on who and what were to be protected.⁴¹

Habermas' earlier work has been rightly criticised for ignoring the position of women, but it can be argued that some of his ideas have a universal application in Western society. In particular, his re-working of public and private are helpful. An examination of the functions of family courts cannot avoid the gendered nature of the discourse, as will become evident in later chapters. This is foremost in private law cases, where most disputes are between fathers and mothers. Consequently, the extent of men and women's caring responsibilities of their children, the disparity in their economic position and the emotional aspects of their relationship breakdown all affect their experience of the legal process. In the great majority of public law cases, it is mothers with whom local authority children's services are engaging. These women have often grown up in households with abusive fathers and/or have adult relationships with violent men.⁴²

The exclusivity of Habermas' vision of the public sphere of the 18th century and the concept of bourgeois gentlemen discussing great ideas in the salon culture may today seem as rarefied as Arendt's Athenian citizens. However, the point of the ideal speech situation is that it is an ideal, against which the value of discourse can be measured. It is challenging to envisage the possibility of an ideal speech situation in policy-making on family courts, where the voices of women and children struggle to be heard. The campaigns the media choose to pursue do not necessarily represent all marginalised groups affected by family courts. The fathers' rights movement has been promoted by the media as a redress for fathers who are unfairly prevented by the courts from having contact with their children, but a study of the different campaigning groups' websites found the most commonly expressed purposes to be to prevent men from being removed from the home; to place men at the centre of the family, and to gain control over women and their sexuality.⁴³ Recent research in courts in England and Wales

⁴⁰ M Freeman, Introduction to M Freeman (ed) *Family, State and the Law* (Ashgate, Aldershot 1999); N Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 *Journal of Law and Society* 61-796

⁴¹ S Moller Okin, 'Reason and Feeling in Thinking about Justice' (1989) 99 *Ethics* 229-249

⁴² J Masson, J Pearce and K Bader, *Care Profiling Study* (Ministry of Justice, 2008)

⁴³ F Kaganas, 'Domestic Violence, Men's Groups and the Equivalence Argument' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, London 2006)

suggests that claims of court bias against fathers are not substantiated.⁴⁴ Nevertheless, the Children and Adoption Act 2006 was drafted in response to such claims; its implementation is a struggle because of the dissonance between its objectives of enforcing contact and the reality of lack of commitment and resources. In Australia, Graycar vividly described the disproportionate impact of anecdote on policy-making in 2000.⁴⁵ This process was repeated in more recent legislative reform there, discussed in Chapter Five, and in amendments to media law in England and Wales (Chapter Six). These are typical of gaps between policy formulation and implementation⁴⁶ which could be reduced or avoided if policy was reached by agreement through communicative action.

THE LEGITIMACY CRISIS - LEIFEWORLD AND SYSTEMS

In primitive societies, the lifeworld and systems were not differentiated; their separation is a feature of late modernity. Although we need systems, they are not free-standing, but anchored and institutionalised in the lifeworld. It is when systems colonise or take over the values of the lifeworld that society is in crisis, described by Habermas as the uncoupling of the lifeworld.⁴⁷ As capitalism forces up the pressures and costs of system integration, the subsystems of the economy and administration begin to expand into the lifeworld, money turning us into consumers and the state turning us into its clients: 'The rationalisation of the lifeworld makes possible the emergence and growth of subsystems whose independent imperatives turn back destructively upon the lifeworld itself.'⁴⁸

Habermas reconsidered functionalism by adapting Parsons' concept of the AGIL diagram, that showed how systems functioned by four integrated sub-systems of interdependent supply and allocation of resources with agreed values and norms.

⁴⁴ J Hunt and A Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice, 2008)

⁴⁵ R Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737-755

⁴⁶ M Hill, *Understanding Social Policy* (7th edn Blackwell, Oxford 2003) 89-91

⁴⁷ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 154-5

⁴⁸ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 186

Parsons' AGIL diagram:

A daptation (securing material resources)	G oal attainment (allocation of resources)
I ntegration (developing norms)	L atent pattern maintenance (ordered patterns of value commitments)

This was revised by Habermas who re-cast the I and L functions (norms and values) as the lifeworld, and G and A (power and money) as the steering media or rationalised systems.⁴⁹ Therefore, in the diagram above, the upper layer (adaptation and goals) represent the system, legitimated by the lower layer, the lifeworld of norms and values. Rational actions in the systems of economy and state are legitimated by communicative action in the lifeworld of norms and values.

Habermas' version also shows the relationship between the public and private spheres. This is easier to see by rearranging the diagram:

	Public	Private	
<i>Rational action</i>	G – the administrative state, dependent on power	A – the economy, dependent on money	Systems , <i>Material reproduction, legitimated by the lifeworld</i>
<i>Communicative action</i>	I – integrative norms	L – values	Lifeworld , <i>Symbolic reproduction, legitimates systems</i>

⁴⁹ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 243-244

It is important to note the double axis: the horizontal axis between systems and lifeworld, as well as the vertical axis between the public and private sphere. Both of these boundaries are permeable. The lifeworld is steered by the systems of the market economy and state power, which in turn are anchored in the values of the lifeworld. By looking at the vertical axis, the AGIL diagram can also be used to categorise norms and power as the public sphere, and values and money as the private sphere.⁵⁰ This diagram captures the integration of lifeworld; systems; and the public and private spheres.

The following simplified format shows the state system and agreement in civil society as public, and the market economy and our internal values as private.

	Public	Private
Systems	The state	The economy
Lifeworld	Norms	Values

Systems consist of elements that can be ‘counted’ in terms of money and votes, but the constituents of the lifeworld cannot be quantified.⁵¹ However, the steering media of state power and the economy can only be accepted as legitimate if they reflect value commitments. Therefore when they become ends in themselves, unsupported by the lifeworld, they lose their validity. Common understandings of state power and the economy are reached in the lifeworld, not in themselves. It is communicative action that produces the lifeworld, which gives meaning to systems rationalised by science, technology and quantification. Resentment of an audit culture or ‘tick-box mentality’ indicates disenchantment with a process-driven style of management that loses sight of the substance of what is being managed. Current research indicates that children and families are less supported by welfare services where

⁵⁰ AW Frank *Notes on Habermas: Lifeworld and System* <<http://www.ucalgary.ca/~frank/habermas.html>> Last accessed 26 April 2011; N Fraser, ‘What’s Critical about Critical Theory? The case of Habermas and gender’ in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995)

⁵¹ AW Frank, *Notes on Habermas: Lifeworld and System* <<http://www.ucalgary.ca/~frank/habermas.html>> Last accessed 26 April 2011

professionals are required to spend a substantial amount of time recording data.⁵² The concept of ‘McDonaldization’ has been used to warn against the negative effects on services of relying only on efficiency, calculation, predictability and control.⁵³ In Habermas’ view this would be because services have lost touch with communication that originated in the lifeworld, becoming a ‘remote and unwelcome force of micro-management.’⁵⁴

Habermas’s idea was that, as the lifeworld and systems separated, language became the mechanism whereby we could agree our norms and values. He used hermeneutics, the science of interpretation, to argue that we arrive at a consensus in the lifeworld through ‘communicative action’. This draws on Mead’s theory of symbolic interactionism, whereby society is explained by a series of interchanges between social actors, in contrast to the fixed structures of Parsons, where social actors were relegated to the sidelines. Communicative action means reaching a common understanding, which is only possible in norms and values (the I and L in the diagram) and not in money or the state (A and G). The latter must express the understandings that are reached by the former to be accepted as legitimate.

Therefore state-made law is accepted when it derives from agreement reached in the lifeworld. Systems theory (such as Luhman’s) that sees societies as objective structures only, cannot fully account for the acceptance (or not) of the law by individual citizens.⁵⁵ Habermas’s theory is that legitimacy of the law depends on subjective levels of commitment to it. Within the tension between the expansion and restriction of freedom by the welfare state, Habermas sees the law as a system that increasingly imposes its regulation on the way we live. Its origin is as a steering mechanism, and it should therefore serve the lifeworld, not become an end in itself. Excessive legislation and regulation does not accord with our instinctive sense of justice and morality. However, the lifeworld is supported by our expectations that we can rely on stability and authority of law.

⁵² D Wastell, S White, K Broadhurst, S Peckover and A Pithouse, ‘Children’s services in the iron cage of performance management: street level bureaucracy and the spectre of Švejkism’ (2010) 19(3) *International Journal of Social Welfare* 310-320

⁵³ G Ritzer, *McDonaldization of Society* (California, Pine Forge Press 2004)

⁵⁴ L Goode, *Jurgen Habermas: Democracy and the Public Sphere* (Pluto Press London, 2005) 122

⁵⁵ R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 138

Habermas identified four types of social formation, as follows. The third is where we are now, and the fourth is to be strived for.

1. Primitive: regulated by myth, where change comes about by natural or ecological factors
2. Traditional: nation-states based on unstable class structures⁵⁶
3. Liberalist-capitalist: where exploitation of labour becomes de-politicised by economic reward⁵⁷
4. Universalistic: where society will form a consensus on its common interests.⁵⁸

Following Weber, the earliest forms of society were guided by myth, which blurred objective, social and subjective worlds. Tribal societies were structured by kinship relations.⁵⁹ These then evolved through system differentiation into early capitalist societies. Historically, the decline in tradition and myth has weakened the possibility of mutual understanding and consensus. At the same time the steering media of money and power were separated from the lifeworld and legitimated through law. Weber saw this triumph of purposive rationality as bureaucratisation leading to the 'iron cage'; Marx as the exploitation of the labour market; the Frankfurt school as instrumental reason leading to reification.

In contrast, Habermas is more optimistic. Rather than the conflicts within capitalism inevitably bringing about its collapse, modern society can survive, provided its condition allows what he terms 'communicative action'. Modernity is signified by the emancipation of norms from tradition and Habermas recognises Weber's fear of the intrusion of increased bureaucracy, legalisation and regulation into social life. He calls this the 'colonisation of the lifeworld'. However, he envisages instrumental reason as containable within its system boundaries. Communicative action is an alternative, emancipating, form of rational action in the lifeworld which formulates systems. While acknowledging the 'lifeworld' of traditional family forms, Habermas would say that modern social policy on the family is more likely to be accepted if it comes from open communication and consensus, rather than an appeal to an image from an idealised past.

⁵⁶ See Chapter Three

⁵⁷ See Chapter Four

⁵⁸ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 153-154

⁵⁹ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 156-160

JURIDIFICATION

Habermas offers the juridification of family law in Germany as an empirical example of his thesis of colonisation.⁶⁰ He defines juridification as a tendency to increase formal positive law. Legal norms need to be capable of being substantively justified, not just accepted solely through procedure. Habermas sees the law as an ‘institution’ based on moral principles, supported by law as a ‘medium’ combined with those of money and power. Routinely, law is enforced procedurally, but if law is questioned, it cannot be legitimated just as a medium; it requires substantive justification in the lifeworld of informal norms of conduct.⁶¹ In the first wave of juridification, civil law was developed to allow private contracts; then citizens were given civic rights against the sovereign in a constitutional state; and the development of constitutional and democratic rights was then guaranteed by laws produced through political participation.⁶² Although the welfare state restricts the market economy and enforces welfare benefits for its citizens, these policies are ambivalent, both giving and taking away freedoms. As Habermas puts it, juridification of life-risks restructures interventions into the lifeworld of the recipients and regulation of benefits brings impersonal distant bureaucratic structures and social services offered by the therapeutocracy. Public welfare policy now uses the law as a medium to regulate social welfare relationships within the lifeworld. He sees the law being used increasingly to control previously informal aspects of the lifeworld, commodifying culture, recreation, and especially education; the school becoming a route for job prospects rather than a site for teaching in a traditional sense. Social policy now demands economic investment in childhood, but this is focused on producing the future citizen rather than promoting the value of childhood itself.⁶³

Habermas warned against therapeutocracy; over-reliance on experts and an invasion of family life by professionals.⁶⁴ Reminiscent of Foucault and Donzelot,⁶⁵ preventive science directs current policies of early intervention in family problems, producing the spectre of

⁶⁰ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 356-357

⁶¹ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 365

⁶² J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 361

⁶³ C Piper, *Investing in Children* (Cullompton, Willan 2008)

⁶⁴ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 363

⁶⁵ M Foucault, *Discipline and Punish: The Birth of the Prison* (Tr. A Sheridan, Penguin, London 1991); J Donzelot, *The Policing of Families* (Tr. R Hurley, Hutchinson, London 1980)

Foucault's panopticon, tracking children by database.⁶⁶ Donzelot conceptualised 'the social sphere', where family life can be directed by public authorities. This has been distinguished from Habermas's visible 'public sphere' where ideas are openly debated.⁶⁷ In the 1970s, Habermas was suspicious of the juridification of German family law, establishing individual rights within families and dismantling the *paterfamilias* structure.⁶⁸ More recently, he attributed the feminisation of poverty in the US to liberalisation of divorce.⁶⁹

Such observations undermine Habermas' claim to be progressive in welcoming social movements for change.⁷⁰ His conservatism about family relations has been criticised because it did not acknowledge the benefits of legal protection to women and vulnerable family members.⁷¹ What he seems to be trying to argue is that over-regulation of social interaction turns relationships into objective encounters; administrative and judicial control should supplement the socially integrated legal context, but there is a danger of negative consequences if they take them over. His statement that: 'The protection of the welfare of the child as a basic right can be implemented only by giving the state possibilities to intervene in parental privileges, once regarded as untouchable,'⁷² might be read as colluding with the *laissez faire* model of child care.⁷³ However, it makes more sense as part of his wider argument that he believes individualisation and children's rights are part of the evolving lifeworld, and systems must adapt to meet these by way of rational consensus. Such an approach is reflected in Olsen's 'myth of non-intervention' and by Dingwall, Eekelaar and Murray's description of the 'liberal dilemma' of child protection.⁷⁴

Overall, Habermas' own attempt to use the juridification of family law as an example of colonisation is quite weak, relying largely on 1970s research in Germany that showed how

⁶⁶ T Dowty and D Korff, *Protecting the Virtual Child: The Law and Children's Consent to Sharing Personal Data* (Action on Rights for Children, London 2009)

⁶⁷ JJ Rodger, *Family Life and Social Control: A sociological perspective* (Macmillan, Basingstoke 1996) 34-35

⁶⁸ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 368

⁶⁹ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and democracy* (MIT Press, Cambridge Mass 1999) 422

⁷⁰ J Sitton *Habermas and Contemporary Society* (Palgrave MacMillan, New York 2003)

⁷¹ N Fraser, 'What's Critical about Critical Theory' in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995)

⁷² J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 369

⁷³ L Fox Harding, *Perspectives in Child Care Policy* (Longman, Harlow 1991) Ch 2

⁷⁴ F E Olsen, 'The Myth of State Intervention in the Family' *University of Michigan Journal of Law Reform* (1985) 28 835-864; R Dingwall, J Eekelaar and T Murray *The Protection of Children* (2nd edn, Avebury, Aldershot 1995) Ch 10

wardship subordinated children as objects of the proceedings rather than participants.⁷⁵ (It is interesting to note a small group of researchers in Australia was very approving of the inquisitorial role of judges in Germany, suggesting that practice may have changed in the past 30 years.⁷⁶)

A better example of juridification is given by Frank, who places relationships between health professionals and patients in the lifeworld, that is being colonised by insurance companies (in northern America) and governments (for example, in the UK) to produce a crisis in legitimacy, evidenced by the popularity of complementary medicine and the prevalence of clinical negligence actions. Communicative action would enable informed agreement to be reached about medical treatment, rather than resource-led decisions.⁷⁷ We must acknowledge that attitudes to professional status and institutional care are changing, and adapt systems accordingly. Similarly, Fraser resists arguments that recognising the value to the economy of housework and child care are commodification, but instead takes them out of the private sphere into the public space.⁷⁸

It will be seen that fears of juridification, the law taking over, are intertwined with those of delegalisation, the law being replaced by other disciplines. While these might appear another example of duality, they are argued as two sides of the same claim: perhaps most vividly expressed by Donzelot's Russian doll motif, where the tutelary complex replaces the judicial model with an educative model, and the judge in court is enveloped by layers of other professionals in an 'endless ramification of ... powers'.⁷⁹ In Habermas' words: '...replacing the judge with the therapist is no panacea: the social worker is only another expert, and does not free the client of the welfare state bureaucracy from his or her position as an object.'⁸⁰

⁷⁵ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 369-370

⁷⁶ M Harrison, *Finding a better way? A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra 2007)

⁷⁷ AW Frank, *Notes on Habermas: Lifeworld and System* www.ucalgary.ca/~frank/habermas.html Accessed 26 April 2011

⁷⁸ N Fraser, 'Rethinking the Public Sphere: A Contribution to Actually Existing Democracy' in C Calhoun (ed), *Habermas and the Public Sphere* (1992) 110-111

⁷⁹ J Donzelot, *The Policing of Families* (Tr. R Hurley, Hutchinson, London 1980) 8

⁸⁰ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 370

The state is expected to uphold theories of justice grounded in our norms and values but ‘the rationing motif dominates our civil justice system’,⁸¹ driven by a reduction in legal aid expenditure as an end in itself, rather than arrived at through open discourse. Diversion policies will only work if they make sense within court users’ understanding of what family life and adult-children relationships mean to them. Our own experience and evaluation of the family (private) and the norms we expect other families to follow (public) are inter-twined in the lifeworld. Systems driven by economic and ideological forces will not be accepted if they do not reflect these. We take our private views into the public sphere to arrive at societal values.

RESPONSES TO THE THEORY OF COMMUNICATIVE ACTION

Habermas’s concept of the lifeworld as a heritage of shared experience does not find sympathy with some postmodern theorists. In the context of globalisation, the concept of a ‘shared lifeworld’ may seem distant, and Habermas unduly optimistic. He famously called modernity an ‘unfinished project’,⁸² and took issue in the 1970s with the nihilism of some postmodern theorists. Although a critical theorist, he updated theories of functional systems to look for solutions and progress.

Society and family life are now seen as fragmented, not integrated. Beck and Bauman believe that individualised biographies lie across the system and the lifeworld; subsystem boundaries pass through individual lives dependent on institutions; how one lives becomes a biographical solution to systemic contradictions. Beck describes social progress, a vision of a better future, as depending on our self-perception of our transience in a relatively unchanging environment, whereas in postmodern society it is the individual who feels static amidst an ever-changing world.⁸³ Bauman sees the postmodern family as still adjusting to a society where men can no longer build their identity on the expectation of a vocation or a ‘job for life’. Instead, we are encouraged to live episodic, fragmented lives: ‘the hub of postmodern life strategy is not identity-building but the avoidance of being fixed.’⁸⁴ Although Durkheim thought people aspire to detach themselves from the present because they need to believe their actions have

⁸¹ G Davis, ‘The Halls of Justice and Justice in the Halls’ in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 109

⁸² W Outhwaite, *Habermas A Critical Introduction* (Polity Press, Cambridge, 1994) 121

⁸³ U Beck *Risk Society: Towards a New Modernity* (Sage, London 1992) 136-7

⁸⁴ Z Bauman ‘Broken Lives, Broken Strategies’ in Z Bauman, *Life in Fragments: Essays in postmodern morality* (Blackwells, Oxford 1995) 89

enduring consequences, we now feel that individuals are longer-lived than social institutions, that we have a right to happiness, and to live in the present. For Bauman, the lifeworld is now filled by surfing and drift, as we move through a 'succession of nows'.⁸⁵ Giddens has described the phenomenon of successive relationships as 'confluent love'.⁸⁶

This has an impact on family life. Individualisation and commodification produce uncertainties that lead us to attempt to protect children by ever-increasing surveillance. In Parton's interpretation, the loss of the previous security experienced by most people in a marriage partner for life has led us to invest all our visions for a better society in our children (our own, and 'childhood' as a construct).⁸⁷

As Beck describes it, Habermas envisaged political decision making as based on the way the interventionist state 'jumps into the functional gaps of the market' to improve material and intangible infrastructure. However, as the benevolent state becomes established, it loses its 'utopian energy', and its scope is attacked by external developments.⁸⁸ However, Habermas wrote that it had always been misleading to assume that utopian ideas of emancipation and happiness coincided with increasing power and wealth, and that the Marxist notion of progress being made on the basis of labour power must now be viewed as historical.⁸⁹ We benefit more from what can be achieved through communicative rationality than instrumental rationality. Although society is more than ever dependent on public discourse to achieve solutions, globalisation offers both new opportunities and threats to the concept of the ideal speech situation.

21st century pluralism and recognition of diversity of cultures would seem to reject the notion of a shared sense of tradition and the universalism of the ideal speech situation, on the grounds that consensus is impossible to achieve. But political theorists still envisage the public sphere as an important frame of reference, an arena in which the *possibility* of

⁸⁵ Z Bauman, *Society under Siege* (Polity Press, Cambridge 2002) 191-194; 236

⁸⁶ C Smart 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy (1997) 26 (3) *Journal of Social Policy* 301-321 at 307

⁸⁷ N Parton *Safeguarding Childhood: Early intervention and surveillance in a late modern society* (Palgrave MacMillan, Basingstoke 2006)

⁸⁸ U Beck *Risk Society: Towards a New Modernity* (Sage, London 1992) 189-190

⁸⁹ J Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate* (Polity Press, Cambridge 1989) 54

understanding an agreement is tested.⁹⁰ As societies become more complex and more differentiated, the burden on communicative rationality grows heavier.⁹¹

Applying the perspective of Habermas, the courts struggle to reconcile their historical structures with the imperatives of social policy, to deal with the diversity of family life and culture. For centuries, courts were accessed by only a minority of families at different ends of the social strata, and their economic and administrative systems were connected to separate societal expectations. As the lifeworld becomes more rationalised, we expect these systems to adapt, but instead they take on their own self-perpetuating nature. The result may be that we are prepared to give up on the courts ever functioning effectively, and instead turn to alternative dispute resolution. However, if values are still not agreed, new policies for dispute resolution will be based primarily in the spheres of economy and power, and may also fail to be accepted as legitimate.

THE IDEAL SPEECH SITUATION

Communicative rationality in the lifeworld is the means whereby private problems can be resolved in the public realm. Habermas contrasts instrumental or strategic (teleological or goal-oriented) actions which are purposively rational with communicative action, verbal and non-verbal inter-action between individuals who seek to reach an understanding about their action situation and their plans of action in order to co-ordinate their actions by way of agreement.⁹² Within the lifeworld, ‘value commitments are reaffirmed, and the basis of influence re-established’⁹³

Unlike purposive rational action, communicative action is the process of reaching a common understanding. Although a communicative action has a rational basis, it cannot be unilaterally imposed, but must be capable of being challenged and validated. Therefore, communicative action underlies participatory democracy, rational discussion, and consensus based on universal values. Although Habermas believes that communicative rationality can be undermined by the power of the mechanisms of state and market, it continues to enable

⁹⁰ L Goode, *Jurgen Habermas: Democracy and the Public Sphere* (Pluto Press London, 2005)

⁹¹ J Sitton, *Habermas and Contemporary Society* (Palgrave MacMillan 2003) 69-71

⁹² J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 86

⁹³ AW Frank, *Notes on Habermas: Lifeworld and System* <www.ucalgary.ca/~frank/habermas.html> Last accessed 26 April 2011

democracy and participation. As Fraser explains, Habermas' theories about an inclusive space for the communicative generation of public opinion legitimises views that can withstand public scrutiny, gives a mandate to politicians and holds them accountable, and enables us to ask whether *all* citizens are participating.⁹⁴

The public sphere enjoys the freedom to engage in rational argument, communicative rationality, in contrast to instrumental rationality. The threat is that this discourse is distorted by state propaganda or the commercial interests of mass media. The 'ideal speech situation' is an abstract concept where all contributors set aside their different status and have an equal right to be heard. This is used by Birkinshaw⁹⁵ to support transparency in government affairs and freedom of information, and is particularly useful in examining the call for publicity of family court proceedings.⁹⁶

The call for more publicity to be given to the courts' operations could be seen as an opportunity for a public discourse to improve current systems. Complaints about alleged secrecy can be seen as an example of the need for open deliberation in the public sphere to legitimise law, in terms of Habermas's concept of the power of communicative action in an ideal speech situation. However, communication is distorted by the power of the economic forces that drive the press and broadcasting media. Habermas sees the makers of 'public opinion' as in truth contemptuous of the public interest.⁹⁷

Moreover, responding to the more powerful and articulate members of society moves resources and attention away from children in care toward the children of the well-off. This is a class issue in that the children in most need are subject to neglect, linked to parental poverty, illness and drug use. However, these families do not have a strong voice and their interests are marginalised by pressure groups. Some of the loudest voices claim to represent fathers, but only narrowly in the 'fathers' rights movement'⁹⁸ rather than in empowering fathers who are marginalised by professionals' child protection procedures.⁹⁹ Other groups

⁹⁴ N Fraser, *Scales of Justice: Re-imagining Political Space in a Globalising World* (Polity Press, Cambridge 2008)

⁹⁵ P Birkinshaw, *Freedom of Information: the law, the practice and the ideal* (Butterworths, London 2001)

⁹⁶ See Chapter Six

⁹⁷ W Outhwaite, *The Habermas Reader* (Polity Press, Cambridge 1996) 25-26

⁹⁸ R Collier and S Sheldon, 'Fathers' Rights, Fatherhood and Law Reform – International Perspectives' in R Collier and S Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006)

⁹⁹ J Scourfield, *Gender and Child Protection* (Palgrave Macmillan, Basingstoke 2003) 98-101

have explicit agendas to discredit medical and/or social work practitioners.¹⁰⁰ In this way, the public sphere comes to be dominated by those who do not reflect the private concerns of more than a few.

THE PUBLIC/PRIVATE DISTINCTION AND FAMILY COURTS

Fraser wrote:

Habermas's account offers an important corrective to the standard dualistic approaches to the separation of public and private in capitalist societies. He conceptualises the problem as a relation among four terms: family, (official) economy, state and public sphere.¹⁰¹

It will be argued that a standard dualistic approach, separating the interests of children into public and private family law, is unsustainable in the court setting. Instead, the values common in public and private law, which court systems serve, underlie the basis of legitimacy of process. Seeing the 'the interinstitutional relations'¹⁰² amongst the four concepts is more helpful in analysing what the courts' functions are, whether these meet needs, and whether there are alternatives.

In England and Wales, the overlap between public and private has been recognised to some extent in the central legislation, the Children Act 1989. (It will be seen that the position is more problematic in Australia.¹⁰³) This Act arguably has achieved legitimacy though being a product of communicative action. It will be seen that, in contrast to some less successful legislation, the 1989 Act was the result of inclusive and considered consultation and debate.¹⁰⁴ Some important steps were taken to unify the family courts under a combined jurisdiction; the principles relating to parental responsibility and children's welfare were applied to all matters brought to court under the Act.

The primary difference that is still maintained is the level of children's representation.

¹⁰⁰ See Chapter Six

¹⁰¹ N Fraser, 'What's Critical about Critical Theory' in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995) 32. (Fraser uses the term 'official economy' to denote the value capitalism attributes to paid labour whereas she also sees unpaid child-rearing as social labour).

¹⁰² N Fraser, 'What's Critical about Critical Theory' in J Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge, New York 1995) 31 et seq.

¹⁰³ Chapter Five

¹⁰⁴ Chapters Four, Five and Six

This division was perpetuated in the Law Commission recommendation that children in private law proceedings ('ordinary family disputes'¹⁰⁵) receive a lesser level of representation. There was some dissension from this point of view, at the time, from advocates of children's rights such as Judith Timms, who recently commented that she was told that '...public law parents are dysfunctional and private law parents aren't...'¹⁰⁶ The Act's philosophy of non-intervention in the exercise of parental responsibility applied both to private law disputes, where parents should not be stigmatised just because they were divorcing, and in public law, to keep in check unwarranted social services applications.

Shortly after the Act was passed, Bainham pointed out that 'total fusion [of public and private law] would be out of the question since state intervention in family life is of its nature quite different to private disputes between individual family members.' He thought the extent to which the same principles did apply through the Act was better described as 'confluence'.¹⁰⁷ Bainham's objection was that the non-interventionist principles in the Act amounted to an abandonment of public interest in children who were subject to private law disputes. He warned that fathers would be marginalised in a system that maintained the *status quo* in living and caring arrangements, rather than enquiring into the individual child's situation. Thus, any public duty to take children's welfare seriously would be trammelled by respect for parental agreements that (in his view) would most often favour mothers. While there is no evidence of this effect, a few years later, research by Rebecca Bailey-Harris and others found s 1(5) manifested as reluctance by courts to adjudicate in parental disputes, leading to a level of dissatisfaction for both parties, who had approached the court because they were unable to agree but were then pressured into 'settlement'.¹⁰⁸ Bainham had criticised s 1(5) as devaluing the state's responsibility toward children by elevating parental autonomy. However, Bailey Harris et al. found that parents were still being coerced by the state.

This differentiation between the level of protection accorded to children has however been gradually modified, particularly in the past ten years, as policy moved more toward the idea

¹⁰⁵ Law Commission, *Family Law Review of Child Law, Guardianship and Custody* (Law Com 172, HC 594, 1988) para 6.26

¹⁰⁶ J Timms 'The Children Act 1989 - What did it achieve and for which children and young people?' Paper given at Nagalro Conference, London, 6 October 2008.

¹⁰⁷ A Bainham 'The Privatisation of the Public Interest in Children' (1990) 53 *Modern Law Review* 206-221 at 219

¹⁰⁸ R Bailey-Harris, J Barron and J Pearce 'Settlement Culture and the Use of the No-order Principle under the Children Act 1989' (1999) 11(1) *Child and Family Law Quarterly* 53

that children in private law cases also require attention. This has been influenced to some extent by research that shows a high level of distress in children in private law cases,¹⁰⁹ and an increase in courts using a power to direct separate representation of children, often to avail themselves of a more in-depth investigation.¹¹⁰ There has also been an ideological drive to widen the net from ‘child protection’ to ‘safeguarding’, as exemplified by the transfer of inspection of Cafcass from the courts to Ofsted (education inspectors).¹¹¹ The latter base their inspections on safeguarding children from harm in the context of improving educational attainment. This more interventionist approach may have been symptomatic of a wider move toward increased surveillance of children, a symptom of postmodern anxieties.¹¹² There are already signs that the present government, intent on reducing public expenditure, will be moving from the ‘state paternalism’ role back toward ‘*laissez faire*’.¹¹³ This is indicated in the emphasis on reducing the use of family court proceedings in both the Family Justice Review and the Legal Aid, Sentencing and Punishment of Offenders Bill. The idea that ADR is the preferred option for resolving parental disputes has been revived, despite the failure to follow this through under the Family Law Act 1996.¹¹⁴

Thus we have seen the pendulum swing between values of private family life being cited as the basis for non-intervention and ADR, to a rediscovery of the public interest in children’s welfare and saving them from dysfunctional parenting. The question is whether these policies have developed through public discourse based on private experiences to inform decisions in the public good, or whether communication has been distorted by the media of power and the economy.

¹⁰⁹ A Buchanan, J Hunt, H Bretherton and V Bream, *Families in Conflict: Perspectives of children and parents on the Family Court Welfare Service* (Policy Press, Bristol 2001)

¹¹⁰ G Douglas, M Murch, C Miles and L Scanlan, *Final Report for the Department of Constitutional Affairs: Research into the Operation of Rule 9.5* (Department for Constitutional Affairs, 2006)

¹¹¹ This is the position in England. In Wales there has been only one inspection of Cafcass Cymru which used the Ofsted methodology: Care and Social Services Inspectorate Wales *Inspection of Cafcass Cymru 2010* (CSSIW, Cardiff 2010) 2

¹¹² N Parton, *Safeguarding Childhood: Early intervention and surveillance in a late modern society* (Palgrave MacMillan, Basingstoke 2006)

¹¹³ Paradigms identified in the history of child care policy by L Fox Harding, *Perspectives in Child Care Policy* (Longman, London 1991)

¹¹⁴ Ministry of Justice Practice Direction 3A ‘Pre-application protocol for mediation information’ issued 23 February 2011, now PD 3A to the Family Procedure Rules 2010 (Mediation is discussed below in Chapter Seven.)

In child protection, measures have also been taken to decrease both the volume of public law cases that reach court, and the time and resources spent on them when they do.¹¹⁵ The first point was premised primarily on the *Care Matters* agenda, which encourages family placements even more strongly than provided for in the 1989 Act and has led to increased use of placement with family and friends both within and without court proceedings. The latter involves more use of residence and special guardianship (private law) orders than care orders. This policy was produced after responsibility for children's services in England was transferred to the government department responsible for education.¹¹⁶ *Care Matters* is explicit that children in care are an inefficient burden on public expenditure, because of the poor long-term outcomes, largely measured by low educational attainment.¹¹⁷

Secondly, attempts have been made to reduce expenditure on those public law cases which do reach court with the aim of reducing both the cost of legal aid¹¹⁸ and of judicial time.¹¹⁹ The Public Law Outline, introduced in April 2008, includes a 'pre-proceedings' stage, during which alternatives to applying for care orders are explored. Avoiding a court process by arriving at an intra-family solution might feel a more familiar and comfortable outcome, within the lifeworld.¹²⁰ However, similarly to encouragement of ADR in private law, there is a risk of the systems failing to serve families who do not have protection available in their own personal network. There is a danger that this failure arises not from rational discourse about the state's role in support, but is skewed by cost-based and instrumental decision making.

JURIDIFICATION OR DELEGALISATION?

As noted above, in *The Theory of Communicative Action*, Habermas described juridification as the formality of legal process extending into the lifeworld with pathological effects.

¹¹⁵ P Welbourne, 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System*, *Care Matters* and the *Carter Review of Legal Aid*' (2008) 20 (3) *Child and Family Law Quarterly* 335-358

¹¹⁶ Although the Welsh Government has not shifted the emphasis in children's services from care to education to the same extent, the courts are similarly affected because the Ministry of Justice has responsibility for courts in both England and Wales.

¹¹⁷ Department for Children Schools and Families, *Care Matters: Time for Change* (2007 Cm 6932)

¹¹⁸ Ministry of Justice, *Proposals for the reform of legal aid in England and Wales* (Consultation Paper CP12/10 Cm 7967, 2010)

¹¹⁹ J Masson, 'Controlling costs and maintaining services – the reform of legal aid fees for care proceedings' (2008) 20 *Child and Family Law Quarterly* 425

¹²⁰ D Hayes and S Houston, '“Lifeworld”, “System” and Family Groups Conferences: Habermas's Contribution to Discourse in Child Protection' (2007) 37(6) *British Journal of Social Work* 987-1006

Similarly, Cretney prefers the appeal of ‘private ordering’ to a court, because it is inevitable that families will always identify courts with the coercive power of the state.¹²¹ However, our expectations of justice and welfare rely on the law; the interdependence of legal systems and the lifeworld they serve depends on a correct balance. If ‘informalism’¹²² results in net-widening, with families being regulated by non-legal professionals, this may not reflect the lifeworld either. The processes of the ‘therapeutocracy’ are not universally trusted any more than the law. Donzelot begins with the 19th century movement to ‘medicalise’ the family, which he traces through to the emergence of social work, a desire to educate instead of punish.¹²³ These are modes of discipline as envisaged by Foucault as symptomatic of post-structural power relations.

The unequal relationship between social workers and ‘clients’ created a danger that professionals could impose their pseudo-scientific theories in family work; this was exacerbated by fears in the post-Finer period up to the 1990s that de-legalisation weakened individuals’ rights to representation and self-determination.¹²⁴ Since then, the social work ethos (whether psychodynamic or family systems theories) common across local authorities, probation service and charities – of caseworking with parents – was replaced by a more instrumental target-based approach. Faith was placed in systems, not in people.¹²⁵ The previous more personalised role might have been seen in Foucauldian terms as ‘normalising’ the family, but the shift to technology-driven quantitative-based judgements seemed even more likely to produce a surveillance society.¹²⁶ This is now recognised in Eileen Munro’s review of child protection, but she fears that Government is wary of relaxing central control and trusting front-line workers.¹²⁷

¹²¹ S Cretney, ‘Private Ordering and Divorce: How far can we go?’ (2003) 33 *Family Law* 399

¹²² R Cotterrell, *The Sociology of Law: An Introduction* (OUP, Oxford 1992) 291-4

¹²³ J Donzelot, *The Policing of Families* (Tr. R Hurley, Hutchinson, London 1979)

¹²⁴ J J Rodger, *Family Life and Social Control: a sociological perspective* (Macmillan, Basingstoke 1996) 42-45

¹²⁵ D Wastell, S White, K Broadhurst, S Peckover and A Pithouse, ‘Children’s services in the iron cage of performance management: street level bureaucracy and the spectre of Švejkism’ (2010) 19(3) *International Journal of Social Welfare* 310-320

¹²⁶ N Parton, *Safeguarding Childhood: Early intervention and surveillance in a late modern society* (Palgrave MacMillan, Basingstoke 2006)

¹²⁷ E Munro, Evidence given to HC Education Committee, 29 June 2011

< <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeduc/uc1312-i/uc131201.htm> > Last accessed 23 July 2011

Where state intervention is required in cases of child abuse and neglect, care proceedings have long been ‘the last resort’.¹²⁸ Now, however, the courts are seen as being unable to cope with the volume of cases, and policies are continually produced to avoid their being involved. Welbourne argues that this may create a two-tier system.¹²⁹ Families are increasingly forced to accept ‘private’ arrangements of children being placed with extended family or foster carers outside the oversight of the court, but this diversion entangles families in processes no less alienating than adjudication. Arguably, children’s welfare and parental rights are both more effectively upheld in the court process than by ‘informal’ agreement,¹³⁰ although judicial scrutiny may well diminish in the near future, again for economic reasons.¹³¹

One example of an alternative in child protection cases is the family group conference, a meeting which facilitates family members to agree a safe plan for the child. Hayes and Houston utilise Habermas’ theories in this example of melding public and private relationships. They see these conferences as an example of undistorted communication leading to better outcomes for children.¹³²

In *Between Facts and Norms*, Habermas talks about ‘mediation’ between the lifeworld and systems. This prompts one to think of his ideas on communicative rationality having something to offer mediation-type processes in family law. This terminology has indeed been drawn on in the field of international mediation, in the use of Habermasian discourse ethics re-connecting Kant with real world processes.¹³³ Hayes and Houston’s use of Habermas’s concept to mediation in family group conferences is obviously a model of ADR with much in common with mediation in the sense of third party facilitation.¹³⁴ Habermas argues that the

¹²⁸ R Dingwall J Eekelaar and T Murray *The Protection of Children* (2nd edn, Avebury, Aldershot 1995); J Hunt, A Macleod and C Thomas, *The Last Resort: Child Protection, the Courts and the 1989 Children Act* (TSO, London 1999)

¹²⁹ P Welbourne ‘Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*’ (2008) 20(3) *Child and Family Law Quarterly* 335-358

¹³⁰ P Welbourne ‘Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*’ (2008) 20(3) *Child and Family Law Quarterly* 335-358 at 351

¹³¹ Family Justice Review Panel, *Interim Report* (Ministry of Justice, 2011) para 4.144 et seq

¹³² D Hayes and S Houston ‘”Lifeworld”, “System” and Family Groups Conferences: Habermas’s Contribution to Discourse in Child Protection’ (2007) 37(6) *British Journal of Social Work* 987-1006

¹³³ DL Jones, ‘Mediation, Conflict Resolution and Critical Theory’ (2000) 26 *Review of International Studies* 647

¹³⁴ D Hayes and S Houston, ‘”Lifeworld”, “System” and Family Groups Conferences: Habermas’s Contribution to Discourse in Child Protection’ (2007) 37(6) *British Journal of Social Work* 987-1006

social worker is no less a symbol of juridification than the judge.¹³⁵ Foucauldians would argue that the mediator is no less an agent of the state than the judge. Thus moving away from adjudication is rationally-purposive, a cost-cutting exercise in the guise of emancipation from state intervention.

Sinclair also sees communication in child protection processes as distorted by ideology. Both studies place the family in the lifeworld and the social worker in a system.¹³⁶ Social work systems have become process-driven and uncoupled from the lifeworld as the formality of the law dominates, a shift developing since the loss of faith in the welfare state and emphasis on risk since the 1980s.¹³⁷

LIFEWORLD, SYSTEM AND SOCIAL POLICY

Political manoeuvring and distorted communication notwithstanding, successive governments attempt to meet popular demand by identifying social problems and formulating policies to address them.¹³⁸ Contemporary society does not tolerate child abuse and neglect and consequently responds by constructing a system of child protection. Our moral values (in the lifeworld) dictate that the state should use systems that promote the interests of vulnerable children. This is a straightforward example of our private family values influencing public norms and being supported by the state and public finance, within the ambivalence in a democratic society about state intervention in families. Since Dingwall, Eekelaar and Murray¹³⁹ identified the 'liberal dilemma' of removing children from their birth families, the issue has become even more complex because it has emerged that removal to public care is not a complete answer. The government concluded in *Care Matters* that the cost of the care system could not be justified by the poor life outcomes of the children that system ostensibly protected.¹⁴⁰ However, it is not always clear whether policies to avoid children acquiring the status of being 'looked after' by local authorities are based on their welfare or on the financial

¹³⁵ J Habermas, *Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 370

¹³⁶ T Sinclair, 'Mad, bad or sad? Ideology, distorted communication and child abuse prevention' (2005) *Journal of Sociology* 41(3) 227-246

¹³⁷ N Parton, *Governing the Family* (Macmillan, Basingstoke 1991)

¹³⁸ RF Drake, *The Principles of Social Policy* (Palgrave MacMillan, Basingstoke 2001)

¹³⁹ R Dingwall, J Eekelaar and T Murray *The Protection of Children* (2nd edn, Avebury, Aldershot 1995)

¹⁴⁰ Department for Children Schools and Families, *Care Matters: Time for Change – Impact assessment* (Cm 7137, 2007)

implications.¹⁴¹ The language now being used by Government, referring to local authorities' duties as 'burdens', suggests the latter.¹⁴² Where the influence of cost considerations distorts language and circumscribes free debate, the legitimacy of new policies is jeopardised.

Identifying the 'social problem' in private law cases is more difficult. Parental separation is common and no longer stigmatising; but the courts are asked to deal with the most extreme situations. If this is because we are concerned about the emotional damage caused to children by inter-parental conflict, our motivation cannot be differentiated from public law. There is no rationale to maintain the public/private distinction here, if the courts' function is to 'safeguard' the child. Private law applications are initiated by parents, not the state, but not all parents see safeguarding their children as the primary issue. Perhaps the social problem driving policy is a re-definition of parenthood that has only in the last 20-30 years impacted on the family court system to produce an unmanageable volume of contact applications. In the lifeworld we accept that the errant father who loses touch with his children, leaving the primacy of the maternal relationship undisturbed, is no longer the stereotype. However, while our systems are driven by unrepresentative media images, short-term political advantage, and cost-saving, little progress in reconstructing gendered parenting is apparent.

CONCLUSIONS

When the Children Act 1989 was drafted, a policy distinction was drawn between public and private law cases on the grounds that the former involved deviant or inadequate parents, whereas the latter did not. Public law cases necessitated state intervention because of a failure of parenting. If parents resort to court to make decisions about parenting it is difficult to avoid the conclusion that they also have failed. We feel discomfort, at the very least, about handing over such decisions to an institution. That dissonance stems from our experience of family relationships in the lifeworld; if the court systems are to steer us, they must be firmly rooted in the lifeworld to have any validity.

¹⁴¹ P Welbourne 'Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*' (2008) 20(3) *Child and Family Law Quarterly* 335-358

¹⁴² All local authorities toward children in need and children at risk of harm are included in an online consultation under the heading: *Tackling burdens; reducing burdens on local government* <<http://www.communities.gov.uk/localgovernment/decentralisation/tacklingburdens/>> Last accessed 9 July 2011

When family relations fail, individuals turn to courts and state agencies. The aggrieved father will pursue his right to contact with his children; victims of domestic violence will call in the police; the press will condemn the social worker who did not act quickly enough to remove a child from dangerous parents. These are all instances where we call on systems to extend into our lifeworld to remedy an imbalance in power relations, and are disappointed if legal procedures do not reflect our lifeworld assumptions about justice. We simultaneously resent institutional control of our position in society and our identity, while seeking ever-increasing recognition and protection of our rights to exert these. Meanwhile, government rejects the expanding cost of the court system, tries to divert parties into alternative processes, ostensibly to empower them to arrive at their own solutions.

Habermas's work is pervaded by the theme of interdependence of autonomy in both the private and public spheres. In the private sphere, the potential for self-knowledge arises from communicative action. The ideal speech situation allows society to work toward agreed truth in shared values and at the same time enables the self-development of the individual.¹⁴³ The conditions of an 'ideal communication community' would enable the individual to fully develop their moral autonomy beyond immediate restrictions to a universal identity, freed from convention. Secondly, it would enable self-realisation. Individuals assume an identity in both a social world, and a subjective world; the first is their relationship with society, the second their concept of themselves. The nature of the language used by the individual can reflect both self-determination and self-realisation.

Wright Mills' sociological question of how social order is possible is answered by Habermas in constructing a theory of a lifeworld of shared understanding and communication, underpinned by instrumental and strategic actions by economic and administrative systems. Courts try to resolve disputes, whether by adjudication or overseeing alternative methods. In family proceedings, court operations are seen as seriously failing by varying sections of the community that have little else in common. This may lead to a conclusion that family disputes are not soluble by a legal system that has become ideologically and economically driven to the extent that it has separated from the values and beliefs of those it serves, and has therefore lost legitimacy. The system must therefore return to a public discourse on shared values that can reach a consensus on what is required.

¹⁴³ J Habermas, *Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 96-111

CHAPTER THREE

HISTORY OF FAMILY COURTS Part One: before the welfare state

EARLY JURISDICTION IN FAMILY CASES	65
ECCLESIASTICAL COURTS: ORIGINS	66
JUSTICES OF THE PEACE: ORIGINS	69
CHURCH COURTS, PARLIAMENT AND DIVORCE	71
<i>MARITAL SEPARATION AND THE ECCLESIASTICAL COURTS - DIVORTIUM A MENSA ET THORO (SEPARATION FROM BED AND BOARD)</i>	74
<i>MARITAL SEPARATION AND PARLIAMENT – DIVORTIUM A VINCULO MATRIMONII (FREEDOM FROM THE BOND OF MARRIAGE)</i>	77
<i>ACTIONS FOR DAMAGES AT COMMON LAW – CRIMINAL CONVERSATION</i>	80
<i>PROCEDURAL REFORM – MATRIMONIAL CAUSES ACT 1857</i>	83
THE GROWTH OF THE JURISDICTION OF THE JUSTICES OF THE PEACE: 16th – 19th CENTURIES	88
<i>THE POOR LAWS</i>	88
<i>JPs' OTHER POWERS TO REGULATE AND PROTECT THE FAMILY</i>	90
THE FURTHER ENTRENCHMENT OF THE DIVISION	94
<i>THE HIGH COURT: 19th – 20th CENTURY</i>	94
Children in the High Court	97
<i>MAGISTRATES COURTS: 19th – 20th CENTURY</i>	100
Children in the magistrates courts	105
The Probation Service	108
CONCLUSIONS	110

EARLY JURISDICTION IN FAMILY CASES

The description ‘family justice system’¹ now reflects the multi-disciplinary nature and range of stakeholders in family courts, but even the term ‘family court’ did not exist in the extensive period covered in this chapter, from the middle ages to the 1940s. Adjudication on matrimonial causes; separation; divorce and the origins of youth justice and child protection became consolidated in two separate systems, the original duality in the history of family courts.

References to children hardly appear in court records until the 20th century.² Tracing the origins of family courts shows how systems that relegated the interests of women, and almost ignored those of children, were unsuited to the demands of social policy in the 20th century. This is starkly obvious in retrospect, but it seems extraordinarily difficult to succeed in making progress in adapting the courts. It can therefore be argued, in Habermas’ terms, that systems created to serve earlier ideologies took on a life of their own and became self-serving, rigid and slow to adapt to changing values and needs.

The earliest family jurisdiction in England and Wales was exercised separately by ecclesiastical courts and justices of the peace (JPs); a division between spiritual and temporal law. The ecclesiastical courts’ role was supplemented by actions in the common law courts and parliament from the 17th century; these were all consolidated in 1857. When the reforms were debated in the 1850s, these functions were being undertaken firstly by ecclesiastical courts and a Parliament with an active House of Lords, including many bishops; and secondly by JPs administering the poor law. The latter jurisdiction (now known as magistrates) remained separate until the late 20th century. This division was condemned as discriminatory and unfit, having survived for some 30 years after the establishment of the welfare state.³

¹ M Murch and D Hooper, *The Family Justice System* (Family Law, Bristol 1992)

² Even in the first reported family law cases, from 1865, very few relate to children: M Freeman, ‘The Child in Family Law’ in J Fionda (ed), *Legal Concepts of Childhood* (Hart, Oxford 2001) at 184-185

³ Department of Health and Social Security, *Report of the Committee on One-Parent Families Volume 1* (Cmnd 5629, 1974) paras 2.14-2.15 (hereafter: Finer Report)

ECCLESIASTICAL COURTS: ORIGINS

In the early modern period, the common law was used in the state's courts, after the concurrent development with Roman (or civil law) and equity, but aspects of civil law remained influential in the ecclesiastical courts until these were abolished in the 19th century. The early history of family law has been described as a compound of Roman law, canon law, and legislation. Roman law was authoritative through much of Europe until canon law was established in the 5th and 6th centuries.⁴ Until 1857, the division in family law worked by ecclesiastical courts dealing with matrimonial causes, while common law dealt with any questions of property rights for widows, or questions of illegitimacy. If it was necessary to check on the validity of a marriage to determine such questions, the common law court would obtain a certificate from the relevant bishop.⁵ Equity had some limited influence on the separate rights of women and children, and its wardship jurisdiction was the origin of the concept of paramount consideration of children's welfare.⁶

Church courts (originally the canon law courts of the Catholic Church but re-invented during the Protestant Reformation) held jurisdiction for all matrimonial causes because of the theological interpretation of marriage as indissoluble, both in natural (or God-given) law, and as set down in the Christian gospel.⁷ Natural law was additionally regulated by society-imposed norms exercised by the Church, which 'gave rise to a vast system of jurisprudence.'⁸

The validity of a marriage could be certified only by a bishop, each of whom operated through a Consistory Court. Despite the symbolic and legal status of marriage, interpretation of what constituted a marriage ceremony varied until reform in Lord Hardwicke's Marriage Act 1753, so there was considerable scope for disputes about validity. Although the Church accepted verbally contracted marriages outside its own buildings, it was customary for

⁴ T James, 'The English Law of Marriage' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 24

⁵ T James, 'The English Law of Marriage' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 26; RB Outhwaite *The Rise and Fall of the Ecclesiastical Courts 1500-1860* (CUP, Cambridge 2006) 47

⁶ P Pettit, 'Parental Control and Guardianship' in RH Graveson and FR Crane (eds), *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) ch 4; NV Lowe, 'The House of Lords and the Welfare Principle' in C Bridge (ed), *Family Law Towards the Millennium: Essays for P M Bromley* (Butterworths, London 1997) 128

⁷ TA Lacey, *Marriage in Church and State* (2nd edn, SPCK, London 1947) 17

⁸ TA Lacey, *Marriage in Church and State* (2nd edn, SPCK, London 1947) 64

marriages to be settled by parents and the wider family.⁹ Therefore, recognition in canon law during the Middle Ages of contracted and clandestine marriages contradicted both religious and secular norms, and the earliest records show that courts heard more applications to confirm a marriage than to end one. One explanation is that the Church had to be flexible about the ways in which a lawful marriage could be contracted, because any extra-marital sexual relationship was mortal sin.¹⁰ As McGregor put it in a commentary on his work with the Finer Committee:

In medieval times, the Church maintained that marriage was indissoluble but so feared the eternal repercussions of sexual waywardness that canon lawyers turned it into a formless contract requiring little more than the clandestine consent of the parties, preceded or followed by sexual intercourse¹¹

So although theologians advance the belief that parties come together in a natural union, for the purposes of companionship and raising children, while conceding that society requires a system of formal recognition of this status,¹² Stone and McGregor saw a pragmatic court system created to balance religious doctrine with human behaviour by governing the status of marriage.

Rebecca Probert argues that it is a myth that unmarried cohabitation was rife before Lord Hardwicke's Act and the later development of Victorian sensibility; women would be anxious to establish their married status to be socially accepted and be 'settled' to be eligible to rely on the poor laws for subsistence.¹³ In this way, we can perhaps discern the origins of the courts' protective function. The 1753 Act caused a growth of the courts' marriage licensing function, while the adjudication on the validity of the status of existing marriages diminished.¹⁴ Outhwaite describes the functions of the ecclesiastical courts as, firstly, verification and record, and secondly, corrective and adjudicative.¹⁵ The corrective function addressed crimes of adultery and fornication by imposing acts of penance.¹⁶ It could be argued that upholding morality was sufficient protection for family members.

⁹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 53-4; R Probert 'The Judicial Interpretation of Lord Hardwicke's Act 1753' *The Journal of Legal History* (2002) 23: 2, 129 - 151 at 131

¹⁰ Finer Report *Volume 2* (Cmnd 5629-1, 1974) App 5 para 2-3

¹¹ OR McGregor, *Social History and Law Reform* (Stevens, London 1981) 43

¹² TA Lacey, *Marriage in Church and State* (2nd edn, SPCK, London 1947) (1947) 3

¹³ R Probert, 'Looking Back on the Overlooked: Cohabitants and the Law 1857-2007' in N Lowe and G Douglas (eds), *The Continuing Evolution of Family law* (Jordans, Bristol 2009) 58; 63

¹⁴ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts 1500-1860* (CUP, Cambridge 2006) 48-9; 54

¹⁵ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 5

¹⁶ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 10-11

Thus in pre-modern times, the church courts upheld married life as integral to the religious identity of the subject, before the secularisation and differentiation of the lifeworld, as explained by Habermas, based on Weber.¹⁷ The Finer Report also attributed rationalist motives; that the institution of marriage protected women and advanced men's interests.¹⁸ The function of verification undertaken by the ecclesiastical courts protected some women's and children's need for economic support, but the overall impression from these historical accounts is one of regulating social and moral order, the origin of persisting beliefs that courts must help to stabilise family life.

Different procedures were followed by the parallel ecclesiastical and common law court systems. Each bishopric of Canterbury and York held a Consistory Court for several days about once a month in the cathedral building. The chief town in each diocese had three or four proctors, who combined the roles of solicitors and barristers and had trained in Roman and canon law at Oxford or Cambridge, admitted by application to the bishop. The procedure in matrimonial causes involved various pleadings by a proctor for each party. The defendant could propose interrogatories of the witnesses, who would then be questioned privately by a registrar or examiner who recorded the depositions.¹⁹

After studying all the documents and listening to the arguments, the bishop's chancellor made a decree. He played a more dominant role than a judge in the common law court, and decided on all the facts without a jury.²⁰ A study by Shepard and Spicksley of court records indicates that witnesses' testimony was valued in accordance with their personal wealth and status.²¹ Findings already made by ecclesiastical courts were not challenged in the common law courts, which were concerned with civil claims for damages and were served by judges and barristers who had trained at the Inns of Court. Witnesses in common law courts were publicly cross examined, although the parties themselves only testified from 1851. The judge took a detached role, giving legal advice to a jury on the points made by the barristers. Juries

¹⁷ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 46-53, as discussed in Chapter Two above.

¹⁸ Finer Report Volume 2 (Cmnd 5629-1, 1974) App 5 para 1

¹⁹ *Scott v Scott* [1913] AC 417

²⁰ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds), *A Century of Family law 1857-1957* (Sweet & Maxwell, London 1957) 291

²¹ A Shepard and J Spicksley, 'Worth, Age and Social Status in Early Modern England' (2011) 64(2) *The Economic History Review* 493-530

were originally used in civil as well as criminal cases, made up of lay men with property qualifications, and it was their role to reach a verdict.²² The common law courts were therefore primarily concerned with property rather than relationships, although they later extended their jurisdiction over marital issues in actions for criminal conversation, as will be discussed below.

Adjudication of matters involving family relationships outside marriage was the province of the JPs.

JUSTICES OF THE PEACE: ORIGINS

The JPs held a highly influential position associated with keeping the peace, combining court duties with law-making powers. The earliest exercise of their jurisdiction in family matters was enforcing sanctions against parents of illegitimate children.²³ This reflected the ecclesiastical courts' role in upholding public morality, supplemented by a local economic imperative. JPs had no powers regarding the validity of a marriage except when they replaced the church courts for a few years during the Interregnum.

A royal edict of 1195 established 'keepers of the peace' in an attempt by the king and his judges to impose order throughout the country. The term 'justice of the peace' originated in the Justices of the Peace Act 1361; the alternative term 'magistrate' coming into use during the 19th century. The JPs' functions were designated in the 1361 Act as restraining offenders, rioters and all other barrators,²⁴ arresting and punishing them according to their offence.²⁵

JPs were members of the local gentry and minor aristocracy who could be relied on to maintain order in times of unrest. Their powers grew in piecemeal fashion amidst disagreements between localities and government, and some opposition from professional lawyers. Lander comments that by 1500 it was doubtful if even the Justices knew what their functions were.²⁶ They were appointed by annual commissions issued by the King's Council. This long-standing institution of lay justice can be ascribed to the existence of a middle class

²² AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds), *A Century of Family law 1857-1957* (1957) 289

²³ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 41-42

²⁴ People who stir up quarrels by spreading false rumours.

²⁵ F Milton, *The English Magistracy* (OUP, London 1967) 1-4

²⁶ JR Lander, *English Justices of the Peace 1461-1509* (Alan Sutton, Gloucester 1989) 12

gentry, sympathetic to upholding the central rule of law in their local communities against the threat of over- exercise of powers by the feudal lords.²⁷ It was extended to Wales by Henry VIII in the 16th century. Less successful attempts were made to introduce the institution in Ireland and Scotland, but systems were also established in the colonies.²⁸ Their judicial and administrative functions made them, at the height of their power in the 16th to 18th centuries, ‘the most influential class of men in England’.²⁹

Skyrme's comprehensive history of JPs in the shires and towns and more far-flung outposts reveals a varied if not idiosyncratic application of justice. Even when writing in 1991, he admits to ‘some marked differences’ in the composition and practice of benches across the country.³⁰

Eventually, commentators were to complain that the magistrates courts’ jurisdiction in family matters was inappropriately placed in ‘police courts’.³¹ Others maintained that JPs had wider, more integrative functions, from which we might trace the evolution of their family jurisdiction. Skyrme claims that: ‘The linking of the ordinary citizen with the administration of justice was part of the national heritage deeply ingrained in the way of life of the English people which could not be uprooted.’³² The JPs’ role in family law is discussed below.

Following this introduction, the early jurisdiction of the church courts in matrimonial causes will now be considered, followed by the JPs. The interests of children were of course affected by both types of court but they did not feature in their own right until very recently, having being ‘hidden’ behind their parents.³³

²⁷ T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) xx

²⁸ See Chapter Six on the role of JPs in Australia

²⁹ F Milton, *The English Magistracy* (OUP, London 1967) 1

³⁰ T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) xxii

³¹ For example: OR McGregor, ‘Family Courts?’ (1987) 6 *Civil Justice Quarterly* 44-55; E Szwed, ‘Family courts - are they a solution?’ in H Geach and E Arnold (eds) *Providing Civil Justice for Children* (Edward Arnold, London 1983)

³² T Skyrme, *History of Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) xxi

³³ A Skevik, ‘Children of the Welfare State: Individuals with Entitlements, or Hidden in the Family?’ (2003) 32(2) *Journal of Social Policy* 423-440

CHURCH COURTS, PARLIAMENT AND DIVORCE

Although most matrimonial causes heard in the church courts judged the validity of a marriage in order to define personal responsibilities, actions brought to achieve a separation were also property-related, because their main purpose was economic.³⁴ Women and children had to be financially maintained by the head of the household, so an abandonment of this role led to a social problem.

Prior to 1857 there were two types of 'divorce': *divortium a vinculo matrimonii* obtainable by Act of Parliament, on the ground of adultery,³⁵ and *divortium a mensa et thoro* (separation from bed and board) by an ecclesiastical court, on the grounds of adultery or life-threatening cruelty. Adultery by a wife was sufficient grounds for a remedy for a wronged husband, but a female petitioner had to also prove aggravated circumstances. Access to either procedure was very restricted by the nature of the facts to be established, often reliant on servants' evidence, and by the costs of doing so. Only a parliamentary divorce could allow the parties to re-marry.

A marriage could be ended by a church court only by granting a decree of nullity. It is now thought that earlier writers were mistaken in claiming that 'canon law provided abundant opportunities' for annulments, of which there are few records.³⁶ For example, the Finer Report claimed that the Church developed 'an elaborate theory of nullity' by which applications could succeed because the breadth of prohibited degrees of consanguinity and affinity was utilised to trace an incestuous connection between parties living in small communities.³⁷ This perception may have stemmed from Pollock and Maitland, who are extremely critical of the ecclesiastical courts' application of the rules against marriage within the prohibited degrees of consanguinity and affinity:

³⁴ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 183

³⁵ Discussed below

³⁶ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 53

³⁷ Finer Report Volume 2 (Cmnd 5629-1, 1974) para 5 p 86-87; see also T James 'The English Law of Marriage' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 25

Reckless of mundane consequences, the church while she treated marriage as a formless contract, multiplied impediments which made the formation of a valid marriage a matter of chance ... a maze of flighty fancies and misapplied logic.³⁸

While the idea of ecclesiastical courts endlessly taken up with imaginative arguments on the validity of individual marriages may have popular appeal, it was perhaps encouraged by those who disliked the influence of the established Church. Outhwaite's study presents a more mundane picture, of few marital suits of any type.³⁹

There were other non-judicial, socially accepted methods of separating: a private separation agreement; desertion; or wife-sale.⁴⁰ These were 'private ordering to a degree unknown today... outside the law.'⁴¹ Only a declaration of nullity allowed re-marriage by either party. In other cases, any new 'marital' relationship was adulterous or bigamous. The only way in which a party to a valid marriage could re-marry was by obtaining a divorce by a specific Act of Parliament, clearly an avenue open to only a few of the wealthiest husbands. (There were no female petitioners until 1801; four women successfully brought petitions between 1801 and 1857.) Only 317 parliamentary divorces were passed between 1690 and 1857, the highest number of petitions received in any one year being 12 in 1799 (ten of which succeeded).⁴² By 1850, about 50 orders for separation were being made annually by all the church courts.⁴³ So when secular divorce jurisdiction was finally established in 1857, only about 60 couples per year were using a public legal procedure to effect a separation.

Ingram suggests that the incidence of recognised separations was confined to the extremes of the social scale.⁴⁴ Stone concedes this rarity before the 20th century to the extent that he is impelled to justify his historical study of divorce by its highly symbolic significance in society, 'carrying a heavy baggage of passionately felt moral principles and symbolic meaning'.⁴⁵ Before 1857, there were simply no courts available in England and Wales which

³⁸ F Pollock and FW Maitland, *The History of English Law before the Time of Edward I, Volume II* (2nd edn, CUP, Cambridge 1968) 385-6; 389

³⁹ RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 150-1860* (CUP, Cambridge 2006) Ch 6

⁴⁰ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 141- 148

⁴¹ K O'Donovan, 'Wife Sale and Desertion as Alternatives to Judicial Marriage Dissolution' in J Eekelaar and S Katz (eds) *The Resolution of Family Conflict: Comparative Legal Perspectives* (Butterworths, Toronto 1984) 42

⁴² L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 325; AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 13

⁴³ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 184

⁴⁴ M Ingram, *Church Courts Sex and Marriage in England 1570-1640* (CUP, Cambridge 1987) 148

⁴⁵ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 6 (This book is relied on heavily in this Chapter because it has been consistently cited in later authoritative works.)

could dissolve a valid marriage. The cultural and economic pressures on couples to stay together were such that marriages normally only ended on death, which occurred, on average, earlier than for adults in the 20th century.

There is evidence that, between the 16th and 19th centuries, relatives and neighbours took it on themselves to intervene in marital troubles, and local communities might subject an erring spouse to public humiliation.⁴⁶ Scolds and deserters might be subject to public penance in church, a dressing-down or even violence by neighbours, a Foucauldian ‘spectacle’, now replaced by the ‘discipline’ of the mediator or lawyer.⁴⁷ Stone cites records as recent as the 18th century of family and friends writing with unsolicited advice, and arranging ill-conceived meetings to attempt reconciliations.⁴⁸

While careful to deny any association between relationship breakdown and ease of access to divorce in the 1990s, Stone concluded that:

...there has been removed the ancient moral stigma that for centuries lay upon marital breakdown, and especially upon a public divorce...it has become so extremely common, familiarity has led not to contempt but to public indifference: divorce is thus sociologically reinforcing, like any other habit.⁴⁹

The religious legacy keeps the quest for marriage-saving in the public sphere, although there is some doubt as to how faithfully policy ideals of marriage reflect the morality of today’s Christian believers.⁵⁰ Although the doctrine of marriage as a sacrament was rejected by the Reformation, religion is the bedrock of the moral value of the binding and enduring nature of marriage. Church of England policy still affirms that marriage should be undertaken as a life-long commitment although ‘recognises that when marriages break down, the civil law must deal with the consequences of that breakdown’.⁵¹ Of course, other faiths which value marriage as an institution now co-exist in England and Wales but, overall, we have become more secular, with the accompanying rise of the companionate marriage.⁵² Occasionally, attempts are made to revive the religious symbolism: when the divorce rate rose after World

⁴⁶ M Ingram ‘Ridings, rough music and “the reform of popular culture in early modern England” (1984) *Past and Present* 79-113 at 105

⁴⁷ M Foucault *Discipline and Punish* (Tr. A Sheridan, Penguin, London 1979)

⁴⁸ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 4

⁴⁹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 415

⁵⁰ E Hasson, ‘The Street Level Response to Relationship Breakdown: A Lesson for National Policy’ (2004) 26(1) *Journal of Social Welfare and Family Law* 31-51 at 41-42

⁵¹ < <http://www.cofe.anglican.org/info/socialpublic/marriage.html#furthermarriage> > Last accessed 24 July.2011

⁵² C Smart, ‘Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy’ (1997) 26 (3) *Journal of Social Policy* 301 at p 306

War II, it was suggested that couples who married in Register Offices needed to be reminded of the solemnity of the occasion and the obligations they were undertaking.⁵³ (The format of the ceremony was amended accordingly). The next section examines the earliest attempts by the Church to deal with consequences of breakdown.

MARITAL SEPARATION AND THE ECCLESIASTICAL COURTS - DIVORTIUM A MENSA ET THORO (SEPARATION FROM BED AND BOARD)

Outhwaite's description of the church courts' functions as verification and adjudication covered applications to validate or nullify a marriage, for restitution of conjugal rights (whereby a wife might obtain alimony from a deserting husband) or jactitation.⁵⁴ It was not until the 18th century that the number of applications for separation began to outnumber those relating to validity. The limited remedies available explain why few engaged with the cumbersome process. Separation applications might have been attempts to obtain higher maintenance than was privately agreed; to enable a husband to separate from an adulterous wife in a way that would shed his liability for maintenance; or as a collusive preparation for a parliamentary divorce.⁵⁵ Procedures were slow and expensive, with lawyers having to travel to gather all the evidence in person. Although more efficient, the specialist London court, the Doctors' Commons, required a qualifying residential period of 21 days.⁵⁶ Procedures depended on private written documents and professional examinations (held in private and written into further reports) of witnesses by lawyers. Different rules of evidence were used from the common law, and only the judge's decision would be given in open court.

Stone criticises delay in the church courts, saying that although it was claimed in 1853 that an uncontested suit took two to five months, 'in fact' they took four to nine months. A contested case could take up to two years.⁵⁷ In contrast, Kiralfy states that the entire proceedings lasted about three months and 'compare favourably in despatch with common law proceedings'.⁵⁸ He does however list a number of problems. There were difficulties of enforcement, with

⁵³ Lord Chancellor, *Final Report of the Committee on Procedure in Matrimonial Causes* (Cmd 7024, 1947) para 87. I.4

⁵⁴ Jactitation was a suit against a false claim of marriage; a judgment against the defendant enforced 'perpetual silence on him' – the last case being heard in 1932 (See TA Lacey, *Marriage in Church and State* (2nd edn, SPCK, London 1947 n126)

⁵⁵ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 183

⁵⁶ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP 2006) 65

⁵⁷ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 197

⁵⁸ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds) *A Century of Family law 1857-1957* (Sweet & Maxwell, London 1957) 293

weak sanctions such as excommunication for failure to appear or breaching an order. Non-conformist churches were able to conduct their own marriages under the Marriage Act 1836, but these were then regulated by courts of the established Church. Above all, he identifies the limited nature of the remedy to separation without re-marriage, and in common with Stone links this last factor with the wider injustice of parliamentary divorce being available only to 'the wealthiest'.⁵⁹ But the church courts were also expensive, and beyond the average person's reach; the most straightforward case would cost over £100 and costs could reach several thousand pounds. The Campbell Commission in 1853 estimated the normal cost of an undefended application as between £300 and £500.⁶⁰ Although poor people might be exempted from paying court fees under the 'poor persons' procedure', the other costs of bringing an action were high.⁶¹ An ancillary decree of alimony (usually one-third of his income) could be made where the husband had been found guilty of aggravated adultery (the only ground of separation available to women). The problem was that the church courts could offer no proprietary remedies, so could not enforce debts against the husband's property.⁶²

Husbands had a legal obligation to maintain their wives on the basis that men had to maintain themselves, and husband and wife were legally one. The common law courts did not recognise any corresponding right of the wife to enforce this obligation, or an alimony order, because all matters pertaining to marriage were within the ecclesiastical courts' jurisdiction: '...for the common law to have entertained a claim for maintenance by the wife against her husband would have amounted to an invasion of the spiritual jurisdiction.'⁶³ Thus, the ecclesiastical and common law courts between them caused women and children to become destitute and throw themselves on the mercy of the poor laws.⁶⁴ To quote Lord Lyndhurst in the debate on the 1857 legislation: 'From that moment the wife is almost in a state of outlawry. She may not enter into a contract...she is homeless, helpless, hopeless, and almost

⁵⁹ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 297

⁶⁰ J Barton, 'The Enforcement of Financial Provisions' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 354

⁶¹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 306; also known as *in forma pauperis*, a limited right to make a civil claim without paying a fee, since the 15th century, see A Paterson, *Legal Aid as a Social Service* (The Cobden Trust, London 1970) 11.

⁶² J Barton, 'The Enforcement of Financial Provisions' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 353

⁶³ *Manby v Scott* [1663] 1 Mod 124 at 128, cited in *Finer Report Volume 2* (Cmnd 5629-1, 1974) para 25

⁶⁴ J Barton, 'The Enforcement of Financial Provisions' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 356-7

destitute of civil rights. Liable to all manner of injustice ...'⁶⁵ (The position of a wife divorced by Parliament was in theory better, as the bill would be passed on the understanding that the husband had executed a bond securing some income on specific property.⁶⁶)

By the mid 17th century, private deeds of separation were being drawn up by conveyancing lawyers to enable couples to separate, so far as possible, with a degree of independence. Such arrangements recognised the increasing importance of contract law and an encroachment on church law. In this way, 'An officially non-divorcing society could devise its own quasi legal instruments to cope with the fact of irremediable marital breakdown.'⁶⁷ So we can see the professional players as agents for change ahead of the law.

The fate of children of married couples was dependent on the father. Although private deeds of separation sometimes gave custody of a child to the mother, these were not necessarily accepted by the courts, and a father's inherent power over his children could not be abrogated by a separation deed.⁶⁸ Applications by women to the High Court for writs of *habeas corpus* for the return of their children on separation rarely succeeded. Mothers could not even interfere with the power of a testamentary guardian who had been appointed by the deceased father. Although the court might exercise its own power over the guardian to award custody to a mother, this was extremely rare.⁶⁹ It was not until the Custody of Infants Act 1839 that the Court of Chancery was able to transfer the custody of children aged under seven years to their innocent (that is, non-adulterous) mother. Under the Custody of Infants Act 1873, the High Court could award custody to a mother, even if guilty of adultery, of a child aged up to age 16; from 1881 the courts could make such order as they thought fit. It was not until 1925 that the child's welfare became a feature in the court's decision making.⁷⁰

Even where a wife may not have been completely deterred from seeking a separation by the prospective loss of her livelihood and children, there were few remedies available, as the ecclesiastical courts interpreted the ground of cruelty narrowly. In 1790, Sir William Scott,

⁶⁵ Hansard vol 142 col 410 cited in RH Graveson, Introduction to RH Graveson and F Crane (eds), *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 7

⁶⁶ J Barton, 'The Enforcement of Financial Provisions' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 357; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 134, and discussed below.

⁶⁷ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 182

⁶⁸ *Westmeath v Westmeath* [1821] Jac 264

⁶⁹ P Pettit, 'Parental Control and Guardianship' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 56-67

⁷⁰ Discussed below

the judge in the Court of Arches, explained this strictness of the rule: the duties of marriage could be overcome by the duty of self-preservation in a situation where a wife was in immediate threat of physical harm, but any lesser harm did not amount to cruelty sufficient to obtain a separation order.⁷¹ (This remained the basis of the law until cruelty became a ground for divorce in 1937.⁷²)

As the volume of business in the ecclesiastical courts diminished during the 18th and 19th centuries, they came under increasing attack for inefficiency. There are complex reasons for the decline; dissatisfaction with the courts' wider operations probably led to them losing their matrimonial jurisdiction.⁷³ Outhwaite wrote that, although records immediately following the Restoration in 1660 are poor, there appear to have been more prosecutions for specifically religious matters than crimes related to 'sexual lapses' such as bastardy or defamation.⁷⁴ This indicates a social change in attitude toward the power of the Church in regulating private moral behaviour, as the functions of Church and State increasingly separate: 'By 1830 the policing functions of the English ecclesiastical courts against the laity had virtually disappeared.'⁷⁵ A decrease in the rate of actions relating to probate and payment of tithes, together with the restrictive nature of sentencing and lack of reform of procedure all contributed to the decline.⁷⁶

Before dealing with the fate of the church courts' matrimonial jurisdiction, the separate parliamentary process will be considered.

MARITAL SEPARATION AND PARLIAMENT - DIVORTIUM A VINCULO MATRIMONII (FREEDOM FROM THE BOND OF MARRIAGE)

Parliament's authority to grant a divorce was derived from the powers it inherited from Rome in the Reformation: a power to issue 'no more than the pre-Reformation Papal Decree'.⁷⁷ The limitations of the separation *a mensa et thoro* could cause problems for the wealthiest

⁷¹ *Evans v Evans* [1790] Eng Rep 161

⁷² Matrimonial Causes Act 1937, see S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 263-4

⁷³ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) Ch 9

⁷⁴ Defamation usually related to charges that the complainant had been wrongly subjected to insults about their sexual behaviour. The church's jurisdiction was not removed until the Defamation Act 1885.

⁷⁵ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 84

⁷⁶ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) Ch 9

⁷⁷ RC Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 7

families if suspicions about a wife's associations cast doubt on whether a true heir of the blood line was guaranteed. A landowner who had not produced his own male heir might therefore need to obtain a declaration of the illegitimacy of his wife's children, as well as an opportunity to re-marry and continue the family line. The importance of patrilineal descent was recognised by the development of a divorce process by act of Parliament, available only to very few men.⁷⁸ The ground was adultery, and the Act dissolving the marriage would include a clause allowing the husband to re-marry. It is remarkable that only about 160 years ago, the dissolution of a marriage was of such public concern that the legislature had to be harnessed to examine the individual relationship in question.

The remedy appeared in the late 17th century. Procedurally, the readings of bills for divorce took a similar form to a full court trial, with the possibility of stiff cross-examination by the Lord Chancellor himself. The first bills to be accepted were from men of high rank, who had obtained a separation in the church court, and who could claim a danger of their family inheritance passing to illegitimate children. Standing orders introduced in 1798 and 1809 eventually stipulated requirements: proof of adultery by two witnesses; a previously good relationship between the couple with no evidence of adultery or cruelty by the husband; a separation *a mensa et thoro* and a successful criminal conversation action with no evidence of collusion, all of which were subject to cross examination. Stone called this a panoply, intended to reassure any parliamentarians who worried that divorce undermined society and disadvantaged women. Being unavailable to the lower orders, any rise in the number of bills could be used as grounds for attacking the degeneracy of the ruling classes.⁷⁹ For complex ecclesiastical law reasons, although some type of divorce was made available in most European countries during the Reformation, this had never been settled in England.⁸⁰ Simple divorce on the grounds of mutual incompatibility was introduced in France shortly after the revolution, and applied for at a rate alarming to the English, already fearful of social disorder in Europe.⁸¹

Despite the trappings of scandal, once the facts were established, a bill for divorce could be passed almost automatically. Some petitioners had influential friends in either House who

⁷⁸ Four women did manage to obtain a divorce before 1857, as noted below.

⁷⁹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 332-335

⁸⁰ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 301-308

⁸¹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 277 (Although restricted by Napoleon in 1803 and not fully reintroduced until 1884).

could secure them a dispensation from cross examination; connivance and collusion became more blatant. By the mid 19th century about half of petitions were brought by professional men rather than solely members of the aristocracy.⁸²

The double standard whereby only a man could petition on the sole ground of adultery was further promoted by standing orders requiring a clause forbidding the wife from re-marrying. The consequences for most divorced wives may have been punishment enough. The grim position of a wife following a church court separation was replicated, regarding their children and their finances. However badly a father might have behaved, he was in sole control of whether his children ever saw their mother. Some women divorced by Parliament did have opportunities to retain some money. The reading of the bill for divorce could include representations by an officer known as the 'ladies' friend' who was to ensure financial provision was included. Some women had their own connections amongst parliamentarians who would argue for a good financial settlement. A deed was normally drawn up before the bill was submitted, otherwise a wife could lose all of her marriage portion (dowry), pin money (an allowance for her personal expenses) and widow's entitlements.⁸³

As far as parliamentary scrutiny was concerned, the fate of women and children depended on individual connections, their welfare being of little significance in the public sphere. This hardly changed until the Married Women's Property Act 1882, probably the greatest achievement of Victorian feminism, bestowed autonomous legal capacity on women, which allowed those who had some property of their own the possibility of economic independence.⁸⁴ It was a far greater step toward equality of men and women than the reform of divorce law.

There were four exceptional cases where women were successful with petitions, between 1801 and 1857. Two were 'aggravated' by incest, one by bigamy and another by cruelty and bigamy.⁸⁵ Women were further discriminated against by the rise of the action for criminal conversation, premised on a wife's body and reputation being owned by her husband.

⁸² L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 335

⁸³ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 345

⁸⁴ ML Shanley *Feminism, Marriage, and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey 1989) 102-103

⁸⁵ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 360-362; *Finer Report Volume 2* (Cmnd 5629-1, 1974) para 17

ACTIONS FOR DAMAGES AT COMMON LAW – CRIMINAL CONVERSATION

A husband could pursue a civil suit through the common law courts for damages, assessed by a jury, for criminal conversation against a co-respondent in adultery. Although this was a separate legal action to the two types of separation, a marriage could end through a combination of all three.

When dealing with separations, courts had to make judgments about whether or not a matrimonial offence had been committed, in order to reach a decision. The ecclesiastical courts and JPs had been able to punish crimes of adultery and fornication, but as already discussed, by the late 17th century the church courts' capacity to apply their moral code weakened, while JPs' priority was the financial maintenance of illegitimate children. Adultery, previously punished by public confession, fines, the stocks or whipping, was effectively decriminalised.⁸⁶ However, the common law courts, Kings Bench and Common Pleas, revived ritualistic public spectacle by extending the tort of trespass to criminal conversation, known as 'crim. con.' The husband and the co-respondent were the only parties to the action, and juries (made up largely of city merchants) made speedy decisions for often very high sums in damages. The 1809 standing orders had made a crim. con. judgment a step in the process of parliamentary divorce, but findings had no effect in the church courts, which did not accept common law proceedings as evidence.

The number of crim. con. actions grew rapidly, from ten in 1740, to 75 in 1790. Stone argues that this phenomenon does not necessarily reflect an increase in the rate of adulterous behaviour by wives, because courts were happy to encourage a proliferation of crim. con. actions for other reasons.⁸⁷ Firstly, common law judges were trying to attract more business by promoting the principle that monetary compensation should be available for any tort. Secondly, the growth of the nation-state encouraged a change in attitude toward resolving issues by law rather than violence.⁸⁸ A re-definition of male honour reflected the move from an 'honour and shame society' to a commercial one, where litigation became the acceptable mode of revenge.⁸⁹ Prevailing theories of the sanctity of property and contract increased the

⁸⁶ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 232-3

⁸⁷ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 256-62

⁸⁸ J Habermas, *The Theory of Communicative Action, Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 176-177

⁸⁹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 240

importance of securing patrilineal descent, and continued the double standard of behaviour between men and women, necessitated by fear of the consequences of a wife's adultery.

Thus, in a rationalised and legalised society, courts adapted their functions to quantify the level of hurt, humiliation and disgrace of the cuckolded husband into financial redress. The high levels of damages that could be awarded, and a successful action assisting with divorce, were instrumental in achieving the goals of the protagonists.

Although parliamentary divorce proceedings were conducted in a circumspect manner that attracted little public attention, the details of crim. con. actions were relished by the popular press.⁹⁰ According to Stone, Lord Kenyon, appointed Lord Chief Justice in 1788, was so influenced by moral panic about promiscuity in the upper classes and fears of social breakdown (as in France) that he 'converted a private civil action into a public criminal one'.⁹¹ Kenyon sought to curb dissolute behaviour by encouraging even higher levels of damages, and he personally prosecuted crim. con. actions with extraordinary rhetoric. So the action developed from one of a private claim for financial recompense to a means by which the judge and jury was encouraged to set punitive levels of damages against the defendant, irrespective of his means.⁹² Thus we can see those working in the courts behaving in response to popular appeal, without any change in the substantive law.

Despite the incentive of a high financial return, by the early 19th century it was recognised that these cases were largely based on collusion, for pragmatic reasons rather than satisfying outraged family values, and that damages awarded were not always being collected. (Sometimes the damages paid for the subsequent divorce bill). Outhwaite's more recent analysis agrees with Stone's, that debate on the mid 19th century reforms acknowledged crim. con. as 'embarrassing'.⁹³ The legal action between two men could involve serious injustices against the wife, who had no voice in the proceedings and was powerless to respond to any allegations being made.⁹⁴ Debate in the Lords raised the question of whether

⁹⁰ S Cretney ' "Disgusted, Buckingham Palace..." Divorce, Indecency and the Press' in S Cretney, *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 94

⁹¹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 274

⁹² L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 273-8

⁹³ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 166

⁹⁴ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 24; 183

the law could be reformed so that an adulterous husband could also be punished, but this was too thorny an issue to go very far.⁹⁵

The rise of the companionate marriage with its child-centred household and structural isolation of the family unit from kinship and society has been well documented.⁹⁶ Victorian domesticity attributed a different type of value to women; rather than as mere property, married life began to symbolise support and companionship.⁹⁷ Engels argued in 1891 that capitalism depended on the surrender of women to the patriarchal family unit; the indissolubility of marriage originating in economic relations.⁹⁸ Therefore the function of the wife in western society as ‘head servant’⁹⁹ whether rationalised as economic or conceptualised as contributing to social order, could justify a claim on her by the husband. As the division between commercial and domestic worlds became more marked, a seducer was seen as a home wrecker in a wider social sense, rather than merely a trespasser against the individual husband. The crim. con. action exemplifies the interface between the public and private realms with which family law was beginning to struggle.

Stone attributes the longevity of the crim. con. action, invented by common lawyers, to it being a legal device that was ‘.. twisted to suit the needs of the key participants in the process: the elite males who were the plaintiffs, the barristers, and the judges who staffed the courts.’¹⁰⁰ For 200 years, the action served to address moral panic; support wealthy men in enforcing their proprietary position over women and children; facilitate divorce and re-marriage; punish the wrong-doer, and generate fame and wealth for the lawyers involved in highly publicised cases:

These radical changes in the latent functions of the action, made to satisfy the leading participants, are enough to explain why it survived until 1857. But no-one can argue that this was the most functional and economical way to achieve the desired ends.¹⁰¹

⁹⁵ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 164; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 289-91

⁹⁶ See for example, C Lasch, *Haven in a Heartless World: the family besieged* (Norton & Co., New York 1995) and L Stone, *The Family Sex and Marriage in England 1500-1800* (Penguin, Harmondsworth 1979)

⁹⁷ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 43; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 289-290

⁹⁸ F Engels, *The Origin of Family, Private Property and the State* (4th edn, Foreign Language Press, Peking, 1968) Ch 2

⁹⁹ F Engels, *The Origin of Family, Private Property and the State* (4th edn, Foreign Language Press, Peking, 1968) 85

¹⁰⁰ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 299

¹⁰¹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 299

PROCEDURAL REFORM – MATRIMONIAL CAUSES ACT 1857

So far, we can see little, if any, sign of the protective function of courts identified in Chapter One. The courts did not challenge patriarchal values nor the legal and physical capacity of husbands to ill-treat or confine their wives and children. Even a woman experiencing serious violence at the hands of her husband had little recourse to court for a remedy, other than the magistrates binding him over.¹⁰² The common law had no interest in family relationships that did not come within the ‘twin rubrics of property and breach of the peace.’¹⁰³ Graveson lists four questions facing the reformers: replacing the ecclesiastical courts’ long entrenched jurisdiction; providing women with more than their limited remedies in equity; whether divorce should be available to the poor; and the Church’s opposition to remarriage.¹⁰⁴

The sanctity of marriage as a theological construct was reinforced by the power of the Church and its bishops in the House of Lords. The double standard regarding adultery, to protect patrilineal descent, was bolstered by reference to biblical authority.¹⁰⁵ While the ecclesiastical courts held the jurisdiction for matrimonial causes, bishops and their officials resisted change. Similarly to the way the crim. con. actions were manipulated to suit the lawyers and juries who managed that process in the common law courts, the church courts could hold themselves accountable to their institutional values, rather than to the parties before them. Although marital causes were ‘secularised’ in the mid 19th century, this was procedural change only. The law did not adapt to recognise any change in the values of family life.

So, although it may appear that systems embedded in the lifeworld of the religious era changed to suit modernity in 1857, they did not effectively break from the past. During the process of change, players in the system coped by manipulating court systems for their own purposes. Stone claims that there was little relationship between the manifest function of the courts, based on theology, and their latent functions in enabling those who had sufficient wealth and power to retain their social position and avoid scandal.¹⁰⁶ Nevertheless, the central tenets of religion and class division were retained.

¹⁰² Discussed with reference to JPs below

¹⁰³ J Barton, ‘The Enforcement of Financial Provisions’ in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 352

¹⁰⁴ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 9-11

¹⁰⁵ TA Lacey, *Marriage in Church and State* (2nd edn, SPCK, London 1947) 17-22

¹⁰⁶ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 18

Stone calls it ‘indefensible’ that parliamentary divorce was restricted to a handful of wealthy males for more than 150 years.¹⁰⁷ In retrospect it is hardly surprising that this was so, while the population was largely respectful of religious teaching and women were economically dependent on men. As it became known in the public sphere that the legal process paid little respect to the principles of morality it was supposedly upholding, the debate could begin. There were fractures between the lifeworld and systems, although differing views on what these were. Benthamite reformers were calling for large scale overhaul of all court structures and some were concerned to advance women’s interests.¹⁰⁸ Lord Lyndhurst, who had chaired the preceding select committee led arguments in Parliament to equalise the status of husbands and wives in divorce law.¹⁰⁹ Although the Finer Report refers to ‘leading personalities of the times’ making repeated reference to the inequality between the sexes and the classes in publications and parliamentary debate and evidence to committees, it produces no record of Parliament considering class issues in access to justice.¹¹⁰ Indeed, Stone claims there was ‘nothing in the Parliamentary debates of the 1850s which shows the slightest awareness of these [social inequality] problems.’¹¹¹ Shanley notes that several Lords and Bishops spoke against divorce being available to the poor, as this would lead to mass immorality.¹¹² Graveson comments that the Commons, recently reformed, would never have favoured a bill that maintained divorce as the privilege of the rich; it was the Spiritual Peers who opposed cheaper divorce as encouraging immorality amongst the poor.¹¹³ Stone and Outhwaite both paint vivid descriptions of the Bill being forced through both Houses against a plethora of delaying tactics by its opponents, including evangelicals, Roman Catholics and bishops.¹¹⁴

The Matrimonial Causes Act 1857 (MCA 1857) was designed to move matrimonial disputes to the civil courts. It was one of a series of reforms to unify and rationalise the administration

¹⁰⁷ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 346

¹⁰⁸ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 6; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 368

¹⁰⁹ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 39-40

¹¹⁰ Finer Report Volume 2 (Cmnd 5629-1, 1974) App. 5 para 29

¹¹¹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 383

¹¹² ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 40-41

¹¹³ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 8-10

¹¹⁴ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 381-2

of the law.¹¹⁵ The ecclesiastical courts' jurisdiction was predominately probate; thus we can see the first divorce courts envisaged narrowly as part of a mechanism for settling property matters, in contrast to the wider functions of family justice today. As Cretney explains of the Act:

Its origins certainly do not lie in any concern for abstract justice. Rather they lie in the pressing need, highlighted by the growth in personal wealth associated with industrialisation, to get rid of the ramshackle probate jurisdiction exercised by 350 or so ecclesiastical authorities and replace it with a more efficient system of dealing with deceased's property.¹¹⁶

Outhwaite's history of the ecclesiastical courts notes that their dwindling business had reduced their efficiency.¹¹⁷ They were subject to increasing criticism from 1660 through to the 18th century, reflected in contumacy¹¹⁸ and weak sanctions for non-attendance. Records suggest that petitions to Parliament about the courts' powers arose from individual circumstances of delay and frustration rather than ideology. For example, in 1733 an irate father brought a case against clergymen who performed a dubious marriage ceremony for his 17-year-old daughter without his consent; his dissatisfaction with the progress of his complaint was one of the drivers of a series of bills to reform clandestine marriage and church court procedures.¹¹⁹ Most complaints related to probate or to discipline of the clergy, rather than matrimonial causes.¹²⁰ The first appears to reflect an increasing disconnection between wider sections of society which were beginning to have an interest in cost-effective administration of probate, and the system that was being preserved by the Church courts. The second may have come about through weakening of leadership in the Church, increased secularisation, or both. In any event, as society grew more affluent and more individuals encountered the legal process administered by the Church, the less satisfactory and more ossified the systems became.

The marital jurisdiction did attract some complaints as well. Separation *a mensa et thoro* effectively condemned many families to live in uncertain or illegal situations. Nor were parliamentary processes highly regarded, being described by one of the MP in to Commons

¹¹⁵ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds) *A Century of Family law 1857-1957* (1957) 289

¹¹⁶ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 162

¹¹⁷ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 102

¹¹⁸ Wilful disobedience of court orders

¹¹⁹ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 107-14

¹²⁰ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 119-56

in 1835 as a scandal, disgrace, a cause of jest and merriment, and an expensive farce.¹²¹ Many sources quote the sardonic judgment delivered by an Assize Court judge in 1845 advising an impoverished deserted husband that he need only spend £500 to £600 in a series of actions that would endure for one or two years, repeatedly proving his case.¹²² Divorce was available in Scotland from 1573 so there were cross-border difficulties, and some lawyers were also unhappy about the scandals associated with crim. con. cases and collusion.¹²³

According to the Royal Commission set up in 1850, the cost of a typical parliamentary divorce was £700 or £800 or, if contested, some thousands of pounds.¹²⁴ The Commission did not recommend any change in the substantive law, but proposed an administrative reorganisation to abolish all the ecclesiastical courts and transfer their probate and matrimonial jurisdiction to secular courts.

Initially, the majority of matrimonial business was to be handled by the Court of Chancery, but instead new courts were established in London.¹²⁵ This suggests that commentators are correct that there was no intention to widen access to divorce; a de-centralised system would have been available to far more couples. Those who harboured fears of the lower orders becoming uncontrollable and irresponsible succeeded in denying them the personal freedom available to the wealthy.¹²⁶

Nor did the Act itself bring major improvements for women. The new Divorce and Matrimonial Causes Court could award child custody and visitation rights; a woman was able to be party and therefore defend her reputation in the new action for damages that replaced crim. con.; and grounds for divorce were extended to include the ‘aggravating circumstances’ of desertion and mental cruelty. Husbands, however, could obtain a divorce on the grounds of

¹²¹ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 159-60

¹²² Mr Justice Maule, cited by RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 160-1; ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 37; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 368-9

¹²³ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 19

¹²⁴ Report of the Commissioners into the Law of Divorce 1852-3 cited in L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 355

¹²⁵ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (Cambridge Studies in English Legal History, Cambridge University Press 2006) 162

¹²⁶ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (Cambridge Studies in English Legal History, Cambridge University Press 2006) 163; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 385-386

adultery alone, until the Matrimonial Causes Act 1923. The lobbying on behalf of women which succeeded in making divorce (restricted as it was) available to them has been seen as a step in progress toward property reform.¹²⁷ Poor women still had access to justice only through JPs.¹²⁸ Soon, legislation introduced from 1878 would mean that JPs were dealing with thousands of cases per year awarding maintenance to beaten or deserted wives, discussed below.

Expectations of the volume of court business were low. The Lord Chancellor thought the proposals inefficient because matrimonial causes needed judges of the highest quality but there would be insufficient business to occupy a court full time.¹²⁹ (It had been argued during the passage of the Bill that if probate was successfully transferred, but divorce was not, the small amount of work retained by the church courts would not have maintained a group of ecclesiastical lawyers.)¹³⁰ Divorce was tried by in an inquisitorial manner by three judges; appeals could be taken to the Court of Appeal and from there to the House of Lords. Separation *a mensa et thoro* became a decree of judicial separation in the High Court.

Reconsidering Graveson's four questions, above, it can be seen that systems were changed to address the problems of Church control mainly to better serve the interests of upper and middle class men with, possibly, incidental improvements for some wives and children. The implementation of the MCA 1857 'opened no floodgate'¹³¹ having little effect on the majority of the population, divorce being obtainable only at considerable financial cost. Although:

'...several hundred middle-class men and women were moved every year from the categories of the eloped, the deserted, the privately separated, or the judicially separated, to the category of the divorced...the number of people involved remained statistically minute.¹³²

¹²⁷ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 38-39

¹²⁸ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (Cambridge Studies in English Legal History, Cambridge University Press 2006) 166

¹²⁹ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 9 citing Hansard vol 142 col 403

¹³⁰ RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 173

¹³¹ Finer Report Volume 2 (Cmnd 5629-1, 1974) para 34

¹³² L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 387

By 1880, the number of annual average decrees was still only 277; by 1900 it was 500.¹³³ For the majority of the population, regulation of family relationships remained a matter for the local JPs.

THE GROWTH OF THE JURISDICTION OF THE JUSTICES OF THE PEACE: 16th-19th CENTURIES

THE POOR LAWS

The domestic jurisdiction of magistrates courts, established in 1878, had its roots in the poor law system, originating in the mid 16th century.¹³⁴ The main aim was to reduce the number of paupers dependent on the parish, ‘a subject with which the sixteenth and seventeenth century authorities were almost morbidly obsessed.’¹³⁵ The Finer Report described the poor law as the means through which the public supported those who were unable to support themselves, but then sought reimbursement by imposing legal liability upon their relatives in accordance with Tudor notions of kinship.¹³⁶ These obligations of kinship were manifested as relatives of any person unable to work being required to support them at a rate set by the local JPs, or pay a penalty of £1 a month.¹³⁷ JPs also oversaw the building and maintenance of ‘houses of correction’ for vagrants and the local unemployed to maintain themselves.¹³⁸

Taking a more positive line, Skyrme describes the extension of the criminal and administrative role of the JP to social and economic functions under the poor laws as ‘the beginning of social services’.¹³⁹ The poor laws provided work for the able bodied and relief for the destitute. Conceding that the Tudor policy was based on failure to enforce the repression of vagrancy, he finds evidence of some JPs taking a humanitarian attitude toward their administration of the system rather than merely trying to contain expenditure. Although the ‘strongest incentive for the legislation was the necessity to remove a pressing danger to society rather than a spirit of charity’ Skyrme calls it ‘the greatest social achievement of the

¹³³ RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 12

¹³⁴ The Poor Act 1575 8 Eliz. 1. 3.

¹³⁵ F Milton, *The English Magistracy* (OUP, London 1967) 103

¹³⁶ Finer Report Volume 1 (Cmnd 5629-1, 1974) para 4.19

¹³⁷ 43 Elizabeth 1 C. 2 (1601)

¹³⁸ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 135

¹³⁹ T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) 193

age and a landmark in the history of JPs. It confirmed them as the focal point for local administration in a system of government which was to last until the nineteenth century.’¹⁴⁰

Beneficiaries had to establish a right of ‘settlement’ or connection to the parish; this was one reason why proving marital status was so important to wives and mothers.¹⁴¹ Churchwardens and annually-appointed parish overseers set a poor rate, collected it and distributed it to the deserving poor. Their duties included setting work or obtaining apprenticeships for abandoned children; this ‘constructive principle of [child] care remained unaltered in our legislation for 347 years’, according to Heywood.¹⁴²

Affiliation proceedings remained within the magistrates’ remit until abolished by the Family Law Reform Act 1987 (although transferred to elected boards of poor law guardians for a short period, 1834 to 1839).¹⁴³ The policy was one of punishment and enforcement against both parents, with no explicit regard to a child’s welfare.¹⁴⁴ From 1844, a mother of illegitimate children could herself bring a case against the putative father in the petty sessional court.¹⁴⁵ Although women were usually reluctant to do so, pressure was applied, and ‘the fundamental principles and procedures underpinning the bastardy jurisdiction, established in the mid-Victorian period were still firmly in place when the Finer Committee reported over 100 years later.’¹⁴⁶

There was no *common law* obligation on a parent to financially support their children (unless they had entered into a contract to pay, for example, for their education). All obligations to maintain children came within the poor law legislation. Wikeley concludes from the extensive historical literature that the parish had a duty to maintain the deserving poor, rather than the poor having any right to relief or active role in negotiating it.¹⁴⁷ When this ‘multitude of practices’ across parishes was consolidated into what could be described as a system in

¹⁴⁰ T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) 193

¹⁴¹ R Probert, ‘Looking Back on the Overlooked: Cohabitants and the Law 1857-2007’ in N Lowe and G Douglas (eds), *The Continuing Evolution of Family Law* (Jordans, Bristol 2009) 58; 63

¹⁴² J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn Routledge, London 1978) 10

¹⁴³ Under the ‘new poor law’: Poor Law Amendment Act 1834: N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 53

¹⁴⁴ I Pinchbeck and M Hewitt, *Children in English Society Volume I: From Tudor times to the 18th century* (Routledge, London 1973) 207

¹⁴⁵ J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn Routledge, London 1978) 99

¹⁴⁶ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 57

¹⁴⁷ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 38-9

1834,¹⁴⁸ it was on the basis of ‘less eligibility’ that ensured that a pauper could never be in a better financial position than a labourer.¹⁴⁹

Clearly the JPs’ function here was one of social control, but this necessitated an element of protection. Women, children and the infirm would have faced starvation without the poor laws. Despite the Church imposing moral responsibilities on the family form, it could not, it seems, provide for the survival of the vulnerable without the law-making powers of the JPs, who appear to have achieved legitimacy through a mixture of amateurism and localism.

JPs’ OTHER POWERS TO REGULATE AND PROTECT THE FAMILY

For a brief period during the English Civil War, JPs acquired extended powers in domestic matters. Of course, the ecclesiastical courts were temporarily abolished; civil ceremonies conducted by JPs were the only legal form of marriage from 1653-1657, and JPs also pronounced on the validity of a marriage. There were even proposals for marriage formalities to include a clause allowing divorce by either party on the ground of adultery.¹⁵⁰ Uncertainty about the church courts’ jurisdiction continued well after the Interregnum, and private separation deeds became more common, with evidence of JPs improvising when asked to endorse agreements.¹⁵¹

In the longer term, JPs’ functions regarding family relations were administering the poor law and powers associated with the criminal law, for example binding over a violent or cruel husband to keep the peace. The ecclesiastical courts and JPs both addressed the punishment of sexual delinquency.¹⁵² As discussed above, along with the ecclesiastical courts, they had been able to punish miscreants for fornication and adultery, but this corrective function gradually fell into disuse by the mid 18th century. Some JPs were also clergymen. We can see a picture of societal values being enforced through medieval and early modern structures; with adjudication integral to local communities, in both church and lay courts, undertaken by the men who concerned themselves with moral and economic control of family life.

¹⁴⁸ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 39

¹⁴⁹ *Finer Report* Volume 2 (Cmnd 5629-1, 1974) App 5 para 54

¹⁵⁰ T Skyrme, *History of the Justices of the Peace Volume 1* (Barry Rose, Chichester 1991) 226-7; L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 97; 149

¹⁵¹ L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 150

¹⁵² RB Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500-1860* (CUP, Cambridge 2006) 61-2

The Finer report is extremely critical, throughout, of the JPs' involvement in family matters having accidentally emerged from the early criminal and poor law jurisdiction. The Committee's disapproval reflects the Fabian perspective of some of its members, but in the face of evidence of the inefficiency of the administration of maintenance orders, their complaints are not entirely ideological. Wikeley justifies these criticisms in his recent work on child support.¹⁵³

Most families who came into contact with the earliest family courts were affected by JPs, not judges. It is therefore interesting to briefly look at the type of person who became a JP, the nature of society's expectations of them, and the way this might influence their application of the law through their own courts. Furthermore, we should try to evaluate how much the JPs' role in local justice and services, exercised over eight centuries, is reflected or appropriate in the 21st century administration of family law.

JPs were largely unpaid and therefore had to be wealthy men. (Stipendiary magistrates were introduced in 1792, as discussed below.) The 1361 statute required JPs to be 'one lord and with him three or four of the most worthy in the county', ascribing a measure of financial, as well as moral, worth to those who were also seen to have integrity to be charged with keeping the peace.¹⁵⁴ From 1439, a minimum income was stipulated for eligibility.¹⁵⁵ This parallels the way in which wealthier witnesses' testimony was valued in the ecclesiastical courts, and the jurors selected in crim. con. actions. Property qualifications were abolished by the Liberal government in the early 20th century, although of course only a narrow band of society could afford the time to undertake JPs' duties.

At the height of their influence, early in the 19th century, JPs were 'the effective rulers of the land'.¹⁵⁶ Holding combined functions as judges, administrators and police, they governed the country through the quarter and petty sessions and also influenced the government through political channels. Their civil functions were analogous to the modern public services undertaken by local authorities. exercising all aspects of local government, backed by enforcement powers, including trade; shipping; agriculture; liquor licensing; gaming;

¹⁵³ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) Ch 4; to be discussed further in Chapter Four

¹⁵⁴ F Milton, *The English Magistracy* (OUP, London 1967) 6-7; See also A Shepard and J Spicksley 'Worth, Age and Social Status in Early Modern England' (2011) 64(2) *The Economic History Review* 493-530

¹⁵⁵ 18 Hen. VI c. 11 (1439)

¹⁵⁶ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester, 1991) 37

hunting; weights and measures; bridges; highways; gaols; vagrants and gypsies They even set local prices and wages, thereby being responsible for the local economy.¹⁵⁷

In petty sessions, even a 'single Justice' could exercise a broad range of functions in his own home. The more serious quarter sessions were attended by the Lord Lieutenant, most magistrates, sheriffs, coroners, bailiffs, and poor law overseers. There was also a jury of at least 12 men.¹⁵⁸ Given the number and social position of those in attendance, and the breadth of the JPs' duties, the quarter sessions must have taken a dominant role in local affairs. Justice meted out to defendants in such a public way fits well into Foucault's concept of spectacle in early modernity.¹⁵⁹

Although it can be said that JPs were more influential than the local aristocracy or churchmen during the 18th and early 19th centuries, the bench probably comprised almost all of the local nobility, bishops and some of the leading gentry. Almost all secular and ecclesiastical peers and about half of MPs were JPs.¹⁶⁰ Their historical importance was described by C. A. Beard in 1904:

... chosen from the strongest and most stable elements of the gentry ... they possessed that intimate knowledge of local persons and conditions which facilitates efficient administration; but ... they never secured enough corporate independence to endanger the cohesion of the national system. England's early national unity and internal administrative uniformity were in a large measure due to the institution of the justice of the peace.¹⁶¹

JPs may have administered their duties regarding paupers, workhouses and vagrants harshly but centrally-imposed systems were harsh in themselves. Furthermore, their position as local employers and landowners could not leave them impartial.¹⁶² Skyrme admits that the JPs applied overt class discrimination in being far more lenient with their own class than the lower orders, but believes that, in general, the number of inadequate or corrupt JPs was low. He cites various instances of JPs' philanthropy and compassion, giving guidance and advice to individuals in the community.¹⁶³

¹⁵⁷ F Milton, *The English Magistracy* (OUP, London 1967) 9

¹⁵⁸ T Skyrme, *History of the Justices of the Peace Volume Two* (Barry Rose, Chichester 1991) 57-59

¹⁵⁹ M Foucault, *Discipline and Punish* (Tr. A Sheridan, Penguin, London 1979)

¹⁶⁰ T Skyrme, *The Changing Face of the Magistracy* (Macmillan, London 1983) 3; T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 177

¹⁶¹ CA Beard *The Office of the Justice of the Peace* (1904, out of print) 71, cited by F Milton, *The English Magistracy* (OUP, London 1967) 7

¹⁶² T Skyrme, *History of the Justices of the Peace Volume Two* (Barry Rose, Chichester 1991) 105

¹⁶³ T Skyrme, *History of the Justices of the Peace Volume Two* (Barry Rose, Chichester 1991) 127-130

It has been suggested that JPs' performance during the height of their power was, on balance, effective in their administrative duties but variable in their application of draconian criminal law. Their reputation began to decline in the 18th century as blatantly political appointments became widespread. This was resisted by those already in place, partly to maintain the integrity of the role, but 'combined with a good deal of class and party prejudice'.¹⁶⁴

The police courts' jurisdiction over most of the population of London, the Middlesex bench, was exercised by professional stipendiary magistrates from 1792. Eventually, the Home Office assumed the running of prisons and new corporations took over local government in the bigger towns.¹⁶⁵ By the end of the 19th century, local administration in the shires had been transferred to elected county councils. County courts were established in 1846 although small debt enforcement and all family matters remained within the JPs' jurisdiction.

In 1888, Maitland described magistrates as 'cheap, pure and capable' but 'doomed, sacrificed on the altar of the spirit of the age'.¹⁶⁶ He was unduly pessimistic. JPs have proved indispensable, primarily because of their 'cheapness'.

Attempts are now made to diversify the profile to better reflect society. Judicial statistics are kept on the gender, age, ethnic make-up and disability status amongst the magistracy. In 2009, although gender balance was about equal, only 4 per cent were aged less than 40; and 49 per cent more than 60.¹⁶⁷

In the 19th century, JPs outside London still tended to be appointed mainly from the gentry, but the property qualification was abolished by the incoming Liberal government in 1906, and within a few years included 'working men with a first hand knowledge of the conditions of life amongst their own class'.¹⁶⁸ The Sex Disqualification (Removal) Act 1919 allowed the selection of women.¹⁶⁹

¹⁶⁴ F Milton, *The English Magistracy* (OUP, London 1967) Milton 14; T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 135-9

¹⁶⁵ F Milton, *The English Magistracy* (OUP, London 1967) 17

¹⁶⁶ FW Maitland, 'The Shallows and Silences of Real Life' in *Collected Papers* (CUP, Cambridge 1911) 472

¹⁶⁷ The appointment of a 19-year-old law student was controversial: K O'Hara, 'Controversy flares over 19 year old magistrate' *Yorkshire Post* 7 September 2006

¹⁶⁸ Report of the Royal Commission on the Selection of Justices of the Peace (1910 Cd 5250) 10

¹⁶⁹ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 658

The magistrates courts' powers from the late 19th century will be covered in the next section.

THE FURTHER ENTRENCHMENT OF THE DIVISION

THE HIGH COURT: 19th-20th CENTURY

As noted above, in the decades following the 1857 Act, divorce petitions to the High Court were very rare. A series of social reforms introduced by the Liberal government included setting up a Royal Commission chaired by Lord Gorell to enquire into law and administration in divorce, matrimonial causes and applications for separation orders, with particular reference to the 'poorer classes'. Gorell was an immediate past President of the Probate Divorce and Admiralty Division of the High Court, and known for his reformist views, similar to those being publicised by an influential pressure group, the Divorce Law Reform Union.¹⁷⁰ At that time, the High Court was dealing with 800 divorce petitions annually, while the magistrates were dealing with 15,000 applications for matrimonial orders.¹⁷¹ The Commission reported in 1912 on the lack of capacity in the PDA to deal with even this small number of petitions, and the inequality of a process which served only those who could afford to travel to London.¹⁷² There were only about 15 cases being heard annually under the poor persons' procedure.¹⁷³ (Applicants might be eligible for fee exemption, but relied on their finding a barrister and solicitor charitable enough to support them free of charge.¹⁷⁴)

Although the majority of Commission members wanted to decentralise the High Court jurisdiction to enable local sittings, they opposed the idea of extending divorce jurisdiction to the county court because of reluctance to entrust cases to registrars.¹⁷⁵ (These were local solicitors who fulfilled judicial roles on a part-time basis, and whom the Commission felt would be ill-equipped to adjudicate on divorce.) Cretney says that there was a perceived risk of conflict of interest if a local solicitor was judging a case with which he was familiar and it was generally accepted that the seriousness of divorce required the expertise of barristers

¹⁷⁰ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 206-8

¹⁷¹ *Finer Report* Volume 2 (Cmnd 5629-1, 1974) para 42; see next section regarding JPs' domestic jurisdiction

¹⁷² Report of the Royal Commission in Divorce and Matrimonial Causes (Cd 6478, 1912) paras 48-62 (hereafter: 'Gorell Report')

¹⁷³ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 307

¹⁷⁴ A Paterson, *Legal aid as a social service* (The Cobden Trust, London 1970) 11

¹⁷⁵ Gorell Report (Cd 6478, 1912) para 106

‘even for the poorest persons.’¹⁷⁶ This contrasts oddly with the value placed on local JPs. Instead, the Commission proposed that a small number of county court judges be selected for appointment as Commissioners of Assizes.¹⁷⁷

In other ways, the Gorell Report was progressive. It studied foreign jurisdictions and noted that few were as limited geographically, expensive, discriminatory (against women) and had such restricted grounds for divorce as in England and Wales.¹⁷⁸ It argued for gender equality, widening the grounds for divorce, as well as decentralising the procedure for the benefit of parties with limited financial means. The debate on procedural questions seems to have fallen into abeyance with the outbreak of war, and none of these reforms proceeded until many years later. The poor persons’ procedure was improved slightly in 1914, but was still very restricted: in 1918 only about ten per cent of applications were granted.¹⁷⁹

The disruption to family life caused by both world wars in the 20th century led to an immense rise in the number of applications for divorce; re-settling returned soldiers and shattered families was a priority.¹⁸⁰ From 1914 a backlog of petitions built up to the extent that emergency action had to be taken, with some of the Law Lords stepping in to deal with up to 1,500 cases in one term.¹⁸¹ The rate of divorce increased by six times between 1913 and 1921, and the Administration of Justice Act 1920 adapted the assize system in an attempt to cope. The assize courts’ High Court divorce jurisdiction was extended to all cases which used the poor persons’ procedure, and all undefended petitions.¹⁸²

Cretney comments that changes in procedure can have a greater impact than reform of substantive law. This administrative change, on grounds of expediency, completely contradicted the principle that the highest standard of specialised adjudication and representation was required in undefended divorce cases:

¹⁷⁶ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 276-7

¹⁷⁷ Since the 12th century, High Court judges had been sent out to the shires to hold an assize in quarter sessions twice annually. The procedure was abolished by the Courts Act 1971.

¹⁷⁸ Gorell Report (Cd 6478, 1912) para 34

¹⁷⁹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 306-8; A Paterson *Legal aid as a social service* (The Cobden Trust, London 1970) 11-12

¹⁸⁰ The impact of post-World War II policy will be examined in the next chapter.

¹⁸¹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 277

¹⁸² L Stone, *Road to Divorce: England 1530-1987* (OUP, Oxford 1990) 394-395

The truth was that a large proportion of divorce work was to be discharged, not by the Division specially maintained in London for that purpose, but by the common law judges on circuit sitting in isolation up and down the country.¹⁸³

Presumably, the expense of taking a contested case to London reduced the number of defended petitions. In 1933 it was officially noted that the 1920 Act had probably unwittingly effected a fundamental change.¹⁸⁴ Cases conducted in London decreased to the extent that proposals were made to dispense with the PDA and transfer divorce work to the Kings Bench. However these did not proceed, and extra judges were eventually appointed to the PDA in anticipation of the Matrimonial Causes Act 1937.¹⁸⁵

Rationality was pursued at the expense of moral rhetoric; divorce was such a serious legal procedure that it could not be undertaken by solicitors, but rather than extend the capacity of the specialised divorce court, non-specialist judges straight from the Bar were deemed suitable. The courts were functioning according to entrenched professional perceptions and boundaries, not in response to the Gorell Report concept of ‘human needs’. Thus there has to be serious doubt as to whether the courts were promoting the values and needs of the parties or a self-serving bureaucracy. In Habermas’ view, when administrative systems are prioritised for their own sake, they are uncoupled from the lifeworld that give them meaning.¹⁸⁶

Whatever its contradictions, the new undefended divorce procedure was cheaper and quicker for parties, even if some High Court judges found the hearings tedious.¹⁸⁷ Real reform was achieved when the Matrimonial Causes Act 1923 gave equal status to women in that they could petition for divorce on the sole ground of adultery. This also had the effect of creating the legendary ‘hotel divorce’ whereby an apparently adulterous scene could be staged by the husband, then used as evidence to procure a divorce.¹⁸⁸ Collusion was still a bar on divorce, so a petition could only succeed if the court was presented with a ‘wronged’ wife, whatever the truth of the breakdown of the marriage. Practitioners and the public were becoming

¹⁸³ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 279

¹⁸⁴ Business of the Court Committee Second Interim Report 1933 (Cmd 4471 para 13) cited in S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 278 n 31

¹⁸⁵ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 281

¹⁸⁶ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 318-331

¹⁸⁷ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 278 n 33

¹⁸⁸ As famously satirised in Evelyn Waugh’s 1934 novel, *A Handful of Dust*

increasingly aware of the disparity between the law which was meant to be upholding morality, and the legal practice that encouraged or relied on immorality, if not bordering on perjury.¹⁸⁹ Campaigns by the famous lawyer, author, and backbench member of parliament, A.P. Herbert, brought reform in the Matrimonial Causes Act 1937, which extended the grounds for divorce to include desertion, cruelty and unsoundness of mind. There was still a heavy evidential burden on the parties, and entanglement with a lengthy court process, but the rate of applications increased by 50 per cent almost immediately. One reason was that proven grounds for separation in the magistrates court could be used as evidence for divorce.¹⁹⁰

The arguments between those who call for a more humane divorce law and those who attribute family breakdown to the availability of divorce continue.¹⁹¹ It is however notable how little attention the courts paid directly to children until relatively recently.

Children in the High Court

Childhood is a construct that changes over time, with a number of models having been identified in the 18th and 19th centuries, which accordingly influence policy.¹⁹² According to Pollock and Maitland, the legal age of an ‘infant’ originated in the custom of a knight’s tenant reaching majority at the age of 21.¹⁹³ The age of majority may have been relevant to a child who would attain status or property. In contrast, under the 19th century ‘New Poor Law’, a father’s liability ended when the child was seven.¹⁹⁴

The only exception to the absolute right of a father with regard to the custody of his legitimate children at common law and equity was the status of the monarch as *parens*

¹⁸⁹ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 299

¹⁹⁰ G Behlmer, ‘Summary Justice and Working Class Marriage in England 1870-1940’ (1994) 12(2) *Law and History Review* 229-275 at 272; AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 19

¹⁹¹ See for example, Baroness Deech: Hansard HL Deb, 10 February 2011, c374

¹⁹² J Fionda, *Devils and Angels* (Hart, Oxford 2005) 20-22; C Piper *Investing in Children: Policy, Law and Practice in Context* (Willan, Cullompton 2008) 32-52

¹⁹³ F Pollock and FW Maitland, *History of English Law before Edward I Volume II* (2nd edn CUP, Cambridge 1968) 438. (The age of majority was reduced to 18 by the Divorce Law Reform Act 1969)

¹⁹⁴ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 53

patria.¹⁹⁵ Until the fusion of law and equity in the High Court in 1875 this was exercised by the Court of Chancery. Wardship, whereby the court controls the exercise of parental responsibility,¹⁹⁶ was a specific aspect of the inherent jurisdiction, although not explicitly distinguished until the effect of the Children Act 1989 on wardship made this necessary. In theory, any child could have been ward, but in practice only wealthy children without parents or legal guardians would have been, because their value lay in the property to be administered to support them.¹⁹⁷ (By the early 20th century, the wardship process was being manipulated to settle disputes in some cases by a parent settling a nominal amount of money on their child and then making the application.¹⁹⁸)

Fox Harding identified the exercise of wardship jurisdiction in the 19th century with a *laissez faire*/patriarchy model of child care, exemplified in the infamous Agar Ellis cases of 1878, which featured disputes over the children's religious upbringing and the wishes of a 16-year-old to spend time with her mother. The court reinforced the absolute rights of the father, despite the wife's lawyers arguing for her own and the children's interests to be taken into account. The court refused to see the daughter, and referred to a father's 'sacred' rights and duties, which could 'never be exercised as well' by a court.¹⁹⁹ Cretney cites correspondence between senior lawyers as late as the 1920s, expressing disbelief that a court could ever decide a question on a child's upbringing against a father's wishes.²⁰⁰

The Custody of Children Act 1839 removed the total presumption in favour of fathers, enabling courts to award custody of a child under seven to its mother (extended to 16 years by the Child Custody Act 1873) and also award access rights throughout their childhood. However, the judiciary were expected to decide in favour of the father if possible.²⁰¹ Children were hardly mentioned in the debate leading to the MCA 1857, as fathers' rights to exclusive

¹⁹⁵ P Pettit, 'Parental Control and Guardianship' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 56. (The doctrine of the Crown as the father of the country gives courts an inherent jurisdiction to protect adults with disabilities and children)

¹⁹⁶ Originally conceptualised as the child's person and property being vested in the court.

¹⁹⁷ NV Lowe and RAH White, *Wards of Court* (2nd edn Barry Rose, London 1986) 5

¹⁹⁸ NV Lowe and RAH White, *Wards of Court* (2nd edn Barry Rose, London 1986) 47

¹⁹⁹ L Fox Harding, *Perspectives in Child Care Policy* (1st edn, Longman, 1991) 42; *Re Agar Ellis* [1878] 10 Ch D 49 (CA); *Re Agar Ellis* (No. 2) [1883] 24 Ch D 317

²⁰⁰ S Cretney ' "What will the women want next?" The struggle for power within the family 1925-1975' *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 155-183 at 162-164

²⁰¹ P Pettit, 'Parental Control and Guardianship' in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 58-59

control and guardianship were otherwise unchallenged.²⁰² However the Act gave the PDA discretion to make orders as to custody, education and maintenance within divorce proceedings.

The invisibility of children in the higher courts is demonstrated by Freeman, tracing the earliest reported family law cases (Probate and Divorce reports) to 1865, in which year there were five cases relating to children, two of which were legitimacy cases concerning property. The other three were settling issues about custody of children. He found very few reported cases specifically about children in subsequent years. Even in 1925 there were none reported in the Divorce Court, and one in Chancery on issues of legitimacy and inheritance where the child was made a ward of court.²⁰³

It was in 1925 that the campaign to end the ‘monstrous legal fiction’²⁰⁴ of a mother having no rights regarding her child’s upbringing led to the Guardianship of Minors Act, which introduced the statutory basis of the child’s welfare being ‘first and paramount’ when courts determined such matters, ending the supremacy of the father’s wishes. This principle had been developed by the Court of Chancery, according to the House of Lords in 1970 in *J v C*.²⁰⁵ Lowe argues that this equitable principle was applied only to wards, and that in the common law a parent-centred approach was invariably taken, prior to the 1925 Act.²⁰⁶ He disagrees with Pettit’s assertion,²⁰⁷ that the welfare principle was applied in all cases involving children’s upbringing since 1925. The provision was interpreted narrowly until *J v C* established that the child’s welfare applied both to disputes between parents, and involving third parties, and was universally applicable across the family jurisdiction.²⁰⁸ It was not until

²⁰² RH Graveson, Introduction to RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 17-19

²⁰³ M Freeman, ‘The Child in Family Law’ in J Fionda (ed) *Legal Concepts of Childhood* (Hart, Oxford 2001) 184-5.

²⁰⁴ Eleanor Rathbone, quoted in S Cretney, ‘“What will the women want next?” The struggle for power within the family 1925 - 1975’ in *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 161

²⁰⁵ [1970] AC 668

²⁰⁶ NV Lowe, ‘The House of Lords and the Welfare Principle’ in C Bridge (ed) *Family Law towards the Millennium: Essays for PM Bromley* (Butterworths, London 1997) 128

²⁰⁷ P Pettit, ‘Parental Control and Guardianship’ in RH Graveson and FR Crane (eds) *A Century of Family Law 1857-1957* (Sweet & Maxwell, London 1957) 76

²⁰⁸ NV Lowe, ‘The House of Lords and the Welfare Principle’ in C Bridge (ed) *Family Law towards the Millennium: Essays for PM Bromley* (Butterworths, London 1997) 134

the passing of the Guardianship of Minors Act 1973 that both parents were accorded equal authority regarding custody, upbringing and property of their children.²⁰⁹

The courts' adoption powers should also be mentioned briefly here, because they were introduced in both the High Court and magistrates courts by the Adoption of Children Act 1926. (The latter were heard by the JPs on the juvenile panel.) It is remarkable to note how recently JPs were deemed competent to adjudicate in adoption hearings while divorce had to be retained by the High Court. The earliest adoption of children was not legally recognised as there was no formal process until the 1926 Act, which remained the substantive law until 1949. The poor law guardians had been able to assume parental rights, and arrange to board out children who were orphaned or deserted. There was some social pressure after the First World War to regularise this process but the 1926 Act required only minimal examination of consent and welfare issues by the court. It was not until the Houghton Committee reported in 1972 that the courts were called on to view adoption as an 'integral part of the legal framework for dealing with children in need.'²¹⁰

MAGISTRATES COURTS: 19th-20th CENTURY

The creation of a divorce court in 1857 was 'of very little value to anyone outside the property classes. The great majority of wives whom their husbands abandoned or maltreated had to make do with such relief as they could find in the poor law or the criminal law.'²¹¹ However, the JPs' protective functions were considerably extended toward the end of the 19th century.

The Matrimonial Causes Act 1878 gave JPs powers to make orders in favour of wives for non-cohabitation, maintenance, and custody of children aged under ten, in cases where a husband had been convicted of aggravated assault. This was extended by the Married Women (Maintenance in the Case of Desertion) Act 1886 and consolidated by the Summary Jurisdiction (Married Women) Act 1895, adding grounds of desertion, aggravated assault, persistent cruelty or wilful neglect. The Licensing Act 1902 extended this to the husband

²⁰⁹ S Cretney, '“What will the women want next?” The struggle for power within the family 1925-1975' *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 155-183

²¹⁰ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 627

²¹¹ Law Commission, *Working Paper No 53 Family Law Matrimonial Proceedings in Magistrates Courts* (1973) 4 para 8

being a habitual drunkard. We can see how this jurisdiction is based in the criminal law, but the historical background to the 1878 Act does reflect wider social issues.

An article in 1878 by journalist and campaigner, Frances Power Cobbe, *'Wife Torture in England'*, concluded that punitive action against perpetrators of violence was ineffective in preventing women from being recurrent victims, but that a better remedy would be to 'give the wife the power of separating herself and her children from her tyrant'.²¹² Despite her plea to those in influential positions to address this social ill, she did not suggest extending divorce to those too poor to take High Court proceedings. She conceded that wealthier women were privileged by the accessibility of divorce on grounds of cruelty, but her solutions were grounded in the class structures of her time. Nevertheless, she recognised gender inequality as a factor in the degradation of working class women subject to repeated violence:

To a certain extent this marital tyranny among the lower classes is beyond the reach of law, and can only be remedied by the slow elevation and civilisation of both sexes. But it is also in an appreciable degree, I am convinced, enhanced by the law even as it now stands...the position of a woman before the law as wife, mother, and citizen, remains so much below that of a man as husband, father, and citizen, that it is a matter of course that she must be regarded by him as an inferior.²¹³

So Power Cobbe attributed the ordeal of poorer women partly to the patriarchal society to which all women were subject, but she had to put her concerns into terms with which members of parliament could deal: 'to save decent working class women from brutal husbands.'²¹⁴ The article is still largely credited with the introduction of the 1878 Act.²¹⁵ The Finer Report describes a bill going through Parliament on the powers of the Queen's Proctor as 'casually' amended to include new powers for the magistrates court. This consolidated the dual jurisdiction, still evident nearly a century later, for 'the same human predicament'.²¹⁶

²¹² F Power Cobbe in *The Contemporary Review* 32 (1878) 55-87 cited by S Hamilton, *Frances Power Cobbe and Victorian Feminism* (Palgrave Macmillan, Basingstoke 2006) 17

²¹³ F Power Cobbe in *The Contemporary Review* 32 (1878) 55-87 cited by S Hamilton, *Frances Power Cobbe and Victorian Feminism* (Palgrave Macmillan, Basingstoke 2006) 17

²¹⁴ ML Shanley, *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 167

²¹⁵ F Power Cobbe in *The Contemporary Review* 32 (1878) 55-87 cited by S Hamilton, *Frances Power Cobbe and Victorian Feminism* (Palgrave Macmillan, Basingstoke 2006) 21

²¹⁶ Finer Report Volume 2 (Cmnd 5629-1, 1974) para 35-6

Behlmer notes that Parliament had not grasped that it was ‘lodging potentially broad matrimonial jurisdiction in the lowest criminal courts.’²¹⁷

The magistracy had started to become professionalised. In the provinces, the appointment of stipendiaries was welcomed by existing JPs in preference to having to accept nominations of men who had created their wealth through trade, but the dual system grew haphazardly, with a stipendiary being appointed in some comparable cities but not others.²¹⁸ Clerks were appointed to advise the bench, regularised by the Justices Clerks Act 1877, which established posts for legally qualified clerks in each petty sessional area.

There was no limit on the number of JPs on the bench until 1938; prior to this, an interesting case could attract large numbers.²¹⁹ Quarter sessions customarily involved the presence of all those notable in the community. This illustrates the paradox between the history of public trial as spectacle,²²⁰ and family privacy. It appears that once certain boundaries of behaviour were crossed, any right to privacy disappeared and the family were subject to the public gaze. Even the upper classes were not immune from publicity in Kings Bench crim. con. actions, which attracted large audiences, but the middle classes were unlikely to be directly involved at either end of the spectrum.

The Gorell report shows an awareness of the tension between criminal and family proceedings:

...there is serious objection to a court, whose main duties are of a criminal character, entertaining applications, which are of a civil nature, concerning the domestic relations of men and women and their children, applications which if granted, may produce the practical although not the legal dissolution of the marriage tie...The evidence satisfies us that the general administration of the Acts is not satisfactory where these cases are dealt with by lay magistrates.²²¹

The Committee was dissatisfied that summary remedies were the only ones available to the poor. Its report recommended that JPs should retain jurisdiction where immediate protection or financial support was needed, but a separation continuing for more than two years would

²¹⁷ G Behlmer ‘Summary Justice and Working Class Marriage in England 1870-1940’ (1994) 12(2) *Law and History Review* 229-275 at 241

²¹⁸ F Milton, *The History of the Magistracy* (OUP, London 1967) 38

²¹⁹ F Milton, *The History of the Magistracy* (OUP, London 1967) 42

²²⁰ J Jaconelli, *Open Justice: a Critique of the Public Trial* (OUP, Oxford 2002)

²²¹ Gorell Report (Cd 6478, 1912) para 140-141

make the case transferable to the High Court.²²² These recommendations were not implemented, and it is difficult to see how the PDA would have coped with this volume of matrimonial cases.

Writing in the 1960s, Milton doubted whether magistrates courts outside London were ever known as ‘police courts’,²²³ but their common physical proximity to police stations can hardly be ignored. Evidence presented to the Gorell Commission, earlier in the century, constantly used this term; and Skyrme noted that it was not conducive to obtaining full evidence of intimate matters.²²⁴ This taint of criminality in the origins of the domestic jurisdiction was abhorred by the Finer Committee, but in the late 19th and early 20th centuries, JPs were sometimes relied on for compassionate assistance.²²⁵ They were seen by some as a source of advice and support, not just as a punitive power.²²⁶ By Victorian times, there was strong ethos of ‘saving’ the poor from becoming criminals.²²⁷

Granting a summons under the Summary Jurisdiction (Married Women) Act 1895 was discretionary, and magistrates could become quite pro-active in the proceedings. Cretny describes a history of tension between magistrates’ perceptions of their role as therapists trying to preserve the family, and that of adjudicators trying to enforce people’s rights. The zealous reformer, Claud Mullins (Metropolitan Police Magistrate, 1931-1947), exemplified this dichotomy, attempting to launch private bills to reform domestic procedure and enforce investigation, advisory and reconciliation duties on the JPs.²²⁸ This campaign attracted criticism from law officers such as the Chief Magistrate and the President of the Family Division. In the words of the Lord Chancellor, Viscount Sankey, in 1934, investigation into parties’ private lives and the offering of advice would ‘confer upon a court of law functions of a non-judicial, advisory and patriarchal character which are difficult to reconcile with the purposes for which a court exists.’²²⁹

²²² Gorell Report (Cd 6478, 1912) paras 143- 145 and 162

²²³ F Milton, *The History of the Magistracy* (OUP, London 1967) 41

²²⁴ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991)

²²⁵ G Behlmer, ‘Summary Justice and Working Class Marriage in England 1870-1940’ (1994) 12(2) *Law and History Review* 229-275 at 232

²²⁶ S Cretny, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 290

²²⁷ See discussion below on the origins of the probation service.

²²⁸ S Cretny, ‘Marriage Saving and the Early Days of Conciliation: the Role of Claud Mullins’ in *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 123-4; see also G Behlmer ‘Summary Justice and Working Class Marriage in England 1870-1940’ (1994) 12(2) *Law and History Review* 229-275

²²⁹ S Cretny, ‘Marriage Saving and the Early Days of Conciliation: the Role of Claud Mullins’ in *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 124

The Harris Committee (established in 1936) did not agree with the Gorell Commission's doubts on the capacity of the magistrates courts' domestic jurisdiction; these were the courts for working people of whom the JPs had local social knowledge.²³⁰ Its recommendations led to several improvements by way of the Summary Proceedings Domestic Procedure Act 1937: domestic proceedings were to be heard separately from criminal cases; the probation service was given a specific conciliation function;²³¹ the bench was to consist of only three JPs, including a man and a woman; cross examination was curtailed; and public attendance and press reporting were restricted.²³² The Committee report makes many prescient points about the distinction between the court's adjudicative and therapeutic functions.²³³

Between the Gorell Commission in 1912 and the Denning Commission in 1947, statute incrementally bestowed powers on JPs almost equivalent to those of the High Court, apart from actual dissolution of a marriage.²³⁴ By the end of the period covered in this chapter, the magistrates had jurisdiction in separation, maintenance and affiliation, with an overlapping jurisdiction with the High Court and county courts under the Guardianship of Infants Act 1886 and the Adoption Act 1926. Skyrme describes the magistrates' matrimonial jurisdiction, until legal aid was introduced in 1949, as amongst its most time-consuming. He points out that with the nature of maintenance orders being so variable, the total owing under such orders at any one time far exceeded the fining powers of JPs in all other matters.²³⁵

The Guardianship of Minors Act 1925 extended to the magistrates courts, with a consequent increase in the number of applications by women about their children; their only previous avenue being the expensive one of wardship.²³⁶ However, sources on the magistrates' role with regard to protection of women from violence are rather scarce after all the activity at the end of the 19th century, and indeed it seems that public concern about domestic violence

²³⁰ Home Office *Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction* (Cmd 5122, 1936) (hereafter: Harris Report)

²³¹ The term 'conciliation' in this context still described attempts at reconciliation, not its current meaning.

²³² T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 251

²³³ Discussed below

²³⁴ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 250-1; namely the Married Women (Maintenance) Act 1920; Maintenance Order (Facilities for Enforcement) Act 1920; Summary Jurisdiction (Separation and Maintenance) Act 1925; and the Matrimonial Causes Act 1937.

²³⁵ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 251

²³⁶ S Cretney ' "What will the women want next?" The struggle for power within the family 1925-1975' *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 155-183

virtually disappeared until the 1970s.²³⁷ In contrast, children were beginning to become more visible, as Ellen Key's 'century of the child' dawned, bringing views about a child's agency, rather than as merely a subject of good and evil.²³⁸

Children in the magistrates courts

A number of women's pressure groups took private concerns into the public sphere in the late 19th and early 20th centuries. Links have been made between Victorian feminism and the gradual awareness of children's rights to have their welfare considered. Protecting children from neglect and abuse was more acceptable to institutions than protecting women, but feminists were promoting both.²³⁹ This influenced the development of legislation that began to override traditional deference to privacy, such as the Prevention of Cruelty to and Protection of Children Act 1889 ('the children's charter') by which a magistrates court could remove children whose parents were convicted of cruelty and place them with a relative or other fit person.²⁴⁰ The National Society for the Prevention of Cruelty to Children was founded in the same year. Prior to this legislation, the only recourse to protection had been for the child by his or her 'next friend' to sue the parent, or for the poor law guardians to prosecute.²⁴¹ The Custody of Children Act 1891 (the 'Barnardo's Bill') authorised charitable institutions to retain custody of children 'rescued' from abusive parents, who would have to prove themselves fit before the JPs to obtain an order for their return.²⁴² The fact that legislation had to be introduced to protect children from cruelty at the hands of their own parents, and that it was opposed, illustrates the strength of the *laissez faire* paradigm in that period.²⁴³

With loss of their administrative functions, the criminal law became JPs' mainstream work. Until the mid 19th century, criminology was based on rational choice theory and the

²³⁷ M Doggett, 'Marriage Wife-beating and the law in Victorian England' (1992) cited in A Diduck and F Kaganas, *Family Law Gender and the State* (2nd edn Hart, Oxford 2006) 385

²³⁸ S Meuwese, 'One Century of the Child is Not Enough' in S Meuwese (Ed) *100 Years of Child Protection* (Wolf, Nijmegen 2007)

²³⁹ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) Ch 5

²⁴⁰ ML Shanley *Feminism Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton, New Jersey, 1989) 151-3

²⁴¹ L Fox Harding, *Perspectives in Child Care Policy* (Longman, 2nd edn 1997) 35-36

²⁴² J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn Routledge, London 1978) 65

²⁴³ L Fox Harding, *Perspectives in Child Care Policy* (Longman, 2nd edn 1997) 35-36

functions of criminal justice were deterrence, retribution, and accountability. The age of the offender had no bearing on the process. From the mid 19th century, children were re-conceptualised as undeveloped; deviance might be corrected by training, so separate custodial institutions and reformatory schools were established.²⁴⁴ These schools existed in most counties by the late 1850s, run either by magistrates or charities, and taken over in 1860 by the Home Secretary.

JPs were at the vanguard of reform. In 1905, some towns began to set up their own less formal courts for young offenders. The Children Act 1908 then established the separate juvenile court system: those under 16 were to be tried in separate courts from adults; there were restrictions on imprisonment; and proceedings were to be held in private. The concept was seen as innovative and progressive: 'The juvenile court was soon firmly established as an outstanding feature of the magisterial system, and it inspired enthusiastic admiration throughout Britain and overseas.'²⁴⁵

Magistrates courts were agencies that rescued as well as punished children; the 1908 Act is seen as a turning point in child welfare.²⁴⁶ Children now had some rights independent of their parents. Public attention had been drawn to the numbers of children being brought up in abusive or neglectful situations by the poor state of health of many young men signing up for the Boer War.²⁴⁷ The welfare and criminal jurisdictions co-existed, albeit that hearings were held at separate times or in separate rooms. However, the juvenile court compared favourably with the poor law, under which about 20 times more children were in public care than by way of court order.²⁴⁸ When women became eligible to be appointed as magistrates in 1919 they were welcomed as more naturally suited to adjudicating on welfare issues, bringing to cases their 'sympathy, experience and maternal instincts'.²⁴⁹ (Although it was not until 1954 that there were sufficient women JPs to ensure that there was always at least one on the bench.²⁵⁰)

²⁴⁴ J Fionda, 'Youth and Justice' in *Legal Concepts of Childhood* (Hart, Oxford 2001) 78-9; C Piper, *Investing in Children: Policy, Law and Practice in Context* (Willan, Cullompton 2008) 45

²⁴⁵ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 256

²⁴⁶ J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn Routledge, London 1978) 108

²⁴⁷ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 642; L Fox Harding, *Perspectives in Child Care Policy* (1st edn, Longman, London 1991) 86

²⁴⁸ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 657

²⁴⁹ Lord Birkenhead cited by S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 658

²⁵⁰ Juvenile Courts (Constitution) Rules 1954 no. 1711/L.21

The pendulum has swung between punitive and welfare approaches to youth justice ever since.²⁵¹ In 1927, the Moloney Report considered the treatment and protection of young offenders.²⁵² The subsequent Children and Young Persons Act 1933²⁵³ was accompanied by Home Office guidance stressing that mechanisms available to courts for treatment of delinquents and children in need should be closely assimilated. This Act made significant changes in the structure and power of the juvenile courts: magistrates were to be chosen from a specialist panel; court procedures were to be made simpler and less intimidating; rights of attendance by third parties were further restricted, as was press reporting; and powers of local authorities probation officers were extended so that offenders could be committed to their care. The court also had powers to place a child in an approved school, even if they were not charged with any offence. A duty was placed on magistrates, whether a child was an offender or in need of care and protection, to ‘have regard to the welfare of the child or young person and ... in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training’.²⁵⁴

Heywood identifies this as the moment that child care shifted from the poor law to local education authorities.²⁵⁵ The grounds for welfare intervention were lack of parenting; being a victim of criminal abuse; and not receiving a consistent education. A parent could initiate an application if their child was beyond their control.²⁵⁶

Limited figures available indicate a significant increase in the number of children who came within the protection of the courts following the 1930s legislation. However, the degree of care appropriate was sometimes difficult for JPs, still usually older men, to assess: ‘It was no easy matter for the court in such cases to decide where the balance lies between parental autocracy and filial autonomy.’²⁵⁷ Fox Harding sees the progression from the 1908 Act to the 1932 Act as an example of the protective values perspective in practice. The state became more interventionist and although children’s *physical* well-being was prioritised, the integrity of the family unit was devalued in comparison to the *laissez-faire* philosophy of the

²⁵¹ J Fionda, ‘Youth and Justice’ in J Fionda (ed), *Legal Concepts of Childhood* (Hart, Oxford 2001) 80

²⁵² Home Office: Report of the Departmental Committee on the Treatment of Young Offenders (Cmnd 2831, 1927)

²⁵³ Consolidated in the Children and Young Persons Act 1933

²⁵⁴ Children and Young Persons Act 1933 s 21

²⁵⁵ J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn, Routledge, London 1978) 126

²⁵⁶ Children and Young Persons Act 1933 s 10

²⁵⁷ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 669

preceding century.²⁵⁸ By the late 1930s, the Home Department inspectors' reports were beginning to question whether the balance between mechanistic training and education solutions, and preventative work with families, was right.²⁵⁹ Until these issues were addressed in the immediate post-war years, the juvenile courts were the decision-makers in child protection.

Before moving away from the JPs' pre-war jurisdiction, the early stages of a further emerging duality, between the courts' justice and welfare functions, will be considered. Further to references to Mullins and the Harris Committee above, this is exemplified in the role of probation officers in the magistrates courts.

The Probation Service

The Summary Jurisdiction Act 1879 gave magistrates courts powers to discharge a convicted defendant on his undertaking to keep the peace, and present himself for judgment. In 1887 the Probation of First Offenders Act was the first statute to specifically refer to 'probation', introducing this as a national system in England and Wales. In the United States, six states had by 1900 appointed paid officers to advise the courts, report to the police and visit probationers, and the American model appealed to reformers here.²⁶⁰ The Probation of Offenders Act 1907 gave magistrates an option to place an offender on probation when the court 'thinks that the charge is proved' but the circumstances of the defendant or the nature of the crime made punishment inappropriate.²⁶¹

The 1907 Act was widely drawn, to give courts powers to commit an offender to an officer who would 'advise assist and befriend and endeavour to find employment' for them, and report back to the court on their conduct. More than 8,000 untrained part-time officers were appointed in 1908. However, it was not compulsory for JPs to appoint probation officers until the Criminal Justice Act 1925 established probation committees.

²⁵⁸ L Fox Harding, *Perspectives in Child Care Policy* (1st edn Longman, London 1991) 89- 91

²⁵⁹ J Heywood, *Children in Care: the development of the service for the deprived child* (3rd edn Routledge, London 1978) 152

²⁶⁰ M Vanstone, *Supervising Offenders in the Community: A History of Probation Theory and Practice* (Ashgate, Aldershot 2004) 1-12

²⁶¹ T Skyrme, *History of the Justices of the Peace Volume 2* (Barry Rose, Chichester 1991) 262-6; 368-9

Traditionally, the probation movement is traced to a letter written in 1876 by Frederic Rainer to the founder of the Church of England Temperance Society, sympathising with prisoners in London courts, and enclosing a donation of 5 shillings toward someone who would attend the courts to assist with preventing defendants' further slide into criminal activity and imprisonment. This was the first step in establishing the Church of England Police Court Mission. Vanstone's recent history of the service disagrees with orthodox accounts that trace its origins from the missionaries and pressure for penal reform in a homogenous movement motivated by humanity and Christian principles. He argues a synthesis of influences and pressures at the end of the 19th century: the emergence of individual psychology and political and societal concerns about the maintenance of social order. The reformatory ideal was an essential element in the goal of the dominant elite of achieving social order based on deference and reconciliation.²⁶² The court could rely on the probation officer in both criminal and domestic proceedings because he had a holistic view of the family in question.²⁶³

For Vanstone, the value context of the origins of probation included panic about public disorder associated with the changes of industrialisation, as well as the later more enlightened groundswell of humanitarianism motivating penal reforms and concern about imprisonment of children. The Mission promoted individualist solutions based on rescuing, converting and saving drunkards. Magistrates torn between harshness and leniency relied on the missionaries to identify those deserving of mercy, who could achieve divine grace. This ethos developed during the 1920s- 1960s into one of diagnosis and assessment of suitability for supervision. The probation service developed a model of offending as a psychosocial disease, susceptible to expert diagnosis and treatment, but still clung to its roots in religious inspiration and missionary zeal.²⁶⁴ We will see this reflected in the family jurisdiction, but historical sources on the officers' input into matrimonial cases are sketchy until the advent of divorce court welfare.²⁶⁵

The Harris Committee reported in 1937 that most officers were still appointed from the Mission, although there was inconsistency amongst the probation committees as to the

²⁶² M Vanstone, *Supervising Offenders in the Community: A History of Probation Theory and Practice* (Ashgate, Aldershot 2004) vii

²⁶³ N Rose, 'Psychiatry as a political science: advanced liberalism and the administration of risk' (1996) 9(2) *History of the Human Sciences* 1-23

²⁶⁴ M Vanstone, *Supervising Offenders in the Community: A History of Probation Theory and Practice* (Ashgate, Aldershot 2004) 10-16

²⁶⁵ Discussed in Chapter Four

numbers and remuneration of officers appointed.²⁶⁶ Its report expressed an anxiety to restrain the ‘zealous officer... actuated by personal convictions as to the sanctity of the marriage tie’²⁶⁷ Although conciliation should be within the remit of the officer, not the court, the officer needed to differentiate between the circumstances of his criminal and matrimonial clients:

The parties to matrimonial disputes are adults, and for the most part they approach the Court because they desire to obtain relief from a situation which appears to them intolerable. Anything that looks like forced conciliation, depriving them of their rights could aggravate the situation.²⁶⁸

The Committee presented figures demonstrating that large numbers of applicants to the domestic courts were diverted from making an application by seeing the clerk or probation officer. It looked at 6,222 applications and found that only 1,776 went to hearing, with only 919 orders made.²⁶⁹ This appeared to the Committee to stem from the probation officers’ and clerks’ views of themselves as being more effective at saving marriages than the JPs. Its disapproval suggests that reconciliation was not, at that time, viewed as a cost-saving exercise. Rather, this represents an ideological conflict between law and welfare, which will be seen to be a recurring theme in family courts.

CONCLUSIONS

In Chapter One, the current manifest functions of family courts were identified as dispute processing and protection, with latent functions of influencing behaviour and implementing social policy. During the extensive period covered in this Chapter, different courts had different functions. Ecclesiastical courts’ functions were to verify and adjudicate on marital status, according to canon law. As adherence to religious custom faded, these systems were insufficient to meet the needs of the wealthy and powerful, and so the King’s Bench and Parliament acquired functions which enabled a small number of couples to divorce. These were subsumed into the High Court in 1857 with little adaptation of systems to accommodate the wider population, hence functioning as a means of maintaining social order. The JPs also maintained social order through their administration of the poor laws and the criminal law,

²⁶⁶ Harris Report (Cmd 5122, 1936) Part IV

²⁶⁷ Harris Report (Cmd 5122, 1936) para 16

²⁶⁸ Harris Report (Cmd 5122, 1936) para 20

²⁶⁹ Harris Report (Cmd 5122, 1936) App III

with meaningful links to their communities. This duality however persisted for far too long, earning trenchant criticism by the 1970s.

The modern term ‘family justice system’ includes specialist judges; magistrates; lawyers; social work practitioners; as well as court users. This is now ostensibly focused on achieving the best outcomes for children, a different picture to that which appears in this chapter, but awareness of the courts’ history can help explain the problems that beset them today.

Family privacy – a man’s home as his castle – did not figure as a moral value until Victorian times.²⁷⁰ Families had little privacy: most lived in overcrowded conditions and even the upper classes were subject to continual observation by servants. Non-intervention was based not on personal privacy but on retaining patriarchy and social order. The closed nature of ecclesiastical courts and the publicity of crim. con. hearings are the basis of the current confused law on publicising family court proceedings.

Couples did not have to be deterred from applying to courts, because so few could afford to do so. Nevertheless, those who were caught up in the magistrates’ domestic jurisdiction were, by the pre-war period, discouraged from utilising the law. The tension between psycho/social and legal remedies had begun.

Children of divorcing couples were invisible; children who were a potential threat to social order were dealt with in juvenile courts, not yet split between offenders and victims.

These were the dualities that existed around the 1930s and 1940s. As the next chapter will set out, the advent of the welfare state following the Second World War introduced the discipline of social administration, later known as social policy. The state recognised that families had a right to welfare. Family courts, as agents of the state, are instrumental in enforcing or advocating social policy. As policies change, our demands on the courts also change. The major shift in the 1940s in the relationship between citizen and the state has led us to believe that we can turn to the judicial system to protect the rights of family members. It is now acceptable to consider the welfare of the formerly ‘hidden’ child as an object of public concern. One element of welfare provision, the availability of legal aid, had a dramatic effect

²⁷⁰ S Gallagher, *A Man’s Home: Re-thinking the Origins of the Public/Private Dichotomy in American Law* <<http://www.historyofprivacy.net/>> Last accessed 3 April 2011

on the operation of courts, but it was introduced into a court system built on a long heritage of religious and class division. The systems continued for their own sake, with decreasing connection to families' experiences and values.

CHAPTER FOUR: HISTORY OF FAMILY COURTS

Part Two: from post-war to the present

SOCIAL POLICY AND CHILDREN	115
THE POST-WAR PERIOD: SOCIAL POLICY AND THE COURTS	117
<i>THE DUAL JURISDICTION: HIGH COURT</i>	118
The Denning Report and Divorce	118
Divorce and legal aid	121
<i>THE DUAL JURISDICTION: MAGISTRATES COURTS</i>	123
Families in the Magistrates courts – domestic jurisdiction	123
Magistrates – Juvenile courts	125
<i>POST-WAR PERIOD - CONCLUSIONS</i>	126
1960s AND 1970s: PROGRESS AND REFORM	127
<i>DIVORCE REFORM</i>	127
<i>THE FINER REPORT: A 'FAMILY COURT'</i>	129
<i>THE MAGISTRATES' FAMILY JURISDICTION AFTER DIVORCE REFORM</i>	133
<i>PROTECTING CHILDREN BEFORE THE CHILDREN ACT 1989</i>	136
Divorce court welfare	136
Wardship	137
Magistrates: Domestic proceedings and juvenile courts	138
<i>1960s AND 1970s – CONCLUSIONS</i>	141
1980s AND 1990s: 'PRIVATISATION' OF FAMILY LAW?	142
<i>SUCCESSFUL REFORM? CHILDREN ACT 1989</i>	142
<i>FAILED REFORM? CHILD SUPPORT</i>	144
<i>DISAPPEARING REFORM? DIVORCE AND THE FAMILY LAW ACT 1996</i>	146

<i>RUSHED REFORM? UNIFICATION OF COURT WELFARE SERVICES</i>	147
<i>1980s AND 1990s – CONCLUSIONS</i>	149
FAMILY COURTS AND SOCIAL POLICY IN THE 21st CENTURY	150
<i>TOWARDS A FAMILY COURT</i>	152
<i>FUNCTIONS OF FAMILY COURTS 2011</i>	153
CONCLUSIONS	

SOCIAL POLICY AND CHILDREN

The historical overview in Chapter Three draws largely on the analysis of Stone and the Finer Committee that the latent functions of the courts in family cases were the protection of class divisions and vested interests. That argument could still be made today, when the regulation of social order is accepted as part of a legitimate citizen-state agreement to protect economic interests – the pacification of class conflict.¹ The functions of family courts were identified in Chapter One as processing disputes and protecting vulnerable family members, underpinned by latent functions reinforcing the relationship between law and social policy. Social policy developed with the advent of the welfare state in the 1940s. This chapter, the second in the historical overview, considers what the courts did and why, during this shorter but fast-moving time frame. This chapter is divided into four broad time periods:

1. Post war
2. 1960s – 1970s
3. 1980s - 1990s
4. 2000 - 2011.

Social policy relating to children has been conceptualised differently throughout these periods. While it can be agreed that society wants to invest in its future citizens, perspectives change on what sort of citizens we want.²

Lorraine Fox Harding has identified four value perspectives which have influenced child care policy (the first of which was touched on at the end of Chapter Three):

1. *Laissez faire*. This developed from patriarchy to the importance of the psychological tie between parent and child and the predominance of the mother as psychological parent.³ The state and its decision-making agencies, including courts, are distrusted and policy is dominated by arguments for by-passing, rather than improving, them.⁴

¹ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 343- 356

² L Fox Harding *Perspectives in Child Care Policy* (2nd edn, Longman, London 1997) 7-8

³ The work of Goldstein Freud and Solnit: see M Freeman, 'The Best Interests of the Child? Is "The Best Interests of the Child" in the Best Interests of Children?' (1997) 11 *International Journal of Law, Policy and the Family* 360-388

⁴ L Fox Harding *Perspectives in Child Care Policy* (2nd edn Longman, London 1997) 31

2. State paternalism and child protection. This envisages a wide interventionist role for the welfare state on behalf of the child, which mandates public expenditure.
3. Defence of the birth family. The effects of class, poverty and deprivation are recognised as keeping some parents powerless. Supporters of this view want state intervention but in order to support the whole family. Decision makers in the courts and other agencies represent the middle class imposing their own values on families which, if properly supported and resourced, can look after their children better than substitute care.
4. Children's rights and children's liberation. A call for more participation and self-determination for children and young people. Fox Harding raises the question of whether notions of rights and duties are too legalistic for family relationships: 'It may be argued that a precise calculus of rights and duties in such an intimate setting is not usually possible, and, if attempted, could result in destructive conflicts.'⁵ However, she notes that excluding rights in the name of love and care within relationships can lead to repression and exploitation.

Fox Harding concluded in the early 1990s that child care policy was an 'uneasy synthesis'⁶ of these four perspectives. Since 1997, we have seen more explicit interventionist Labour policy planks of the eradication of child poverty, with emphasis on the paid work ethic.⁷ (Although in 2011 we appear to be on the cusp of a return to emphasis on *laissez-faire*.) Social policy evolves through attempts to resolve social problems.⁸ However, identifying a social problem involves making a value judgment, not merely an observation.⁹ Although perceived social problems of delinquency and the 'underclass family' are not new¹⁰, complexity has increased in the context of globalisation: the decline of traditional male employment; the impact of drug abuse; and the resettling of refugees, many with children traumatised by their experiences. Another major development is the recognition of both the prevalence and effects of domestic violence.

⁵ L Fox Harding *Perspectives in Child Care Policy* (2nd edn Longman, London 1997) 139

⁶ L Fox Harding *Perspectives in Child Care Policy* (1st and 2nd edns Longman, London 1991 and 1997) Ch 7

⁷ C Piper, *Investing in Children: Policy, law and practice in context* (Willan Publishing, Cullompton 2008)

⁸ RF Drake, *The Principles of Social Policy* (Palgrave Macmillan, Basingstoke 2001) Ch 8; M Hill, *Understanding Social Policy* (Blackwells, Oxford 2003) Ch 1

⁹ R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn, Avebury, Aldershot 1995) 2

¹⁰ JJ Rodger, *Family Life and Social Control* (Macmillan, Basingstoke 1996) Ch 6. and see J Donzelot, *The Policing of Families: Welfare versus the State* (Tr. R Hurley, Hutchinson, London 1980)

It is in this context of fluidity during the past 60 years that the family courts have been expected to meet changing expectations of justice, but systems have not always connected with those expectations. It will be seen that objections to using a court to enforce rights and duties on family members recur, but that formulating and implementing policies to address this have little chance of achieving more legitimacy if they are not produced through open and rational processes.

THE POST WAR PERIOD: SOCIAL POLICY AND THE COURTS

The introduction of legal aid in 1949 probably had more impact on family courts than any other event. Furthermore, the post-war period was one of increased parental aspirations for their own 'baby boom' offspring and a consensus on new protective legislation for disadvantaged children, which set the tone for preventive work with those families seen as dysfunctional. It was thought that these were the homes that produced both neglect and juvenile delinquency, policy in the 1950s and 1960s following the third perspective above.¹¹ However, the split jurisdiction described in Chapter Three remained, as graphically described two decades later in the Finer Committee Report.

The Finer Committee's remit was 'to consider the problem of one-parent families in our society'¹² This was a 'problem' because the welfare benefits system in the 1960s was still premised on a male-breadwinner family model from the 1940s. Although the Committee's recommendations were not implemented, its report helps to explain the development of family courts both before and since it was published.

The Finer Report details the legacy of courts which had not adapted to the demands of a new citizen-state relationship. It identifies an obsolete, discriminatory system that was maintained for its own sake, no longer anchored in the lifeworld of norms and values, as discussed in Chapter Three, above.

¹¹ L Fox Harding, *Perspectives in Child Care Policy* (2nd edn Longman, London 1997) 100-108

¹² Department of Health and Social Security *Report of the Committee on One Parent Families Volume 1* (Cmnd 5629, 1974) para 1.1.1 (hereafter 'Finer Report')

THE DUAL JURISDICTION: HIGH COURT

Divorce petitions were heard only in the High Court; problems with its workload immediately after the war were considered in reports from the Denning Committee,¹³ and the Rushcliffe Committee.¹⁴

The Denning Report and divorce

In 1945, the Lord Chancellor complained that divorce was becoming so easy that soon it would be possible to obtain one in the post office,¹⁵ a prediction that has never completely materialised, although since the 1970s most of the paperwork can be completed through the post. The truth was that the High Court could not manage demand. In 1946, the same Lord Chancellor¹⁶ appointed a Committee chaired by Mr Justice Denning, with WTC Skyrme¹⁷ as Secretary, to examine the administration of divorce and nullity law, with a view to producing procedural reforms ‘in the general interests of litigants’. Its terms of reference were limited to the legal *process*, specifically on the assumption that the grounds of divorce were to remain; the reforms were to address costs; delay; venue and reconciliation. (This remit is remarkably similar to that of the current Family Justice Review.¹⁸)

The Denning report is notable for devoting a full section of five pages (out of 34) to ‘Children and Divorce’. It cites the principle that a child’s welfare is the court’s first and paramount consideration because ‘no subject had caused the Committee greater concern’.¹⁹ Thus the Committee members saw beyond the administrative imperative to underlying social unease about children’s experiences of parent separation. The principal defect in a system poorly fitted to meet children’s needs was the lack of separate independent representation, meaning that ‘the welfare of the children is subordinated to the interests of their parents.’²⁰ It

¹³ Lord Chancellor’s Department, *Final Report of the Committee on Procedure in Matrimonial Causes* Cmd 7024, 1947) (hereafter ‘Denning Report’)

¹⁴ Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd 6641, 1945)

¹⁵ Lord Jowitt memorandum to Cabinet cited in S Cretney, *Family Law in the Twentieth Century: A History* (OUP, 2003) 282 n. 58

¹⁶ Lord Jowitt also steered the Legal Aid Act 1949 through Parliament

¹⁷ Author of *History of the Justices of the Peace, Volumes 1 and 2* (Barry Rose, Chichester 1991) cited on numerous occasions elsewhere in this thesis

¹⁸ Family Justice Review Panel *Interim Report* (Ministry of Justice, 2011)

¹⁹ Denning Report (1947) para 30

²⁰ Denning Report (1947) para 30

was concluded that although saving marriages was of utmost importance to society, parents who were divorcing had forfeited the exclusive right to determine the future of the children.²¹

The report conveys a major shift in perceptions of *laissez faire* policy and the functions of family courts. Here, the private family unit is disrupted through the parents' own actions and, as a consequence, their relationship with each other and with their children moves into the public sphere, where court welfare officers should attempt reconciliation and report on the children's welfare to the court. No longer is the court process designed solely for adults who are deemed capable of healing any psychological damage caused to children and the impact this may have on wider society. The Committee acknowledged that the state had a duty toward children whose parents had failed to fulfil their joint responsibility in maintaining the stable family unit.²²

Assuming such responsibility had major implications. The growth in the number of post-war petitions was overwhelming the number of judges and court buildings in London.²³ In retrospect, the obvious solution was to delegate work to the county courts, because it was unacceptable for JPs to grant divorces. Although county courts had been established since 1846, they had previously been thought unsuited to family matters.²⁴ The Denning Committee agreed that allowing county courts to adjudicate would denigrate the importance of marriage. Apparently a strong case was made on behalf of barristers to retain the work in the High Court.²⁵ The Committee's solution was to appoint all local county court judges as 'commissioners', which accorded them High Court judge status when conducting divorce hearings. From 1947, almost all 'High Court' divorce was therefore actually administered by county court judges. The plan succeeded in that the county court judges were able to meet the caseload demand in the 1950s, but long-term savings in legal aid were not apparent.²⁶

By the 1950s, these judges dealt with about 27,000 divorce petitions annually, about ten percent of which were defended. Two thirds of the cases were being heard outside London,

²¹ Denning Report (1947) para 33

²² Denning Report (1947) para 33

²³ The number of petitions being brought had more than doubled between 1939 and 1945: S Cretney, 'Tell me the Old, Old Story: The Denning Report, Divorce and Reconciliation' in *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 136

²⁴ Discussed in Chapter Three

²⁵ S Cretney, *Family Law in the Twentieth Century* (Oxford University Press, Oxford 2003) 144

²⁶ S Cretney, *Family Law in the Twentieth Century* (Oxford University Press, Oxford 2003) 287-288

all in public, and witnesses could be cross examined.²⁷ (Progress toward the ‘post office divorce’ will be discussed in the next section.)

The Denning Committee saw the granting of the decree as still a matter of public interest but it looked more deeply into the experience of divorcing couples. The report speaks in warm tones of the probation officers’ work in the magistrates courts and recommended that a ‘Court Welfare Officer’ be available to give advice and guidance to divorcing parents about the children’s welfare.²⁸ This would be part of the role of a new Marriage Welfare Service that should ‘evolve gradually from the existing services and societies just as the probation system evolved from the Court Missionaries’.²⁹ These existing services included probation, the Forces welfare sections, and voluntary organisations.³⁰ Although this proposal was not immediately taken up, a probation officer was appointed to the Divorce Division in 1950,³¹ an arrangement which Cretney believes formed the basis for the Morton Report recommendation in 1956 that a court welfare officer be appointed in each divorce town. Murch, however, wrote that the practice grew on an *ad hoc* basis in courts where there was co-operation between the local judge and chief probation officers: ‘It is not entirely clear why these enquiries were undertaken by the probation service rather than by the Official Solicitor except that in the provinces it might have been considered cheaper.’³²

The Denning Committee recommended that a welfare officer have access to ‘every petition’ and also report to the court in any case, including future reports, if required.³³ It seems unlikely that the Committee anticipated the rate of divorce staying at its wartime level as this would have created an enormous workload for welfare officers. This recommendation for a universal service confirmed a perception of the deviancy of divorce, justifying public attention. The Committee was, however, careful to distinguish between the child of the

²⁷ AKR Kiralfy, ‘Matrimonial Tribunals and their Procedure’ in RH Graveson and FR Crane, *A Century of Family Law 1857 – 1957* Sweet & Maxwell, London (1957), discussed in Chapter Six

²⁸ Denning Report (1947) para 34(i).

²⁹ Denning Report (1947) para 28 (ii)

³⁰ Denning Report (1947) para 28 (ii)

³¹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, 2003) 304 n215

³² M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 207 n12

³³ Denning Report (1947) para 34 (iii)

divorcing couple and the 'deprived child', who needed the 'day to day supervision' of local authority children's officers.³⁴

The retention of this expensive judicial model of divorce was the impetus for the introduction of legal aid, entitlement for those who could not afford lawyers to call on the state for financial assistance.

Divorce and legal aid

The poor persons' procedure³⁵ was taken over by the Law Society in 1926 and was being used by more than a third of divorce petitioners by the late 1930s.³⁶ The Matrimonial Causes Act 1937 had triggered an increase in the divorce rate,³⁷ but it was the 'major casualty of the war on the home front...the number of homes broken and ruined...by infidelity' that made the introduction of legal aid so urgent.³⁸

In 1942, the Law Society and War Office had established a Services Divorce Department which employed about 100 qualified and unqualified staff processing between 3,500 and 4,000 petitions annually. The morale of non-professional soldiers was recognised as a crucial factor toward victory, so speedy resolution of matrimonial difficulties became a public duty, but there was a shortage of lawyers. The Department appears to have worked efficiently, but by 1945, with solicitors coming back to work, the Law Society did not want to maintain a salaried service, and it was wound down.³⁹

Statutory entitlement to legal aid was based on the recommendations of the Rushcliffe Committee that the financial burden of divorce for people who could not afford it should be shifted from solicitors to the state; the aim was to provide financial assistance on a means-

³⁴ Evidence was given to the Denning Committee (para 34 (vii)) by Myra Curtis, Chair of the Committee on the Care of Children, see below. (The High Court did have a wider welfare jurisdiction in wardship cases, discussed in Chapter Three, and below.)

³⁵ See Chapter Three.

³⁶ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 310

³⁷ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 18-19

³⁸ Lt Col Lipton MP, Hansard HC Deb 26 October 1945 vol 414 col 2456

³⁹ A Paterson 'Legal aid as a social service' (The Cobden Trust, London, 1970) 12; S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 312

tested basis as an entitlement for citizens, not just help for the poor; and the solicitor-client relationship was to be the same as if paying privately.⁴⁰

Legal systems needed to adapt to meet the changes in the lifeworld. In the debate on the Legal Aid and Advice Bill, the consequences of lack of access to divorce were described as ‘law and public opinion dangerously drifting apart’. Introducing legal aid was integral to the concept of social security in rebuilding post-war society.⁴¹ The subsequent 1949 Act provided for legal aid and assistance across civil and criminal courts (although not at magistrates level until the 1960s).⁴² The most common reason for an individual to become involved with the courts was because of relationship breakdown. In Parliament, it was claimed in 1945 that the forces were submitting 900 applications a month to the Poor Persons Committee, of which 97% were matrimonial.⁴³

Paradoxically, upholding the institution of marriage was at the heart of the legislation, to prevent it falling into disuse and disrespect. In retrospect, it may appear odd that this urgent drive to regularise relationships was not resolved by simplifying divorce procedures to reduce the cost of lawyers, but legislators thought that the symbolism of legal formality could not be dispensed with. It is arguable that expensive systems may have served those operating them better than those they were intended to serve; but on the other hand, perhaps families sought security in maintaining the concept of the traditional status of marriage.

Twenty years later, just prior to the 1969 reforms, 83% of legal aid cases were still matrimonial (although this figure includes magistrates cases).⁴⁴ There has been a substantial drop in this proportion since then. The divorce rate reached a peak in 1947, then fell slightly until 1971.⁴⁵ Of the current legal aid budget of about £2billion, more than half is spent on criminal law, with about £580 million on advice and representation in family matters.⁴⁶ (However, the Legal Services Commission reported in 2010 that average cost per case was

⁴⁰ Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd 6641, 1945)

⁴¹ Lt Col Lipton MP, Hansard HC Deb 26 October 1945 vol 414 col 2456

⁴² A Paterson ‘Legal aid as a social service’ (The Cobden Trust, London, 1970) 52

⁴³ Lt Col Lipton MP, Hansard HC Deb 26 October 1945 vol 414 col 2457

⁴⁴ A Paterson, ‘Legal aid as a social service’ (The Cobden Trust, London, 1970) 21

⁴⁵ 5.6 couples per 1000 in 1947; falling to 1.9 in 1958; rising to 6 in 1971 and subsequently increasing: L Stone, *The Road to Divorce* (OUP, Oxford 1990) 435-436

⁴⁶ 2008-9 figures given in Ministry of Justice *Proposals for the Reform of Legal Aid in England and Wales* (Consultation paper CP 12/10 Cm 7967, 2010) 29

increasing twice as fast as the increasing volume in private law, and five times faster in public law.⁴⁷⁾

The cost of legal aid has been a primary factor in much of what has happened in the family courts since. For example, in 1976 the government noted that costs to the Legal Aid Fund of matrimonial cases were rising rapidly: £7.5 million more than the previous year.⁴⁸ This led directly to the extension to all undefended cases of the ‘special procedure’ by which divorce petitions were merely read by a district judge and certified for a decree. It is generally believed that this radical change was introduced to save money.⁴⁹ The special procedure effectively transformed divorce to an administrative procedure, without parliamentary or public discussion of the private needs of families nor the wider public interest in divorce.⁵⁰ This mere change by the Rules Committee is said to have reduced the legal aid budget by £6m that year. There was some justification for reform; Elston et al found that proceedings were degrading and ineffective in protecting children, as well as expensive.⁵¹ It seems likely that the majority of parties would have preferred simpler and cheaper methods, and one hopes that the research was influential, but the contrast between the ease of changing these rules and the difficulty in changing the grounds of divorce is remarkable.

Although current expenditure on legal aid cannot be accurately broken down⁵² the dissolution of marriage and civil partnerships is now a largely administrative procedure for which legal aid entitlement is minimal. Instead, legal aid is increasingly directed toward the courts’ protective function, which originated in the JPs’ courts.

THE DUAL JURISDICTION: MAGISTRATES COURTS

Families in the magistrates courts – domestic jurisdiction

The impact of relationship breakdown or poor parenting was regularly seen in the magistrates courts. The only civil law protection against domestic violence, until it was ‘rediscovered’ in

⁴⁷ Ministry of Justice, *Family Legal Aid Funding from 2010: A Consultation* (Legal Services Commission, 2008) 20

⁴⁸ Lord Chancellor’s Advisory Committee on Legal Aid 25th Report (HC 629, 1976) 2, 40

⁴⁹ J Eekelaar, *Family Law and Social Policy* (2nd edn. Weidenfeld & Nicholson, London 1984) 53

⁵⁰ OR McGregor, *Social History and Law Reform* (Stevens & Sons, London 1981) 44; AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 23; S Cretney, *Family Law in the Twentieth Century* (OUP, 2003) 381-383

⁵¹ M Murch, ‘Cultural Change and the Family Justice System’ in G Douglas and N Lowe (eds), *The Continuing Evolution of Family Law* (Family Law, Bristol 2009)

⁵² Family Justice Review, *Interim Report* (Ministry of Justice, 2011) Annex L

the 1970s, was provided by magistrates' orders which enabled women to live apart from, but still be maintained by, their husbands. Children at risk were dealt with in separate juvenile courts.⁵³

Magistrates in the 1940s were able to grant remedies for a spouse seeking separation and maintenance and/or custody of children aged under 16. The Denning Committee reports only briefly on this jurisdiction: provided divorce proceedings had not begun, cases might come before JPs under the 19th century Acts and the Guardianship of Infants Act 1925. Although the county courts had concurrent jurisdiction for the 1925 Act it was primarily used in magistrates courts. Proceedings were limited in effect because the upper limits for maintenance payable were very low, but there were advantages for the parties and the court being assisted by a probation officer.⁵⁴

In the 1950s, the number of maintenance orders was still high: about half the number of divorce decrees, despite the availability of legal aid for divorce. One reason that the wife might be reluctant to seek divorce was the difficulty in enforcing maintenance if the husband re-married.⁵⁵ The grounds for an application were broadly similar to those for divorce, but a woman could also complain of wilful neglect to maintain. This was seen as less heinous than a ground for divorce; it was a product of 'the immaturity of young couples and the failure to realise the responsibilities of marriage and parenthood, rather than from matrimonial offences'.⁵⁶ This was the material distinction between the jurisdictions – the gravity of matrimonial fault belonged in the superior courts while the lower orders were patronised as merely irresponsible. The authoritative figure of the probation officer⁵⁷ was no doubt key to reforming these feckless youths. Attempts were made to hold domestic courts separately from criminal, and the Central London Domestic Court was established in 1952, but if the husband attended, the case was conducted as 'a trial ... like any other'.⁵⁸ The requirement for magistrates' written reasons to be recorded, and the right of appeal to the High Court were

⁵³ Discussed below

⁵⁴ Denning Report (1947) para 32

⁵⁵ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds), *A Century of Family Law 1857 – 1957* (Sweet & Maxwell, London 1957) 307

⁵⁶ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds), *A Century of Family Law 1857 – 1957* (Sweet & Maxwell, London 1957) 308

⁵⁷ M Murch, 'Seebohm: A painful dilemma for probation' (1969) 15(1) *Probation* 18-23

⁵⁸ AKR Kiralfy, 'Matrimonial Tribunals and their Procedure' in RH Graveson and FR Crane (eds), *A Century of Family Law 1857 – 1957* (Sweet & Maxwell, London 1957) 309

seen as adequate in settling higher points of law and maintaining consistent practice.⁵⁹ What sounds like humiliating experiences for the parties were at least held in private and subject to reporting restrictions.⁶⁰

Magistrates - Juvenile Courts

The juvenile courts have been described as a ‘kind of welfare agency’ prior to the war because of a virtual absence of any other child protection agencies.⁶¹ The post-war period saw attention focused more on the social aspects of juvenile criminal proceedings and the need to remove young people from the atmosphere of the criminal court, coinciding with the expansion of social services departments. Under the Children Act 1948 s 5, a local authority had to accept a child placed with them on a ‘fit person order’, made under Children and Young Persons Act 1933.

The first enquiry into the care of children living away from home, the Curtis Committee, was influenced by the findings on the death of Dennis O’Neill, a 12-year old boy brutalised by the ‘carers’ who were being paid by a local authority to house him on their farm. There was wider concern about the myriad of arrangements made for a staggering 124,900 children ‘deprived of a normal home life’, only 26,414 of whom were placed under court orders. Many of these arrangements were unsupervised by any agency.⁶² (In contrast, about 70,000 children are now looked after by local authorities and subject to regimes of regular review.⁶³)

The Children 1948 Act transferred responsibility for children’s welfare from the poor law guardians, approved schools and voluntary organisations to new local authority children’s departments, with trained children’s officers. It reflected contemporary theories about the importance of attachment relationships, and recognised the harmful effects on children of separation from their families. Children who were deprived of a normal home life were to be cared for, as much as possible, as those who lived with their own families. The children’s officers came from a variety of previous experience and professions, and were enthusiastic about their new role in this era of optimism. The Act has been

⁵⁹ AKR Kiralfy, ‘Matrimonial Tribunals and their Procedure’ in RH Graveson and FR Crane (eds), *A Century of Family Law 1857 – 1957* (Sweet & Maxwell, London 1957) 310

⁶⁰ See Chapter Six.

⁶¹ T Skyrme, *History of the Justices of the Peace, Volume Two* (Barry Rose, Chichester 1991) 377

⁶² Report of the Care of Children Committee (Cmd 6922, 1946) 18; 27

⁶³ 64,400 in England and 5,160 in Wales in March 2010: Department for Education Research and Statistics Gateway and Welsh Government National Statistics for Children Looked After. Reviews of plans for looked-after children are regulated under Children Act 1989 Part III as amended.

described as ‘unmatched for its humanity in our legislation’ in furthering the best interests of children.⁶⁴

Splitting juvenile and adult criminal proceedings at the beginning of the 20th century was motivated by a mix of humanitarian and controlling concerns.⁶⁵ While this perhaps allowed a more holistic view of young offenders being children with welfare needs,⁶⁶ it had the disadvantage of associating children in need with the criminal system. The JPs were drawn from a specially elected juvenile panel, although it was not until the mid 1960s that specialism became strictly required; the panels sometimes consisted of those who had the time available.

The magistrates may well have been in a position to represent the norms of the local community in dealing with children who were in need of help, but many children were taken into public care without any judicial process.⁶⁷

POST-WAR PERIOD - CONCLUSIONS

The courts were still stuck in a dual system polarised by the stigma of divorce and crime. The availability of legal aid was undoubtedly a pivotal point in the history of the family courts as the volume of divorce work could not have been maintained without it. Although legal aid was originally envisaged as integral to the welfare state, it can easily be rationed or directed to have quite dramatic effects on the courts, in attempts to save money, without taking the risk of open public discussion about divorce.

Although outside its remit, the Denning Committee did make some tentative suggestions of divorce by consent,⁶⁸ and the issue was looked at again in 1956. A Royal Commission (the Morton Commission) reviewed the history of the effects of matrimonial legislation, but failed to agree on the issue of maintaining the concept of the matrimonial fault. The Church was the most influential supporter of retaining the matrimonial offence, referring to its biblical

⁶⁴ P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 201-202

⁶⁵ J Fionda, *Devils and Angels: Youth Policy and Crime* (Hart, Oxford 2006) 117-118

⁶⁶ J Fionda, *Devils and Angels: Youth Policy and Crime* (Hart, Oxford 2006) 120

⁶⁷ Discussed below.

⁶⁸ Denning Report (1947) para 86

origins, and insisting that any easing of individual hardship by making divorce easier would be outweighed by the damage to social order.⁶⁹

The emphasis on local authorities' responsibilities to provide high quality alternative care for neglected children encapsulated in the Children Act 1948 gave way during the 1950s to preventive work, keeping birth families together. This culminated in the Children and Young Persons Act 1963, which set out a duty to promote children's welfare explicitly by assisting their families to prevent them going into public care.⁷⁰ The role of the magistrates was largely confined to the juvenile court, where practice was little changed until 1991.⁷¹

1960s AND 1970s: PROGRESS AND REFORM

Eventually, objections to reducing the grandeur of the divorce court were overcome by pragmatism, when the Matrimonial Causes Act 1967 provided for all divorce and nullity proceedings to begin in the county court, only transferable to the High Court if defended. Again, anticipated public savings did not materialise, and the 'special procedure'⁷² was fully in place by 1977. Thus, although a divorce is not literally available over the Post Office counter, it can now be obtained by posting a series of completed forms, with almost all divorce work in the country undertaken by district judges.⁷³ Although the incremental moves toward a fully administrative system of obtaining a decree are economic, they probably do reflect changing social attitudes toward accepting divorce.

DIVORCE REFORM

The intention of the Divorce Reform Act 1969 was to remove the requirement in every case for an investigation into the grounds for divorce. The traditional view that there was a public interest in private decisions made about divorce had been undermined by practical pressures as well as 'the permissive society' of the 1960s.

It should be noted that Finer did not attribute the 'problem' of one-parent families to access to the divorce court, pointing out that comparative statistics on *de facto* marital breakdown

⁶⁹ Report of the Royal Commission on Marriage and Divorce (Cmd 9678, 1956) 142; 160

⁷⁰ P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 202; L Fox Harding, *Perspectives in Child Care Policy* (2nd edn, Longman, London 1997) 103

⁷¹ J Fionda, *Devils and Angels: Youth Policy and Crime* (Hart, Oxford 2005) 118

⁷² Discussed below.

⁷³ Re-designated from 'registrars' by the Courts and Legal Services Act 1990.

had not been historically available. Although quoting a fourfold increase in the number of divorce petitions in the preceding 20 years, ‘We do not know whether this means that more marriages are breaking down or whether more breakdowns are coming to court.’⁷⁴

As the debate moved on from Morton toward the 1969 reform, the Finer Report expressed the conundrum in terms of pragmatic court practice, focusing on the disassociation between behaviour and religious and moral concepts of guilt/innocence and punishment/reward:

There was nothing to be found about breakdown in the grounds of divorce as enacted by Parliament. But the reality was that thousands passing through the divorce courts were obtaining consensual decrees under a system in which they were theoretically prohibited. Over 90 % of petitions were undefended ... a certain reluctance among the judiciary to preside over the expenditure of large sums of public money in heavily contested cases in which three parties or more ... might all be legally aided although the outcome might be plain almost from the start. In all these circumstances, many responsibly minded people, whether conservationist or reformist in the attitudes, shared a common anxiety over the factitiousness of the law they saw in operation.⁷⁵

This gap between reality and the version that the divorcing couple had to take to court stemmed from law relating to an era when forensic examination of a marital separation was not only legitimate but also logistically possible. Post-war, the increased incidence of relationship breakdown was of course a problem of public concern, but the intimate details of individuals were not. Furthermore, a court enquiry no longer made economic sense. The system struggled to align legally and actual broken marriages without the requirement of expensive investigations.

This is another example of a legal system disconnected from the lifeworld of experience falling into disrepute. By the mid-1960s, the Church reversed its position by recognising that ‘the present system has not only cut loose from its moral and juridical foundations: it is, quite simply, inept.’⁷⁶ So, the law was amended to address the expense and immorality of court processes which no longer served the popular understanding of the obligations of marriage and family life. In Habermas’ terms, the systems evolved to serve the changing lifeworld.

⁷⁴ Finer Report Volume 1 (1974) paras 3.68; 9.5

⁷⁵ Finer report Volume 1 (1974) para 4.35

⁷⁶ Group appointed by the Archbishop of Canterbury, *Putting Asunder – a Divorce Law for Contemporary Society* (SPCK, London 1966) para 45(f)

The Divorce Reform Act 1969 modernised divorce law into a process which enables individuals to legally end a marriage in a more honest manner, with a view to moving on to the stability of remarriage and a reconstituted family.⁷⁷ The Law Commission famously stated that the objective of divorce law should be to buttress rather than undermine the stability of marriage but where a marriage had irretrievably broken down, ‘to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.’⁷⁸ The problem is that when parents separate, it is the fragile shell of co-parenting that needs to be maintained with fairness, minimising the negative emotions of all the family. And then, as the Finer Report states: ‘The stability of the family ... depends in part upon a machinery which enables spouses whose marriages have failed to establish new unions.’⁷⁹

THE FINER REPORT: A ‘FAMILY COURT’

The Finer Committee was active between 1969 and 1974, contemporaneously with the introduction of the Divorce Reform Act 1969. The Committee’s remit was to address the problems of poverty, social isolation, and discrimination in employment faced by single parents. National insurance benefits were only available to lone parents who were widows, but it was estimated that a million children lived in lone parent households in the UK. The Committee was heavily Fabian and determined to relieve the poverty of these families. Previous attempts to find a way for single or separated mothers to be eligible for benefits were ‘trapped within the iron framework of the fault principle inherited from the canon law.’⁸⁰ Only an ‘innocent’ wife could be maintained by a ‘guilty’ husband, and most could only pursue this entitlement through the magistrates courts, which adjudicated on the reason for the separation, whether maintenance was payable, and how much.

The Committee identified three separate legal systems regulating the maintenance of separated or unmarried parents and their children, namely the divorce law; the magistrates courts; and welfare benefits based on the poor laws. Even post-1969 divorce reform, the magistrates courts were still the domain of the poor. The Committee was appalled by the systemic failure of the magistrates courts and benefits agencies to provide a reasonable

⁷⁷ C Smart ‘Divorce in England 1950-2000: A Moral Tale’ in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (OUP, Oxford 2000)

⁷⁸ Law Commission, ‘Reform of the Grounds of Divorce: The Field of Choice’ (Cmnd 3123, 1966) 10

⁷⁹ Finer Report Volume 1 (1974) para 3.65

⁸⁰ Finer Report Volume 1 (1974) para 2.30

service to lone parents: it talked of a ‘... stage army [of unsupported wives and mothers] being marched as if they were separate companies between the magistrates court and the supplementary benefits office, with each of these institutions pretending they have nothing to do with each other.’⁸¹ The Committee found it indefensible that the principles of the 1969 Act, implemented in the superior courts, did not apply in the magistrates courts, which still operated a 19th century policy of providing ‘police court protection for the lower orders in their matrimonial troubles’.⁸²

Two sets of reforms were proposed on the Committee’s findings that one-parent families suffered from particular financial hardship and deprivation. The first was reform of matrimonial law and the courts, and secondly a different relationship between the courts and social security agencies. The assessment of maintenance should be undertaken by the department and there would cease to be any connection between matrimonial behaviour and payment of maintenance to a dependent spouse and children.

Removing the administrative function from the courts would then pave the way for a unified family court. Interestingly, the concept of ‘a family court’ had originated in a white paper on youth justice in 1965,⁸³ but the Committee was cautious about the diverse and vague (although enthusiastic) notions that had been put to it in evidence.⁸⁴ It was however determined to abolish the matrimonial jurisdiction at magistrates court level and to unify the exiting fragmented jurisdiction, incorporating the resolution of other disputes associated with marriage breakdown, such as child custody and occupation of the matrimonial home.⁸⁵ The Committee set out six criteria which a new family court should satisfy, in order to ‘command the confidence and respect of the whole community’⁸⁶:

1. An impartial judicial institution regulating rights of citizens and settling their disputes according to law
2. A unified institution in a system of family law applying a non-discriminatory uniform set of rules to all parties
3. Organising its work to facilitate conciliation between parties in dispute⁸⁷

⁸¹ OR McGregor, *Social History and Law Reform* (Stevens & Sons, London 1981) 50

⁸² Finer Report Volume 1 (1974) para 4.67

⁸³ Home Office, *The Child, the Family and the Young Offender* (Cmnd 2742, 1965)

⁸⁴ Finer Report Volume 1 (1974) paras 4.279-4.281

⁸⁵ Finer Report Volume 1 (1974) para 4.282

⁸⁶ Finer Report Volume 1 (1974) para 4.424

⁸⁷ The Finer definition of ‘conciliation’ clarified that this was no longer synonymous with reconciliation: Volume 1 (1974) para 4.288-4.299

4. It would have professionally trained staff to assist the court and parties in all matters requiring social work services and advice
5. Working in close relationship with the benefits agencies
6. Organising all procedures and services with a view to assisting and earning confidence of its users.⁸⁸

None of the Finer proposals were implemented. The usual explanation is that an economic crisis forced the government to reduce public expenditure to meet conditions imposed by the International Monetary Fund. An increase in standard benefits payments was central to the Finer plans.⁸⁹ However, McGregor (one of the main authors) was sceptical about cost being the sole factor, citing a demarcation dispute between the Home Office and the LCD and the lack of a proper examination of judicial and accommodation resources.⁹⁰ Critical theorists thought that the recommendations as a whole challenged patriarchy by undermining women's dependence on men.⁹¹

Nevertheless, the Finer Report was a watershed in the discourse on marital breakdown and divorce. It reflected emerging ideas on the role of conciliation and linked together a number of social policy issues in the public focus. It galvanised independent out-of-court mediation and influenced the probation service to adapt to a new model of conciliation, and has been credited with influencing most of the progress and improvement made in the next 25 years.⁹² Despite the strong emphasis in the report on the court being a judicial and not a therapeutic service, the call for more conciliation was not, however, embraced by all lawyers; some saw it as a potential erosion of rights, especially the rights of the less powerful.⁹³

Shortly after the Finer Report, and possibly influenced by it, the Australian government created the Family Court of Australia, which was lauded by Finer's supporters in England during the 1980s.⁹⁴ However the 'unified' Family Court of Australia has jurisdiction in

⁸⁸ Finer Report Volume 1 (1974) para 4.283.

⁸⁹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 469

⁹⁰ OR McGregor, *Social History and Law Reform* (Stevens & Sons, London, 1981) 51-52

⁹¹ MDA Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153-185 at 174

⁹² AL James and W Hay *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 24-25; A Wells, 'Key Messages from Finer' in National Council for Family Proceedings, *Finer – 25 Years On?* (NCFP, Bristol 1999)

⁹³ See, for example, E Szwed, 'The Family Court' and A Bottomley 'Resolving family disputes: a critical view' both in MDA Freeman (ed) *State, Law and Family* (Tavistock, London 1984); S Roberts 'Three Models of Family Mediation' in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988)

⁹⁴ A Wells, 'Key Messages from Finer' in National Council for Family Proceedings, *Finer – 25 Years On?* (NCFP, Bristol 1999)

private law applications only; child protection is the province of state-run courts. This dichotomy is proving troublesome in Australia, as will be discussed in Chapter Five. The Finer Committee's recommendations for a new court covered the matrimonial, financial and child custody jurisdictions. Amidst the detail, there are few references to local authority services. The possibility of the new court welfare service for 'matrimonial clients' being operated by local authorities is mooted. Nevertheless, it is concluded that a new independent service is to be preferred over probation (because of its association with the criminal law) and local authorities (where the level of expertise of social workers and the outcome of the Seebomh reorganisation were not trusted).⁹⁵ Although there is a reference to local authorities having a potential conflict of interests, this is not explained.⁹⁶ The fact that adoption orders could be made in juvenile courts seems to be disapproved of, but no recommendation is made regarding this.⁹⁷

Secondly, the report is explicit that juvenile crime must be excluded.⁹⁸ It concedes that care orders⁹⁹ were frequently made in connection with matrimonial troubles and family breakdown: 'It would thus far seem logical'¹⁰⁰ that the new family court assumes this responsibility. However, one of the grounds for a care order was that a young person had committed an offence, and so the issue was deferred by the Committee 'for future careful attention'.¹⁰¹ This is the only reference in the report to public law cases, which suggests that these were not within the vision of a 'unified' court. Subsequent discussion of the Finer proposals confirmed a focus on 'the problems of separating couples' rather than the 'anomalous, fragmented and confusing' law relating to children.¹⁰²

The report ignores child protection and domestic violence. Its recommendations for conciliation assume that children's interests will somehow be met alongside adults'. It does at least recognise a nexus between matrimonial breakdown and local authority intervention, but it appears very unlikely that the Finer Committee envisaged proceedings between the state and the family as within the family court's jurisdiction. The social problem of the single

⁹⁵ Finer Report Volume 1 (1974) paras 4.324-4.336

⁹⁶ Finer Report Volume 1 (1974) paras 4.332

⁹⁷ Finer Report Volume 1 (1974) paras 4.345 n 3

⁹⁸ Finer Report Volume 1 (1974) paras 4.362

⁹⁹ Children and Young Persons Act 1969 s 1(2)

¹⁰⁰ Finer Report Volume 1 (1974) paras 4.363

¹⁰¹ Finer Report Volume 1 (1974) paras 4.363

¹⁰² E Szwed, 'The Family Court' in M Freeman (ed), *State, Law and the Family* (Tavistock, London 1984) 267

parent, created by young people in need of guidance and advice on birth control and by marital breakdown, was an economic one; the children themselves were not demonised.¹⁰³ A finer ‘family court’ was devoted to disputes between parents and family members; child protection would have been left with the magistrates, replacing one duality with another.

THE MAGISTRATES’ FAMILY JURISDICTION AFTER DIVORCE REFORM

In the 1960s, most custody and maintenance disputes were heard in the magistrates courts and even about one third of adoption applications.¹⁰⁴ The Guardianship of Infants Act 1925 had made applications financially accessible to a far wider section of the population than previously and led to a significant use of the court system to settle parental disputes, probably unintended when the legislation was passed but utilised to meet social need.¹⁰⁵ However, it was not until the Guardianship of Minors Act 1971 that a mother who had committed a matrimonial offence could apply for maintenance for children ‘without the history of the matrimonial breakdown being paraded through the courts.’¹⁰⁶

Paradoxically, the financial implications of custody disputes greatly exceeded JPs’ other powers, if calculating the total payable under a maintenance order over its duration. Debt recovery was usually within the remit of the county courts but maintenance orders made at any level of court were enforced by magistrates. They might also have to apply more complex case law than county courts. So, although the make-up of the bench was predominately non-lawyers, they had not inconsiderable powers. Some magistrates thought of themselves as members of the community, who gave individual advice and reassurance, as ‘unofficial advisers to the people of their neighbourhood.’¹⁰⁷ However, Dingwall and Eekelaar seem to have been swimming against the tide of opinion in arguing for the value of magistrates’ localised, community-based approach to dispute resolution.¹⁰⁸

¹⁰³ Finer Report Volume 1 (1974) paras 8.187-8.914

¹⁰⁴ F Milton, *The English Magistracy* (OUP, London 1967) 105 - 106

¹⁰⁵ S Cretney ‘“What will the women want next?” The struggle for power within the Family’ in S Cretney (ed) *Law, Law Reform and the Family* (Clarendon Press, Oxford 1998) 179 - 180

¹⁰⁶ Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper no. 53, 1973) para 16

¹⁰⁷ F Milton, *The English Magistracy* (OUP, London 1967) 96 - 98

¹⁰⁸ R Dingwall and J Eekelaar, ‘Rethinking Child Protection’ in M Freeman (ed), *State, Law and the Family* (Tavistock, London 1984) 109-110

The work declined in the 1970s, following divorce reform. Cases drifted to the county courts partly through solicitors' preference and partly because of a lack of interest by some magistrates panels.¹⁰⁹ There was a deal of poor press with regard to the competence of magistrates in all types of child proceedings in the early 1970s.¹¹⁰ This reflects the pattern of the ecclesiastical courts losing legitimacy during the 19th century as their workload and expertise declined.¹¹¹

Most magistrates court users came from the lowest socio-economic classes, although divorce was applied for by a representative cross-section of society.¹¹² In 1973, the Law Commission agreed with Finer that the development of two systems had led to anomaly and inconsistency and sympathised with pressure for their integration.¹¹³ However, McGregor later commented that the Law Commission working party was dominated by Home Office officials who opposed any reduction in the jurisdiction of magistrates 'which they appeared to treat as the private property of their office.'¹¹⁴

The 1973 Law Commission report does incline toward saving the magistrates, identifying different objectives for the divorce and magistrates courts: the latter did not deal with the consequences of a change of status but with marriages that had not broken down, and may not do so.¹¹⁵ Accordingly, it criticised the contrast between the two jurisdictions since the Divorce Reform Act 1969 because:

The court of last resort (i.e. the divorce court) can give relief without evidence of a matrimonial offence, whereas the court offering first-aid cannot. Is this sensible, when one of the objects of the law is to encourage reconciliation – or, at the very least, settlement of family disputes without rancour in court or bitterness afterwards?¹¹⁶

¹⁰⁹ T Skyrme, *History of the Justices of the Peace, Volume Two* (Barry Rose, Chichester 1991) 387-388; Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) paras 18 – 19.

¹⁰⁹ Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) para 20

¹¹⁰ T Skyrme, *History of the Justices of the Peace Volume Two* (Barry Rose, Chichester 1991) 490; *The Changing Face of the Magistracy* (Macmillan, London 1983) 169-170

¹¹¹ Chapter Three

¹¹² Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) paras 18 – 19

¹¹³ Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) para 20

¹¹⁴ OR McGregor, 'Family Courts?' (1987) 6 *Civil Justice Quarterly* 44 at 45

¹¹⁵ Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) Para 167(3)

¹¹⁶ Law Commission, *Family Law: Matrimonial Proceedings in Magistrates Courts* (Working Paper No. 53, 1973) para 30

The Commission recommended that the magistrates courts retain jurisdiction of the obligation to maintain. This remained until the transfer of the maintenance function to the Child Support Agency in 1993, when the assessment and recovery of financial support across most of the population was removed from the judicial system into an administrative one.¹¹⁷

In the 1980s, McGregor wrote that, despite the availability of legal aid, the Finer Committee had found that: ‘the firmly entrenched habit of going to the magistrate’s court was sustained by the social assumptions of local solicitors, probation officers and social workers’, and that the welfare benefits agencies ‘went on herding’ their clients into the summary jurisdiction.¹¹⁸ He continued to argue for the abolition of the summary domestic jurisdiction, citing support from eminent members of the higher judiciary, professional and political associations.¹¹⁹ Szwed confirmed that there was an almost universal desire to end the magistrates’ domestic jurisdiction.¹²⁰ Just prior to the Domestic Proceedings and Magistrates Courts Act 1978 being passed, the jurisdiction was ‘dying of inanition’ because of increased public awareness of the county court jurisdiction as well as the dislike of taking matrimonial cases to ‘a court of petty crime’.¹²¹ Furthermore, there was pressure on the Supplementary Benefits Commission by the Lord Chancellor’s Department to stop encouraging their clients to use the courts, attempting to save £3m on legal aid costs. Paradoxically, there was a growing role for magistrates’ courts in enforcing maintenance orders made by the higher courts; McGregor had no hesitation in condemning this on efficiency and moral grounds.¹²²

Writing in 1983 on ‘The changing image of the Magistracy’, Skyrme allocates only a few paragraphs to the magistrates courts’ civil jurisdiction which was ‘often overlooked’ and would be ‘better off’ in the county courts.¹²³ His interpretation of the failure to implement the Finer recommendations was simply that circuit judges had more than enough to do already.

¹¹⁷ Discussed below

¹¹⁸ OR McGregor, ‘Family Courts?’ (1987) 6 *Civil Justice Quarterly* 44 at 48; 49

¹¹⁹ OR McGregor, ‘Family Courts?’ (1987) 6 *Civil Justice Quarterly* 44 at 50

¹²⁰ E Szwed ‘Family Courts: Are they a solution?’ in H Geach and E Szwed (eds), *Providing Civil Justice for Children* (Edward Arnold, London 1983) 172

¹²¹ OR McGregor, ‘Family Courts?’ (1987) 6 *Civil Justice Quarterly* 44 at 54

¹²² OR McGregor, *Social History and Law Reform* (Stevens, London 1981)

¹²³ T Skyrme, *History of the Justices of the Peace Volume Two* (Barry Rose, Chichester 1991) 387

PROTECTING CHILDREN BEFORE THE CHILDREN ACT 1989

Divorce court welfare

It was noted earlier that the Denning Report commended the work of the probation service and wanted it extended to the divorce courts, and that this began in the 1950s. The work of the divorce court welfare officers was largely unrecorded until the late 1970s.¹²⁴ Disputes over custody and access were rare, possibly about 6 per cent of divorcing couples.¹²⁵ The judge could call for a welfare report if he was not satisfied with the arrangements for children as set out in the divorce petition,¹²⁶ but in a sample of divorcing couples in Murch's study in the early 1970s, use of this provision was inconsistent and rare. The researchers criticised the lack of inquiry into some very serious cases.¹²⁷ The judges' options were so limited, that advising on services was probably a better use of resources.¹²⁸ A supervision order could be ordered only in exceptional circumstances.¹²⁹ Even when a report was ordered, parents tended to accept advice from a solicitor as less stigmatising than from a divorce court welfare officer.¹³⁰ This, Murch believed, reflected the Finer Committee's view that the legal professions conceptualised parties as the subject of rights, not as patients requiring treatment.¹³¹ Parties were not entitled to read the officer's report, which was relayed to them by their solicitor;¹³² and a strong moral line was sometimes taken against the parent who was 'at fault'.¹³³ Officers undertook enquiries of other services without the parents' knowledge or consent. Many parents were uncomfortable with the officer being identified with criminal justice.¹³⁴ However, most parents in the study valued the officers' assistance for families to

¹²⁴ M Wilkinson, *Children and Divorce* (Basil Blackwell, Oxford 1981); M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980)

¹²⁵ S Maidment, *Child Custody and Divorce: the law in social context* (Crook Helm, London 1984) 61

¹²⁶ Matrimonial Causes Rules 1973 r. 95

¹²⁷ E Elston, J Fuller and M Murch, 'Judicial Hearings of Undefended Divorce Petitions '38 (6) *Modern Law Review* 609 at 623-624

¹²⁸ S Maidment, *Child Custody and Divorce: the law in social context* (Crook Helm, London 1984) 75 et seq.

¹²⁹ Matrimonial Causes Act 1973 s 44

¹³⁰ M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 35

¹³¹ Finer Report Volume 1 (1974) para 4.285

¹³² M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 118-128

¹³³ M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) Ch 6

¹³⁴ M Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) Ch 9; also identified by J Hunt and J Lawson *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (NCFP, Bristol 1999) and see more recently R Hunter 'Close Encounters of a Judicial Kind: Hearing children's "voices" in family proceedings' (2007) 29 *Child and Family Law Quarterly* 203

adjust to their post-separation circumstances more than their investigative role, and though that the judge did benefit from some social work input.¹³⁵

The problem was that welfare reports were ordered in only the most extreme cases, usually if another enquiry was under way. Thus, the very ordering of a report singled out the family in a negative way.¹³⁶ It may well be that once parents found themselves in this ‘deviant’ category, they submitted without protest to the investigations and advice of the authoritative figure of the probation officer.¹³⁷ However, Maidment found little sign of active judicial decision-making; no statistics were kept on custody and access disputes but from empirical studies she estimated that 94 per cent of parents agreed arrangements and that in a contested case the court extremely rarely disturbed the status quo; in other words, the child stayed where they were.¹³⁸

Murch described the post-Finer role of the probation service and family courts as a shift from ‘marriage saving’ (reconciliation) to ‘child saving’.¹³⁹ Unusually for that time, he saw the officers as potential advocates for children,¹⁴⁰ but most officers worked within the parents’ rights paradigm in Fox Harding’s characterisation.¹⁴¹ For example, use of systems theory whereby the officer sees the family as ‘the client’ rather than addressing rights or needs of individuals was popular.¹⁴² The conflicts between law and social work, exemplified by the court welfare service are discussed in Chapter Seven.

Wardship

As discussed in the previous Chapter, the welfare principle originated in the wardship jurisdiction of the Court of Chancery. Although by the mid 19th century, the requirement for

¹³⁵ M Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 65

¹³⁶ E Elston, J Fuller and M Murch, ‘Judicial Hearings of undefended Divorce Petitions’ (1975) 38 (6) *Modern Law Review* 609 at 637

¹³⁷ M Murch, ‘Seebom: A Painful Dilemma for Probation’ (1969) 15(1) *Probation* 18-23; C Lasch, *A Haven in a Heartless World* (Norton & Co, New York 1995) 16

¹³⁸ S Maidment, *Child Custody and Divorce: the law in social context* (Crook Helm, London 1984) 61; J Eekelaar and E Clive *Custody after Divorce* (Oxford Centre for Sociolegal Studies 1977) paras 13.14; 13.22-13.30

¹³⁹ M Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) Ch 12

¹⁴⁰ M Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 161-164; although the occasional practitioner also took this view: H Bretherton, ‘Court welfare work: practice and theory’ (1979) 26 *Probation Journal* 3

¹⁴¹ L Fox Harding, *Perspectives in Child Care Policy* (2nd edn. Longman, London 1997) 70-108

¹⁴² C Clulow and C Vincent, *In the Child’s Best Interests?* (Tavistock, London 1987)

the child to own property had been dispensed with, it was common until the 1940s for wardship cases to commence with a nominal sum being settled on the child. Its use grew from the early 1950s and the rate increased in 1971 when jurisdiction was transferred to the Family Division, which could be accessed outside London. Legal aid was available, with no need to create a financial settlement, and applications were being made by some parents in predictably unsuccessful attempts to curb their children's behaviour. However by the mid 1980s, 40 per cent of applications were by local authorities because wardship was more flexible than taking care proceedings. Challenges by individuals against local authorities were less successful. The numbers of children made wards rose from 622 in 1971 to nearly 5,000 in 1991. As well as the jurisdiction being less restrictive for local authorities, Lowe and White attributed this popularity to an increased awareness that children's welfare was not necessarily synonymous with parents' wishes; the High Court's willingness to oversee the actions of lower courts and local authorities, and increased mobility of families leading to higher occurrence of international abduction.¹⁴³

The Law Commission made various proposals to regularise wardship without abolishing it, and the restriction in the Children Bill was met with some dismay, as the expertise of the High Court would be lost in complex cases.¹⁴⁴ Section 100(2) removed the eligibility of a local authority to apply for wardship, the premise being that care proceedings would now be sufficient. It was envisaged that most, if not all, care cases would be heard by magistrates.¹⁴⁵

Magistrates: Domestic proceedings and juvenile courts

The magistrates' domestic jurisdiction was protective as well as punitive. Children were indirectly taken into account when making protective orders for mothers because the grounds for applications included cruelty to or failure to maintain children. However, rather than taking children's experiences into account, the efforts of probation officers were still directed toward improving adult relationships by addressing 'marital difficulties' with psychodynamic casework in the 1960s.¹⁴⁶

¹⁴³ NV Lowe and RAH White, *Wards of Court* (2nd edn, Barry Rose, London 1986) 9

¹⁴⁴ Law Commission, 'Wards of Court' (Law Com No 101, 1987) 196 et seq.; A Bainham, *Children: The New Law* (Family Law, Bristol 1990) 94; 196

¹⁴⁵ J Masson, *The Children Act 1989 with annotations* (Sweet & Maxwell, London 1990) 170-172

¹⁴⁶ M Monger, *Casework in Probation* (Butterworths, London 1964)

Despite this apparent marginalisation of children in probation officers' matrimonial work, their social work practice was based on a holistic view of the client and his/her relationships.¹⁴⁷ Magistrates sat in criminal, domestic and juvenile courts. Summary justice did not completely compartmentalise crime, unhappy home conditions and children's welfare. While one might surmise this could provide scope for workable solutions to family problems, the structures were not designed to help. This was partly because the Children and Young Persons Bill 1969 had originally been drafted to transform the juvenile courts into a welfare-based jurisdiction, but was amended after a change of government from Labour to Conservative.

Increased local authority responsibilities for children¹⁴⁸ culminated in the Children and Young Persons Act 1969 which changed the courts' power to make a 'fit person order' into powers and duties for local authorities to initiate care applications. In contrast to care proceedings today, parents were not parties; appeals were rare; and the JPs did not have to give reasons for their decisions. Furthermore, local authorities could make resolutions of assumption of parental rights regarding children voluntarily in their care, without recourse to any court, an administrative power which raised doubts about natural justice. A parent did have a right to appeal to the magistrates, but other family members could be left in ignorance and the High Court would not necessarily exercise its wardship jurisdiction if there was a dispute.¹⁴⁹ One or more of seven conditions had to be met to grant a care order, and the child had to be shown to be in need of care and control. The conditions could be categorised into three groups: neglected and abused; troublesome and truanting; and the juvenile offender.¹⁵⁰ The troublesome concept of risk of harm was not included; this was one reason that wardship was used as an alternative method of protecting children from future harm.

The legislation became muddled because prosecution of juvenile offenders was not replaced by care proceedings as originally intended.¹⁵¹ Instead, young offenders had lost some

¹⁴⁷ N Rose, 'Psychiatry as a political science: advanced liberalism and the administration of risk' (1996) 9(2) *History of the Human Sciences* 1-23

¹⁴⁸ L Fox Harding, *Perspectives in Child Care Policy* (2nd edn, Longman, London (1997) 101

¹⁴⁹ M Hayes, 'Removing Children from their Families before the Children Act 1989' in G Douglas and N Lowe (Eds), *The Continuing Evolution of Family Law* (Family Law, Bristol 2009)

¹⁵⁰ M Hayes, 'Removing Children from their Families before the Children Act 1989' in G Douglas and N Lowe (Eds), *The Continuing Evolution of Family Law* (Family Law, Bristol 2009) 87

¹⁵¹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 695-696

procedural safeguards and children in need of care were ‘in the shadow of the poor law.’¹⁵² However it was generally assumed that magistrates courts were the right level of forum for care cases. (This was confirmed by Lord Mackay in the debates on the Children Bill in the 1980s.¹⁵³) Eekelaar wrote that the magistrates were well-placed to make decisions about balancing child protection and family autonomy, in an effective system of institutional checks and balances.¹⁵⁴ Building on their empirical study, Dingwall and Eekelaar argued in 1990 that magistrates were better able to arrive at decisions (without interference from the High Court) that were in the best interests of children, by applying common sense values in cases where legal issues rarely arose.¹⁵⁵

Another institutional check was the guardian *ad litem*. Access to representation had been improved with the introduction of the role of guardian *ad litem* by the Children Act 1975, now assumed by Cafcass and Cafcass Cymru.¹⁵⁶ (If a guardian was appointed for the child, this also entitled the parent to legal representation.) This tandem model of legal and welfare representation was described by Salgo, a German family law academic, as ‘superior – except for the costs – to all other solutions’ but he conceded that costs could not be easily compared across jurisdictions because ‘no other country takes this difficult task as seriously as the English system.’¹⁵⁷ As the children’s rights paradigm¹⁵⁸ grew in influence, availability of a separate, independent voice for the child was increasingly valued. Like many aspects of social policy it was, however, introduced on a wave of moral panic and a public enquiry into the death of a child who had been in care.¹⁵⁹

¹⁵² R Dingwall and J Eekelaar, *Care Proceedings – A Practical Guide for Social Workers, Health Visitors and Others* (Basil Blackwell, Oxford 1982) 132

¹⁵³ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 769 n 169

¹⁵⁴ J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicholson, London 1984) 181-184

¹⁵⁵ R Dingwall and J Eekelaar, *Care Proceedings – A Practical Guide for Social Workers, Health Visitors and Others* (Basil Blackwell, Oxford 1982) 132 - 133

¹⁵⁶ Cafcass was created by the Criminal Justice and Court Services Act 2000 s12; Cafcass Cymru was separately established by Children Act 2004 s35.

¹⁵⁷ L Salgo, ‘Representing children in civil child protection proceedings – lessons from a comparative study of the systems operating in the USA, Australia, West Germany and England and Wales’ (1998) 10 *Representing Children* 225-237

¹⁵⁸ L Fox Harding, *Perspectives in Child Care Policy* (2nd edn, Longman, London 1997) 144-145

¹⁵⁹ Department of Health and Social Security, *Report of the Committee of Inquiry into the Care and Supervision provided by local authorities and other agencies in Relation to Maria Colwell and the co-ordination between them* (1974); and see N Parton, *The Politics of Child Abuse* (Macmillan, Basingstoke 1985).

1960s AND 1970s - CONCLUSIONS

The reform of divorce law and the attack on the dual jurisdiction by Finer reflected a loss of confidence in both the Church and the state. Criticism from the left saw the welfare state located in patriarchal and class structured capitalism. The focus on the state and an assumption that it can solve problems unconsciously defines problems in the state's own terms, upholding the *status quo*. This places faith in the welfare professional and excludes the experience of individuals who might find such an approach oppressive.¹⁶⁰ Welfare provision was criticised across the political spectrum; 'patriarchal, able-bodied and race-blind ideology' and 'authoritarian paternalism' producing 'a loss of self respect, passivity, and clientism, rather than an ethic of participation.'¹⁶¹ Habermas sees the welfare state going beyond pacifying class conflict to impose a complex web of both giving and taking away freedoms.¹⁶²

The male breadwinner household was no longer the norm, and family life had been invaded by 'the school, the helping professions and the peer group'.¹⁶³ Although the process of obtaining a divorce became more straightforward, more questions were being asked as to the suitability of the court setting for family cases, exacerbated by the illogical and overlapping jurisdiction; calls for a 'family court' continued in the 1980s.¹⁶⁴ In 1984 the Lord Chancellor, Lord Hailsham, announced a re-examination of the idea and set up a committee of civil servants to examine the feasibility and options. This committee stated that it 'was widely held that structural change and rationalisation would provide a better framework' but emphasised that any change would have to be cost neutral.¹⁶⁵ The consultation was to have been followed by a report to Ministers to 'enable them to decide whether to proceed with new arrangements and, if so, in what form' in anticipation of Lord Woolf's civil justice review. Appendix II to the paper illustrates the complexity of court arrangements at that time, with 11 pages taken up listing

¹⁶⁰ F Williams, *Social Policy: A Critical Introduction. Issues of Race, Gender and Class* (Polity Press, Oxford 1989) 207-211

¹⁶¹ H Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31 *Journal of Law and Society* 345-368 at 355

¹⁶² J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 363-364

¹⁶³ C Lasch, *Haven in a Heartless World: the family besieged* (Norton & Co, New York 1995) xiv

¹⁶⁴ M Freeman, Introduction to *Family Values and Family Justice: Collected Essays in Law* (Ashgate, Farnham 2010) xix

¹⁶⁵ Lord Chancellor's Department, *Interdepartmental Review of Family and Domestic Jurisdiction: a consultation paper* (LCD, 1986) para 7.2

the respective courts' jurisdiction. This fragmentation was partly addressed by the elements of unification of the Children Act 1989.

1980s and 1990s: 'PRIVATISATION' OF FAMILY LAW?

While the divorce reform legislation passed at the end of the 1960s may have restored the legitimacy of the courts by bringing the law into line with the reality of relationship breakdown, it has been shown that changes brought in administratively, with little discussion in the public sphere, may have been more influential in modernising processes. The gradual de-legalisation of divorce has occurred almost by stealth, as substantive reform has proved so difficult.

Three major pieces of legislation brought the courts' functions under scrutiny during this period: the Children Act 1989; Child Support Act 1991 and the Family Law Act 1996. All were subject to considerable debate in the public sphere about their implications on people's private lives and on the public interest. During this period of rolling back the welfare state, it was acknowledged that public expenditure was an issue, but ideological debate was also heard. Much of this centred on the role of the state in regulating family life, couched in terms of public and private.

SUCCESSFUL REFORM? CHILDREN ACT 1989

Shortly after the 1989 Act was passed, Cretney described it as signifying the law's 'retreat from the private realm of family life.'¹⁶⁶ Lord MacKay, the Lord Chancellor, introduced the bill as follows:

The government is anxious to make it clear in the Bill that families should generally be left to sort out matters for themselves, unless it is shown that without an order the child's welfare will suffer.¹⁶⁷

However, rather than the state completely withdrawing, it was intended that local authorities' powers and duties under Part III would enable services to be provided to support children's

¹⁶⁶ S Cretney 'Defining the limits of state intervention' in D Freestone (ed) *Children and the law: Essays in honour of Professor H K Bevan* (Hull University Press, Hull 1990) 58 - 59

¹⁶⁷ Cited in P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 9

upbringing within their families.¹⁶⁸ The state's role in both prevention and intervention was redefined. The rediscovery of child abuse following several public enquiries between 1974 and the mid 1980s had resulted in 'a need for greater reliance on individual rights firmly located in a reformed statutory framework where there was a greater emphasis on legalism.'¹⁶⁹ Children would not find themselves in care without an application having been made to court; local authorities could not bypass statute by using wardship.¹⁷⁰ Dingwall and Eekelaar commented that care proceedings thus became a more forensic open contest, but the 'rule of optimism' remained intact amongst social and health workers.¹⁷¹ (Their empirical work, pre-Children Act, had identified a tendency for welfare professionals to hold assumptions about parents' natural love for their children, explain away evidence to the contrary, and take the least interventionist approach to child protection.¹⁷²) The principle of parental responsibility not only meant that children retained a legal relationship with their parents while in care, but also a relationship with both parents, intended to obviate the need for court orders for most separated couples.

Integrating the *laissez faire* and birth families' rights paradigms, the Act is still seen as effective, although there has been a series of augmentations since 1991. The resilience of the Act may be attributed to the extensive consultations and reports that drew on political and professional support and human rights principles.¹⁷³ Its principles and reform of court structures have arguably brought flexibility and better integration of court provision for children than the establishment of a specialist Family Court did in Australia.¹⁷⁴

The unification of family courts was largely achieved through absorbing the magistrates' matrimonial and child care functions and applying the welfare principle across public and private law. Family proceedings were separated from youth justice by the Criminal Justice

¹⁶⁸ C Piper, *Investing in Children: Policy, law and practice in context* (Willan Publishing, Cullompton 2008) Ch 6

¹⁶⁹ N Parton, *The Politics of Child Abuse* (MacMillan, London 1985) 193-198

¹⁷⁰ J Masson, *The Children Act 1989 with annotations* (Sweet & Maxwell, London 1990) 170-172

¹⁷¹ R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn, Avebury, Aldershot 1995) 249-254

¹⁷² R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn, Avebury, Aldershot 1995) 246-247

¹⁷³ Including several Law Commission working papers, its report: *Review of Child Law, Guardianship and Custody* (Law Com 172, 1988) and the interdepartmental review that formed the basis of the white paper: *The Law on Child Care and Family Services* (Cm 62, 1987)

¹⁷⁴ Chapter Five

Act 1991, which renamed juvenile courts as youth courts.¹⁷⁵ Care and domestic proceedings were transferred to the new family proceedings courts (FPCs) under the Children Act 1989. All public law applications were to start in the FPC. The child at risk of offending came within the new statutory definition of a child in need,¹⁷⁶ but the concept in the 1969 legislation that the court would consider the young offender's welfare needs was lost.¹⁷⁷

The success of the Children Act 1989 is often attributed to the extent of Law Commission deliberation, evidence and consultation, but it was influenced by a range of developments. There were three Law Commission working parties on private law aspects from 1984; wide consultation; and a report in 1988. In public law, most of the recommendations of an interdisciplinary working party in 1985 were accepted by the government in a white paper. Other influences were three child death inquiries; the recognition of children's autonomy reflected in the Gillick case; and the European Convention of Human Rights.¹⁷⁸

The immediate impact of the Act on the courts was a reduction in applications, but initial fears that the 'no order principle'¹⁷⁹ would reduce the level of the courts' overview where this was necessary to promote children's welfare, were short-lived. Nor were care proceedings the sole province of the magistrates; by 1996, there were complaints of delay caused by too many cases being transferred up.¹⁸⁰ As Masson concludes, if the Act was indeed intended to make the courts residual, this has failed in both public and private law cases.¹⁸¹

FAILED REFORM? CHILD SUPPORT

The Finer Committee's proposal to remove lone parents' claims for financial support from the courts to a wholly administrative system was revived to form the basis for the Child Support Agency. The level of public expenditure on supplementary benefit escalated

¹⁷⁵ J Fionda *Devils and Angels: Youth policy and Crime* (Hart, Oxford 2006) 119

¹⁷⁶ Children Act 1989 schedule 2 para 7

¹⁷⁷ J Fionda *Devils and Angels; Youth Policy and Crime* (Hart, Oxford 2006) 120

¹⁷⁸ Public enquiries into the deaths of Jasmine Beckford; Kimberley Carlisle; and Tyra Henry – see N Parton, *Governing the Family* (Macmillan, Basingstoke 1991); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

¹⁷⁹ Children Act 1989 s 1(5)

¹⁸⁰ J Hunt, A Macleod and C Thomas, *The Last Resort* (The Stationery Office, London 1999) 290-291

¹⁸¹ J Masson, 'Judging the Children Act: Courts and the administration of family justice' (2010) 5(2) *Journal of Children's Services* 52-59

enormously in the intervening years.¹⁸² Neither the Department for Social Security nor the courts were more than ‘half-hearted’ in extracting maintenance for children.¹⁸³ While some commentators saw the economic imperative as far more important to government than issues of legal status or sexual morality,¹⁸⁴ others saw an attempt to reinforce a dichotomy between maintenance/fatherhood and care/motherhood.¹⁸⁵ Within a few months of the Prime Minister announcing in 1991 that the government was investigating better ways to collect child maintenance, she was advised by the relevant department that this would have considerable resource consequences and require careful study. Nevertheless, within another two months she announced that the Child Support Agency was to be established; the Act was passed just nine months later.¹⁸⁶ There was only a six-week period for public consultation and the responses were never published.¹⁸⁷ The state had made a ‘sideways shift’ into interference in family life, with about 10 million people subject for the first time to dealing with the social security system.¹⁸⁸ At its inception, the CSA dealt with a far wider clientele than the JPs had done. As has been well-documented, the agency was as inefficient and unpopular as widely predicted. Unsuccessful attempts have been made to resort to court action.¹⁸⁹ In 2008 most of its functions were allocated to new Child Maintenance and Enforcement Commission, which promotes the making of private agreements.

There may have been widespread public acceptance of the *principle* that parents should provide realistic financial support for their children, but not the systems introduced in 1993, that were widely criticised from almost all quarters.¹⁹⁰ While the ‘ideal speech situation’ would be particularly hard to achieve on this topic, because communication is dominated by the powerful, a period of genuine public consultation might have prevented disastrous outcomes.

¹⁸² N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 89-90

¹⁸³ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 117

¹⁸⁴ L Fox Harding, *Family, State and Social Policy* (Macmillan, Basingstoke 1996) 126

¹⁸⁵ H Land, ‘Families and the Law’ in J Muncie et al (eds) *Understanding the Family* (2nd edn Sage, London 1997)

¹⁸⁶ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 19-120

¹⁸⁷ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 122

¹⁸⁸ JJ Rodger, *Family Life and Social Control* (Macmillan, Basingstoke 1996) 66

¹⁸⁹ For example, (*R*) *Kehoe v Secretary of State for Work and Pensions* [2004] EWCA Civ 225

¹⁹⁰ H Land ‘Families and the Law’ in J Muncie et al (eds) *Understanding the Family* (2nd edn Sage, London 1997)

DISAPPEARING REFORM? DIVORCE AND THE FAMILY LAW ACT 1996

Although there is little public demand now for change in the ground for divorce, both practising and academic lawyers remain dissatisfied with the artificiality of the five ‘facts’.¹⁹¹ Dingwall and Eekelaar wrote in 1988: ‘Many of the cumbersome aspects of divorce procedures derive from the political difficulty of introducing divorce by consent.’ They thought that humiliating procedures were unavoidable until the substantive law was reformed to remove all elements of fault.¹⁹² The law relating to marriage and divorce attains legitimacy by reflecting the value we accord to marriage – as an institution to be preserved (in the public sphere) or a personal preference (in the private). Although child care policy is increasingly being disentangled from one of upholding marriage, politicians still cling to the declaration that children are best brought up by married parents. The impact is that reform of the law of divorce seems ever remote, but the idea that there is any public interest in legal investigation of individual relationship breakdown is anathema to leading academics, as well as the professional bodies.¹⁹³ This was why there was such disappointment when the attempted reform by the Family Law Act 1996 failed.

Ezra Hasson analyses the two critical purposes of the Act as a duality at the heart of the law of marriage and divorce. The concept of no-fault divorce, following Law Commission recommendations,¹⁹⁴ had been placed within a set of legal mechanisms designed to encourage couples to stay together, the latter being introduced during progression through green and white papers. Attempts to address the concerns of those who took a moral regulation line of idealising marriage resulted in compromise.¹⁹⁵ Furthermore, Hasson shows a disconnect between the discourse at policy level and that at street level, where the majority take a more service oriented approach, wanting no-fault divorce together with flexible opportunities for information and mediation.¹⁹⁶

¹⁹¹ Matrimonial Causes Act 1973 s 1

¹⁹² R Dingwall and J Eekelaar, ‘A Wider Vision’ in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 174

¹⁹³ For example, S Cretney, ‘Private Ordering and Divorce: How far can we go?’ 33 *Family Law* (2003) 399; the campaign by the solicitors’ body, Resolution, to introduce ‘no fault’ divorce, <http://www.resolution.org.uk/editorial.asp?page_id=308> Last accessed 7 July 2011

¹⁹⁴ Law Commission, *The Ground for Divorce* (Law Com No. 192, 1990)

¹⁹⁵ E Hasson, ‘Setting a Standard or Reflecting Reality? The “Role” of Divorce Law and the Case of the Family Law Act 1996’ (2003) 17 *International Journal of Law Policy and the Family* 233-265

¹⁹⁶ E Hasson, ‘The Street Level Response to Relationship Breakdown: A Lesson for National Policy (2004) 26(1) *Journal of Social Welfare and Family Law* 31-51

Not only did the government back up its rhetoric promoting information and mediation, pilot schemes were funded and evaluated before the legislative changes in divorce were implemented. As has been well-documented, the anticipated changes in behaviour and outcomes did not occur.¹⁹⁷ In June 1999, the Lord Chancellor announced that the provisions would not be implemented following disappointing findings in the evaluation of the impact of the piloted processes on either of the two objectives of saving marriages or reducing conflict in divorce. What had been welcomed by many, and distrusted by others, as the state withdrawing from private matters, foundered on the failure of the extra-legal alternative to achieve the legitimacy of the existing system.¹⁹⁸

RUSHED REFORM? UNIFICATION OF COURT WELFARE SERVICES

The family courts' functions were again subject to reform from 1998, with proposals to restructure their welfare advice services.¹⁹⁹ The family court welfare service, still run by the probation service, and the guardian *ad litem* panels, paid for by local authorities, were both subject to some inconsistencies in service delivery because of the large agencies within which they were located. Despite this, they were greatly valued by the courts and the momentum for change came from external factors. Systems that served the interests of children and families in the court setting became dominated by self-serving mechanistic solutions to demands of the criminal justice system; the reorganisation of the probation service precipitated the plan to combine the support services for family courts in 1998. The consultation paper called for a period of three to five years to establish the new service but it was operating from April 2001; the abridged timeframe has been cited as a 'serious misjudgement', leading to subsequent failure.²⁰⁰

Generally, practitioners were in favour of a combined service. The historical split between social work and probation basic training was seen as increasingly obsolete by those in probation who wanted to continue to work with families, and felt that they had more in

¹⁹⁷ For example, in G Davis, 'Family Mediation – Where do we go from here?' (2001) 31 *Family Law* 265 and R Dingwall, 'Divorce mediation: Should we change our mind?' (2010) 32(2) *Journal of Social Welfare and Family Law* 107-117

¹⁹⁸ Discussed in Chapter Seven

¹⁹⁹ Department of Health, Home Office, Lord Chancellor's Department and Welsh Office, *Support Services in Family Proceedings – Future Organisation of Court Welfare Services: Consultation paper* (LASSL(98)11, Department of Health, London 1998)

²⁰⁰ HC Committee on the Lord Chancellor's Department, *Children and Family Court Advisory and Support Service (CAFCASS) Volume 1* (HC 614-1, TSO 2003) paras 20-26

common with guardians *ad litem* than with the increasingly punitive probation service.²⁰¹ They were now moving toward the children's rights paradigm, and the separate structures represented another example of a historical duality that had outrun its course.

There were also fears that the plans were resource-led and that professional autonomy was threatened.²⁰² It is understood that most respondents to the consultation paper favoured a flat decentralised structure, linked to the Department of Health. The service was however set up as a highly bureaucratic centralised agency of the Lord Chancellor's Department in April 2001.²⁰³ (The responses to the consultation were not published). An opportunity for a service to evolve into a system grounded in the lifeworld of practitioners' knowledge and experience and was lost.

Joan Hunt speculated that the UK's 'fairly crude and arbitrary distinctions' between the level of representation of children in public and private law might disappear, and that a more differentiated approach based on an assessment of individual needs would evolve, although that was not imminent and the respective roles needed to be carefully mapped and integrated. She also raised the question of the purpose and function of the new service: was it to be primarily a service for courts or for children? The consultation document indicated the former, twinned with recognition of the growing movement for children's advocacy as well as more empathetic services for parents in the late 1990s.²⁰⁴

On the other hand, there was potential for the greater numbers of private law cases to dominate the service, at the expense of representation of children in public law.²⁰⁵ In 2005, Cafcass policy explicitly switched emphasis and resources from public law to private law cases.²⁰⁶ In subsequent years, increased awareness of emotional harm being caused to children witnessing domestic violence has led to more duties being placed on Cafcass officers

²⁰¹ J Hunt and J Lawson, *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (National Council of Family Proceedings, Bristol 1999)

²⁰² J Hunt and J Lawson, *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (National Council of Family Proceedings, Bristol 1999) 110-111

²⁰³ Criminal Justice and Court Services Act 2000

²⁰⁴ J Hunt 'A Combined Court Service: Issues from Recent Research' (1999) 9 *Seen and Heard* 17-32

²⁰⁵ J Hunt and J Lawson, *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (National Council of Family Proceedings, Bristol 1999) 111; J Masson and M Winn Oakley, *Out of Hearing* (NSPCC/Wiley, Chichester, 1999) 139-140

²⁰⁶ Cafcass, *Every Day Matters* (2005)

<http://www.cafcass.gov.uk/news/2005/new_proposals_benefit_children.aspx> Last accessed 24 July 2011

to assess risk.²⁰⁷ Inevitably, net-widening spreads resources more thinly and reduces protection for those children already suffering harm.²⁰⁸ The pressures on the Cafcass budget have led to the present situation, where the guardians' input is circumscribed and managers attempt to exert more control over them.²⁰⁹

In 1999, Hunt and Lawson wrote,

We strongly urge that [managing the professional autonomy of the practitioners] is given full and open-minded consideration by all those involved, making use of modern ideas about management and organisational cultures.²¹⁰

If their recommendation had been followed, the system may have had a better chance of meeting the needs of children and the courts.

1980s and 1990s - CONCLUSIONS

Apart from the influence of the 'marriage idealists'²¹¹ on the fate of the Family Law Act 1996, the state's interest in regulating adult relationships continued to fall away during this period. Family policy instead recognises that, with the birth of a child, social, economic and legal implications all spring up.²¹² By considering the contrast in public discourse when each of the four pieces of legislation above was introduced, we can see that undistorted communication and transparency of process give the courts a better chance of achieving legitimacy than systems based on vested interests, misinformation and short-term economic gain. Although commentators on the Children Act 1989 and the Family Law Act 1996 spoke in terms of public and private, the dualities imposed by historical court structures, and those emerging between law and social work; court-based and external mediation, all contributed to the current functions of dispute processing and protection.

²⁰⁷ Children Act s 16A (inserted by Children and Adoption Act 2006 s7)

²⁰⁸ N Parton, *Safeguarding Childhood: Early intervention and surveillance in a late modern society* (Palgrave MacMillan, Basingstoke 2006) 185

²⁰⁹ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) paras 4.249-4.252; *A County Council v K and others* [2011] EWHC 1672 (Fam)

²¹⁰ J Hunt and J Lawson, *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (National Council of Family Proceedings, Bristol 1999) 121

²¹¹ E Hasson, 'Setting a Standard or Reflecting Reality? The "Role" of Divorce law and the Family Law Act 1996' (2003) 26(1) *International Journal of Law Policy and the Family* 233-265

²¹² J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984) 24

The Children Act 1989 aimed to build a new consensus and, remarkably for family policy, there were no major political disputes on the Bill in Parliament. There was little media coverage, other than the high profile issue of emergency placements in the context of the Cleveland scandal. Parton suggests that perhaps the legislation was just too complex for the media to bother with. He observed that there was a great deal of lobbying, but concludes that it is difficult to know how much effect this had.²¹³ Smart may well be correct in suggesting that the discourse was dominated by the professions.²¹⁴ In retrospect, however, the resilience of the Act suggests that it has been more effective in helping the courts' functions meet expectations than legislation that was formulated with less opportunity for rational communication.²¹⁵

FAMILY COURTS AND SOCIAL POLICY IN THE 21st CENTURY

Social policy (originally termed social administration in relation to the welfare state) has been recognised in theory and practice since the 1940s.²¹⁶ In the 1990s, it was claimed that (unlike most of Europe) the UK did not have an explicit *family policy*.²¹⁷ This changed during the Labour government administration,²¹⁸ during which the state acquired a complex relationship with families of expectations and responsibilities.²¹⁹ During the 2010 general election campaign, the respective family policies of all three main political parties became fundamental and 'a potential electoral battleground.'²²⁰

Social policy is not always distinct from broader areas of state activity that impact on children's well-being, particularly economic policies.²²¹ Fiscal policy can manipulate family forms,²²² as recently attempted with a proposal to give 'tax breaks' to couples who marry.²²³

²¹³ N Parton, *Governing the Family* (Macmillan, Basingstoke 1991) 148

²¹⁴ C Smart, 'Wishful thinking and harmful tinkering? Sociological reflections on family policy' (1997) 26(3) *Journal of Social Policy* 301-321

²¹⁵ More recently, the Adoption and Children Act 2002 was also drafted in the light of extensive consultation, unlike the hasty passing of the enforcement of contact provisions of the Children and Adoption Act 2006.

²¹⁶ F Williams, *Social Policy: a critical introduction, issues of race gender and class* (Polity Press, Cambridge, 1989)

²¹⁷ F Wasoff and I Dey, *Family Policy* (Gildredge Press, Eastbourne 2000); L Fox Harding, *Family, State and Social Policy* (MacMillan, Basingstoke 1996)

²¹⁸ S Day Sclater and C Piper, 'Re-moralising the family? Family policy, family law and youth justice' (2000) 12 *Child and Family Law Quarterly* 135

²¹⁹ C Piper, *Investing in Children: Policy, law and practice in context* (Willan Publishing, Cullompton 2008)

²²⁰ P Wintour and P Curtis, 'Stable relationships are key to tackling family breakdown says Ed Balls' *The Guardian*, 29 November 2009

²²¹ P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 220

²²² J Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson, London 1984) 204

²²³ Amelia Gentleman 'Is Britain Broken?' *The Guardian* 31 March 2010.

Historically, fragmented departmental responsibility for policy about children was cited as evidence of UK family policy being at the ‘implicit’ end of the spectrum.²²⁴ Since the Seebohm reorganisation in the early 1970s, responsibility for children in need has passed from one government department to another, a series of structural reorganisations described by Jean Packman as: ‘endemic – a chronic condition without hope of a cure’.²²⁵ In 2001, responsibility for children’s wellbeing moved from the Department of Health into Education, emphasising the state’s interest in investing in children as a future resource, not in the here and now.²²⁶ (In the current consultation on the Family Justice Review, the public was presented with a decision already made between civil servants that the court welfare services now in the Department for Education will be subsumed by the Ministry of Justice.²²⁷)

Social policy is formulated when a social problem is identified, and principles such as justice and fairness are applied to address it. Its objectives are often frustrated by an ‘implementation gap’ between intention and effect.²²⁸ This is more likely the less communication and consensus is achieved before the policy is introduced. In particular, policies that make little sense to front-line practitioners are less likely to achieve their objectives.²²⁹ Applying Habermas’ ideas, a more explicit family policy should help bring issues affecting children’s private lives that are in the public interest into the public realm for open discussion. This can lead to better informed policy, so that our systems are serving our needs.

Provision of legal aid was intrinsic to the welfare state and ‘fundamental to the development of an inclusionary form of citizenship’,²³⁰ but by 2004 was being described as residual. At a minimum, it is critical that citizens have access to legal advice and representation where they encounter issues about the boundaries of citizenship rights, because the law must provide a

²²⁴ P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 4

²²⁵ Jean Packman, ‘From Prevention to Partnership: Child Welfare Services Across Three Decades’ (1993) 7(2) *Children & Society* cited by P Daniel and J Ivatts, *Children and Social Policy* (Macmillan, Basingstoke 1998) 203

²²⁶ B Featherstone, ‘Rethinking Family Support in the Current Policy Context’ (2005) 36 *British journal of Social Work* 5-19; C Piper, *Investing in Children: Policy, law and practice in context* (Willan, Cullompton 2008) (Responsibility for children’s care and education in England was held by the Department for Education and Skills since 2001; subsequently by the new Department for Children Schools and Families in 2007, which was renamed the Department for Education in 2010.)

²²⁷ Stated by Keith Towler, member of the Family Justice Review Panel, at a consultation meeting, Cardiff, 31 May 2011.

²²⁸ M Hill, *Understanding Social Policy* (Blackwells, Oxford 2003) 90-91

²²⁹ M Lipsky, *Street-level bureaucracy: the dilemmas of the individual in public services* (Russell Sage, New York 1989)

²³⁰ H Sommerlad ‘Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid’ (2004) 31 *Journal of Law and Society* 345-368 at 348

safeguard against the exercise of arbitrary authority on the part of the state or organisations too large to care about the consequence.²³¹ Although current proposals would curtail access to legal aid in such circumstances, family law has been identified as bearing a large proportion of reduction in services. It is easier to justify withholding public expenditure for services when the Lord Chancellor is able to say:

It cannot be right that the taxpayer is footing the bill for unnecessary court cases which would never have even reached the courtroom door, were it not for the fact that somebody else was paying... a more targeted civil and family scheme... will discourage people from resorting to lawyers whenever they face a problem, and instead encourage them to consider more suitable methods of dispute resolution.²³²

To see whether a court is or is not ‘a suitable method’ for resolution of a problem about a child’s future, we need to think about how they now function.

TOWARDS A FAMILY COURT

The Finer Committee was less impressed by the clarity and consistency of arguments for a family court than by the enthusiasm of its proponents, and was therefore prescriptive about its own plan.²³³ Although the unified family court was not ‘built’, many of these aims have been fulfilled since 1974. The range of powers available to judges and magistrates under the Children Act 1989 unified the processes and outputs for children rather more than the Finer Committee had envisaged.²³⁴ In the succeeding decades the county courts and family proceedings courts have also become more integrated, with unified procedural rules finally introduced in 2011.²³⁵

Recent statistics indicate that there were about 109,000 family applications to county courts and 46,500 to magistrates in a year.²³⁶ However, the Court Service reports slow progress in managing the estate and combining courts.²³⁷ Its Annual Report in 2009 highlights the new combined Manchester centre,²³⁸ and the 2008 Report refers to a Unified Family Service

²³¹ H Sommerlad ‘Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid’ (2004) 31 *Journal of Law and Society* 345-368

²³² Kenneth Clarke, Statement to the House of Commons introducing *Proposals for the reform of legal aid in England and Wales*, Consultation Paper CP12/10 Cm 7967: Hansard HC 15 Nov 2010 Col 659

²³³ Finer Report Volume 1 (1974) paras 4.278-4.338

²³⁴ In contrast with the Australian Family Court, see Chapter Five

²³⁵ The Family Procedure Rules 2010 No. 2955 (L. 17) implemented 1 April 2011.

²³⁶ HMCS Annual Report and Accounts 2009/2010 (HC 113, 2010) 10

²³⁷ HMCS Annual Report and Accounts 2009/2010 (HC 113, 2010) 43

²³⁸ HMCS Annual Report and Accounts 2008/2009 (HC 864, 2009) 38

Programme,²³⁹ but this is not referred to in the two subsequent reports. The aim was to co-locate hearing centres and administrative centres for flexible deployment of resources and to provide a simpler more accessible service for families.²⁴⁰ However it was conceded in 2005 that it will be rare for there to be funds available for new buildings.²⁴¹ Just as McGregor lamented the lack of statistics and failure of the relevant government departments to get to grips with estates and infrastructure 30 years ago,²⁴² so the Family Justice Review notes a lack of management information and physical space on which to base plans for a unified service.²⁴³

FUNCTIONS OF FAMILY COURTS 2011

The formulation of social policy is often triggered by the ‘sensitising impact’ of pressure groups that bring a social problem to public attention.²⁴⁴ Unfortunately, a discourse skewed by motivations based on economy or power can prioritise some issues over others, or even identify a problem that barely exists. An example is the ‘populist juggernaut’ of the fathers rights movement over the past 20 years.²⁴⁵ The risk of a gap between policy formulation and implementation is exemplified by the passing of the contact enforcement provisions of the Children and Adoption Act 2006 before any research was commissioned to enquire as to whether enforcement of contact was a genuine social problem or merely a high profile campaign by a vocal minority.²⁴⁶ To date, the Act appears largely ineffective in reducing conflict or demands on the courts.²⁴⁷

Since the Finer Committee idealised a ‘family court’, the focus of court applications has shifted from finance to residence and contact, in a policy context of increased anxiety over childhood, as a site for ensuring the future.²⁴⁸ These applications are now preceded by

²³⁹ HMCS Annual Report and Accounts 2007 /2008 (HC 741, 2008) 17

²⁴⁰ HMCS Annual Report and Accounts 2007 /2008 (HC 741, 2008) 17

²⁴¹ HMCS *Management Proposals to Develop a Unified Family Service* (Department for Constitutional Affairs, 2005) 25

²⁴² OR McGregor, ‘Family Courts?’ (1987) 6 *Civil Justice Quarterly* 44-55

²⁴³ Family Justice Review *Interim Report* (Ministry of Justice, 2011) Annex L

²⁴⁴ RF Drake, *The Principles of Social Policy* (Palgrave Macmillan, Basingstoke 2001) 106

²⁴⁵ C Smart, Preface to R Collier and S Sheldon (eds), *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006) viii

²⁴⁶ J Hunt and A Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice, 2008) 1

²⁴⁷ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) paras 5.27-5.41

²⁴⁸ N Parton, *Safeguarding Childhood: Early intervention and surveillance in a late modern society* (Palgrave MacMillan, Basingstoke 2006)

obtaining information from the police and other agencies to ensure any potential risks are identified before there is any judicial input into the case. This has become one of the main functions of Cafcass, which now processes checks on 180 applications per day,²⁴⁹ far from the ‘advice and support service’ that was envisaged when it was established.

Care applications no longer turn on the ‘common sense’ of the magistrate,²⁵⁰ as about two thirds are now heard by higher courts. Pronouncements about the ‘draconian’ nature of a decision to remove a child from their parents and the low esteem in which social workers are held have led to a lack of confidence in the FPCs.²⁵¹ It does appear anomalous to have an amateur system and it is doubtful that the non-professionalism of JPs is often seen as ‘restoring participants rights to their own conflicts’.²⁵² The cheapness of unpaid magistrates makes it very difficult to envisage a viable alternative. An inquiry by the Lord Chancellor, Lord Gardiner, in 1965 concluded that the England and Wales legal system was cheaper than 20 similar jurisdictions because so many cases were heard by JPs.²⁵³

Even in the higher courts ‘cases decide themselves under the weight of expert reports and parental concessions.’²⁵⁴ The Family Justice Review proposal to reduce court scrutiny of care plans by local authorities²⁵⁵ echoes Dingwall and Eekelaar’s view prior to the Act that most care proceedings did not require ‘legal’ decisions at all, but Masson suggests that the courts have taken ownership of them to the extent that they are now being conducted like wardship.²⁵⁶

²⁴⁹ Cafcass, *Channel Cafcass Newsletter* (Issue 3 June 2011) 1
<<http://www.cafcass.gov.uk/PDF/FINAL%20June%20Channel%20Cafcass%20080611.pdf>> Last accessed 24 July 2011

²⁵⁰ R Dingwall and J Eekelaar, *Care Proceedings – A Practical Guide for Social Workers, Health Visitors and Others* (Basil Blackwell, Oxford 1982) 132-133

²⁵¹ J Masson, ‘Judging the Children Act 1989: courts and the administration of family justice’ (2010) 5(2) *Journal of Children’s Services* 52-59 at 53

²⁵² N Christie, ‘Conflicts as Property’ *The British Journal of Criminology* (1977) (17(1)) 1-15, and see R Dingwall and J Eekelaar, ‘Rethinking Child Protection’ in M Freeman (ed), *State, Law and the Family* (Tavistock, London 1987)109-110

²⁵³ T Skyrme, *History of the Justices of the Peace, Volume 2* (Barry Rose, Chichester 1991) 418-419

²⁵⁴ J Masson, ‘Judging the Children Act 1989: courts and the administration of family justice’ (2010) 5(2) *Journal of Children’s Services* 52-59 at 56

²⁵⁵ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) paras 4.159-4.169

²⁵⁶ J Masson, ‘Judging the Children Act 1989: courts and the administration of family justice’ (2010) 5(2) *Journal of Children’s Services* 52-59 at 56-57

CONCLUSIONS

To this day, politicians still support the image of the nuclear family headed by two married parents. There was a shift from 1997 to targeting investment in services to improve the future of children.²⁵⁷ The present government recently criticised policy ‘focussing almost exclusively’ on children, signalling a move back to promoting marriage.²⁵⁸ Although much was written in the 1980s about resisting the imposition of fixed family forms, Freeman notes that inclusivity is relatively recent.²⁵⁹

A specialist family court was once seen by many as the clear solution to the flaws in the family justice system. However, ten years after implementation of the Children Act 1989, Cretney commented:

Non-lawyers may doubt the significance of what may easily seem to be low-level management of the court system; but one remarkable (and rarely noticed) fact suggests that there has indeed been an important change. This is that right down to the debates on the 1989 Act no discussion on family law was complete without the invocation of the so-called ‘family court’ as a necessary (and often sufficient) response to the problem under review. Yet a decade later (whilst court structure and procedures remain a matter for debate) this simplistic response has become rare.²⁶⁰

Although the idea of the unified court has been revived in 2011, this is peripheral to the overriding response to the current ‘problem under review’ - to ease the administrative burden on the state by taking families out of the court system altogether.²⁶¹ As Masson comments: ‘what was once a novel idea to bring real improvement to family justice is being presented as the end result of process of administrative decluttering.’²⁶² This was not the view of the Finer Committee which, although encouraging conciliation services, saw these as integral to a court which promoted the right of access to justice.²⁶³

By the 1990s, most people saw the failure of a marriage as a normal hazard of life, not a token of social deviance damaging the reputation of the parties. As Dingwall and Eekelaar

²⁵⁷ C Piper, *Investing in Children: Policy, law and practice in context* (Willan Publishing, Cullompton 2008)

²⁵⁸ Speech by David Cameron, 23 May 2011 <<http://www.number10.gov.uk/news/speeches-and-transcripts/2011/05/speech-on-the-big-society-64052>> Last accessed 4 June.2011

²⁵⁹ M Freeman, Introduction to *Family Values and Family Justice* (Ashgate, Farnham 2010) xi - xii

²⁶⁰ S M Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2005) 724

²⁶¹ Family Justice Review Panel *Interim Report* (Ministry of Justice, 2011)

²⁶² J Masson, ‘Judging the Children Act 1989: courts and the administration of family justice’ (2010) 5(2) *Journal of Children’s Services* 52-59 at 55

²⁶³ Discussed in Chapter Seven.

put it: 'if the parents' character remains unblemished' there was no justification for investigating their fitness to take decisions about their children's welfare.²⁶⁴ Although parents were not always the best judges of what is in their children's interests, they added, 'welfare can be a more insidious form of social control than law, although it is always a fine judgment as to whether its enticements to conformity may not be preferable to outright coercion.'²⁶⁵ The family was exalted as the last refuge of privacy, at the same time as needing expert intervention by the 'guardians of health and morality'.²⁶⁶

The family courts sit within this paradoxical social policy context, exercising their functions of dispute processing and protection. By acknowledging both the historical and ongoing dualities in the lifeworld and the systems that should support it, policy and practice might be developed to improve services for children and families. The discourse is however continually dominated by the maintenance of self-perpetuating systems and distorted by the most powerful voices.

²⁶⁴ R Dingwall and J Eekelaar, 'A Wider Vision' in R Dingwall and J Eekelaar (eds), *Divorce mediation and the Legal Process* (Clarendon Press, Oxford, 1988) 177

²⁶⁵ R Dingwall and J Eekelaar, 'A Wider Vision' in R Dingwall and J Eekelaar (eds), *Divorce mediation and the Legal Process* (Clarendon Press, Oxford, 1988) 179

²⁶⁶ C Lasch, *Haven in a Heartless World: the family besieged* (Norton & Co, New York 1995) 12-13

CHAPTER FIVE

FAMILY COURTS IN AUSTRALIA

THE COURTS' JURISDICTION REGARDING CHILDREN IN AUSTRALIAN FAMILY LAW	160
<i>SEPARATION BETWEEN FEDERAL AND STATE COURTS: PRIVATE AND PUBLIC LAW</i>	165
<i>FURTHER FRAGMENTATION WITH THE INTRODUCTION OF THE FEDERAL MAGISTRATES COURT</i>	167
<i>CHILDRENS COURTS OPERATING IN AUSTRALIAN STATES AND TERRITORIES</i>	168
<i>FAMILY VIOLENCE AND CHILD ABUSE</i>	169
WHY DID THE FAMILY COURT OF AUSTRALIA FAIL TO GAIN LEGITIMACY?	172
<i>THE INFORMAL COURT – IDENTITY CRISIS</i>	174
<i>THE FAMILY LAW REFORM ACT 1995</i>	177
<i>'EVERY PICTURE TELLS A STORY'</i> <i>THE PARLIAMENTARY ENQUIRY 2003</i>	178
<i>THE FAMILY COURT AND THE 2006 ACT</i>	181
The Children's Cases Project and Less Adversarial Trials	183
From family counsellors to family consultants	188
CHILD PROTECTION IN AUSTRALIA	191
THE MAGELLAN PROJECT: 'Where public and private intersect'	198
<i>THE FAMILY LAW COUNCIL REPORT: 'FAMILY LAW AND CHILD PROTECTION'</i>	198
<i>FROM MAGELLAN LIST TO MAGELLAN PROJECT</i>	203

A comparison of the family courts in England and Wales with those in Australia is a logical step in analysis of the courts' functions because Australia has often been cited as an exemplar in having a 'family court' and, more recently, in promoting alternative dispute resolution (ADR). However, as this Chapter shows, a comparison also reveals further aspects of duality.

As enthusiasm gathered for a unified family court following the Finer Report, the establishment of the federal Family Court of Australia (FCtA) in 1976 appeared as a bold and exciting venture into a new era of resolving family disputes.¹ Instead, the failure of the FCtA to achieve legitimacy during the past 30 years exposes flaws in the Finer model, which excluded capacity for child protection. Secondly, the vision of a combined legal and welfare approach to dispute resolution struggled for acceptance. Dissatisfaction expressed in Australia has led to successive attempts to de-legalise proceedings. Alternative dispute resolution has developed from 'alternative' mechanisms to explicit removal of decision making from the public arena of the court to extra-legal arrangements. The history of the Australian system is one of constant tension between the functions of dispute resolution and protection.

In retrospect, there was little that was 'unified' about the Finer 'family court' which may have ended one type of class division between users of the magistrates and county courts but perpetuated another. This division, between the child who needs protection and the child whose parents can come to reasoned settlement of their own relationship difficulties and keep the child safe, is exacerbated by a structural separation of public and private law in Australia. This reinforces a perception that child protection is a parochial issue, whereas divorce and separation belong to a higher, universal system of obligations and rights. Families in private law disputes have for 30 years attracted an enormous amount of public attention and intervention by policy makers, largely centred on the functions of the FCtA. In this way, the private interests of families have a public face. In contrast, state court proceedings, whereby parental rights can be transferred to a public body, receive little public attention. In Australia, 'private law' has a public face that 'public law' does not.

¹ Created by the Family Law Act 1975 (Cth) s 21(1)

Australian family law is rooted in 19th century English society but as will be seen, recent reforms were intended to be a bold move away from the common law.² Although arguments in the UK for abolishing the fault ground of divorce often cite this as a source of increased hostility,³ 30 years of no-fault divorce in Australia has not eliminated post-separation conflict, nor even demonstrably reduced it. Neither has the automatic right of fathers to parental responsibility, irrespective of marital status, stopped anguish about the lack of paternal involvement with children.⁴ The troubled history of the FCtA regulating no-fault divorce since 1976 gives no support to advocates of similar reform here. Indeed, with no possibility open to one partner to establish domestic abuse as a fact leading to the irretrievable breakdown of the marriage, her chances of redressing the power imbalance on separation and asserting herself in consequent legal proceedings are reduced. The no-fault philosophy became embedded as ‘the central tenet of all issues involved in family law’⁵, discouraging any acknowledgement by the court of the effects of violence on the child, because violence was ‘disqualified’ or ‘contextualised’ to make it irrelevant to property and children matters.⁶

In contrast, there is nothing approaching the high profile of care and adoption cases, where children are removed from their families, as seen in England and Wales. There is the occasional moral panic, for example emergency intervention by the federal government in 2007 following the Northern Territory child abuse scandal.⁷ There are fewer reported cases and, it seems, little media interest in state intervention, or lack of it, in comparison to the UK.⁸ Generally speaking, child protection proceedings do not feature in the public arena, and child protection systems may be less accountable than in the UK. It is only recently that a national perspective has been taken on child protection, with the government elected in 2007

² M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007)

³ Law Commission, *Family Law: The Ground for Divorce* (Law Com No. 192, 1990)

⁴ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (2003); P Parkinson, ‘Keeping in contact: the role of family relationship centres in Australia’ (2006) 18(2) *Child and Family Law Quarterly* 157

⁵ R Graycar, ‘The Relevance of Violence in Family Law Decision-making’ (1995) 9 *Australian Journal of Family Law* 58-70 at 66

⁶ R Kaspiew, *Violence in Contested Children’s Cases: An Empirical Exploration* (2005) 19 *Australian Journal of Family Law* 112

⁷ Northern Territory National Emergency Response Act 2007

⁸ For example, In 2008, in two cases where young children died in similar circumstances in Birmingham, England, and Brisbane, Australia, the British press reacted with assumptions about failings by social workers, whereas Australian press coverage was in terms of criminal liability of the parents and made no reference to welfare agencies : M Ivory, ‘Khyra and the blame game’ *Community Care* 29 May 2008; G Robinson, ‘Mourners farewell starved twins’ *Brisbane Times* 25 July 2008.

proposing a national framework, stating that ‘national leadership is required for this important policy area.’ At the same time it reaffirms that individual states remain responsible for individual case decisions.⁹

THE COURTS’ JURISDICTION REGARDING CHILDREN IN AUSTRALIAN FAMILY LAW

As the (then) Australian Family Court Chief Justice, Alastair Nicholson, and his Senior Legal Adviser, Margaret Harrison, wrote in 2000:

What amounts to ‘family law’ for particular purposes is dependent on our century-old Constitution, rather than on any popular understanding or acceptance of the term.¹⁰

This statement goes to the heart of the unique feature of the Australian family justice system, which not only inherited English legal traditions but has embedded a structural separation between ‘family law’ in the federal Family Court and child protection proceedings in state courts. This operational separation is premised on an obsolete distance between public and private law and is arguably no longer sustainable. Systems devised to serve a former stage in the evolution of the lifeworld have become ossified as existing for their own sake, and not modified to reflect modern norms.

Australian law derives its jurisdiction from an Anglo-Celtic/Christian-Judaeo societal model,¹¹ and it is only relatively recently that Australia emerged from the ‘cultural cringe’, whereby home-grown ideas were assumed to be inferior to ‘the intimidating mass of Anglo-Saxon culture’.¹² Australia did not experience the same extent of social upheaval as Europe in the second World War, nor face the ‘five giants’ that post-war British social policy sought to overcome. There is, for example, no universal free health service.¹³ Family support services are primarily provided on a fee-paying basis by third sector organisations. However, the strong cultural links of a substantially shared heritage between Australia and the ‘mother

⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Australia’s Children: safe and well: A national framework for protecting Australia’s children* (Commonwealth of Australia, Canberra Discussion paper, 2008) 13

¹⁰ Hon A Nicholson and M Harrison ‘Family Law and the Family Court of Australia: Experience of the First 25 Years’ (2000) *Melbourne University Law Review* 30

¹¹ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) Ch 1

¹² A Phillips, ‘The Cultural Cringe’, *Meanjin*, no. 4, 1950. Republished in J Lee (ed) *The Temperament of Generations: Fifty Years of Meanjin* (Melbourne University Press, Melbourne 1990) 102-5; and see P Knightley, *Australia: Biography of a Nation* (Vintage, London 2001) Ch 23.

¹³ Although the Federal Government is now controversially trying to introduce standardisation across the states.

country' have produced similarities in social policy.¹⁴ The population is predominantly of western European descent, and policy has followed other western-style democracies, following a pattern of withdrawal of state supported public service over recent decades. A comparison of key indicators of wealth, education and well-being shows Australia as similar to other western countries.¹⁵ The UK and Australia are now both classed as mid-ranking in the league of child poverty in first world countries.¹⁶ This chapter will show that post-war debates about functions of family courts in Australia mirror those in England and Wales. The postmodern crisis of legitimacy identified by Habermas in Europe applies to other western style countries such as the US and Australia, which have also undergone a loss of certainty about the state-citizen relationship, fragmentation and globalisation.¹⁷ Family justice systems in Australia are similarly de-stabilised by the evolution of family form since its family law and jurisdiction were systematised at the beginning of the 20th century.

Australia's Federal Constitution was agreed when its six original colonies formed a Commonwealth at the beginning of the 20th century.¹⁸ The Commonwealth obtained powers to regulate marriage, divorce and matrimonial causes, and related parental rights, and custody and guardianship of children.¹⁹ The states had co-existing powers which they all (apart from Western Australia²⁰) referred to the Commonwealth in 1975. Divorce law had already been unified across the states,²¹ but the jurisdiction remained vested in the individual states' Supreme Courts until 1976. (At the beginning of the 20th century, private rights were still normally regulated within states' jurisdiction, but a uniform approach was preferred in matters of establishing personal legal status. The prospect of an individual recognised as married in one state but unmarried in another was to be avoided.²²) Child protection and adoption, and some disputes between unmarried couples, remain in the states' jurisdiction.

¹⁴ P Knightley, *Australia: A Biography of a Nation* (Vintage, London 2001)

¹⁵ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) 10

¹⁶ UNICEF, *Child Poverty in Rich Countries 2005* (2006) The United Nations Children Fund

¹⁷ A Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173

¹⁸ The Commonwealth consists of six states: New South Wales; Victoria; Queensland; South Australia; Western Australia and Tasmania and two Territories: Australian Capital Territory and Northern Territory. References to state courts in this chapter include their equivalent in the Territories.

¹⁹ Section 51 (xxi) and (xxii) of the Australian Constitution of 1901

²⁰ Explained below

²¹ Matrimonial Causes Act 1959

²² HA Finlay RJ Bailey-Harris and MFA Otlowski, *Family Law in Australia* (5th edn, Butterworths, Sydney 1997) 43-45

Nicholson and Harrison explain the legacy from an era when neither ‘aberrant’ family forms based on *de facto*²³ unions nor state intervention in families to deal with violent behaviour could be sanctioned because the status of marriage transferred rights over property and children, together with a belief in family autonomy and non-interference from external supervision.²⁴ When the Constitution was written, the only role envisaged for legal regulation of the family was that of decisions on marital status. Consequently the Australian system, inherited from the certainties of a past age, struggles to cope with postmodern fragmented family forms.

There is a long-standing substantive difference: the abolition of fault-based divorce by the Family Law Act 1975 (FLA). Divorce law originating in the respective colonies’ enactments between 1867 and 1873 was modelled on the English Matrimonial Causes Act of 1857. Despite the procedural changes in the Matrimonial Causes Act 1959, the legal grounds for divorce remained complex and similar to the English law, until the FLA was passed by the short-lived progressive federal government of the early 1970s. This simultaneously introduced no-fault divorce (the ground is irretrievable breakdown of marriage proved by one year’s continuous separation) and established the FCtA.

Although direct reference to the Finer report has not been found in the Australian literature, it seems likely that this was an influence. The first Chief Justice of the FCtA, Elizabeth Evatt, worked as a research assistant for the Law Commission in England in the late 1960s to 1973. She was a member of a family well-known in Australian public life, which had for generations supported the Australian Labor Party.²⁵ According to Star, she was skilled in social science research, McGregor’s field. The incorporation of a family counselling service, appears to reflect the Finer ethos.

The FCtA has jurisdiction in all states except Western Australia. Its operations are decentralised into local registries. In accordance with the constitutional position, it originally dealt only with disputes relating to marriage, but eventually assumed jurisdiction over children of *de facto* couples from the states’ courts in the late 1980s.²⁶ As the number and

²³ The term *de facto* is used in Australia to describe unmarried co-habiting couples

²⁴ Hon A Nicholson and M Harrison ‘Family Law and the Family Court of Australia: Experience of the First 25 Years’ (2000) *Melbourne University Law Review* 30

²⁵ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 71-74

²⁶ Again with the exception of Western Australia

social acceptance of *de facto* families increased, the distinction between unmarried and married parents was removed and about half of applications to the FCtA now relate to *ex nuptial* children.²⁷

It was always envisaged that the FCtA would be part of a wider system of consultations and research. The FLA established the Family Law Council (FLC);²⁸ this was shortly followed by the Australian Institute for Family Studies (AIFS) in 1980, which commissions and produces research on social policy including child protection. The FLC reports that 80 per cent of its recommendations since 1976 were accepted by government.²⁹ AIFS recently produced a substantial report on the 2006 reforms.³⁰ The continuing importance of these bodies reflects a higher regard for the relationship between law and evidence-based policy than we find in the UK.

Nicholson and Harrison maintain the advantages of a specialist family court: family cases are a low priority in a generalist court, cannot be protected from resource problems, and the quality of judicial decision making is lower.³¹ They believe it is the inherent unpopularity of family law that makes the specialist court a target for criticism; accusations of gender bias by disaffected individuals; the use of discretionary powers of the court; and the disinclination of judges to specialise in family law. These issues were expounded throughout Star's earlier history of the Court.³² Judicial discretion has since been severely curtailed by successive legislative amendments, largely to placate the fathers' rights movement.³³

Unlike the Children Act 1989 provisions whereby an unmarried father has to be proactive to obtain parental responsibility, fathers in Australia have had greater legal rights to parenthood than those in England for some time.³⁴ An unmarried father starts with the same parental

²⁷ J Boland, 'Family Law: Changing law for a changing society' (2007) 81 *Australian Law Journal* 554-576 at 557

²⁸ FLA 1975 s 115(3)

²⁹ Family Law Council, *Annual Report 2006-07* (Commonwealth of Australia, 2007) 19

³⁰ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (AIFS, 2009).

³¹ Hon A Nicholson and M Harrison 'Family Law and the Family Court of Australia: Experience of the First 25 Years' (2000) *Melbourne University Law Review* 30

³² L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996)

³³ P Parkinson, *Decision-making about the Interests of the Child: The Impact of the Two Tiers* (2006) University of Sydney Legal Studies Research paper 06/29

³⁴ R Bailey Harris 'Variations on a Theme – Child Law Reform in Australia' (1997) 9(2) *Child and Family Law Quarterly* 149

rights as the mother, unless paternity is disproved.³⁵ Dewar has described the model of joint parenting envisaged by the FLA (as amended in 1995) as ‘co-operative’ in contrast with the English model as ‘independent’. This was linked to the FCtA retaining a more protective and interventionist role in settling parental disputes under the FLA than courts applying the Children 1989.³⁶ Although both Acts had been influenced by the fathers’ rights movement to introduce ‘automatic legal co-parenting after separation’, the reality was that most day-to-day caring of children was still undertaken by women.³⁷ These private arrangements rarely come into the public realm until parents separate. Laws based on notions of equality that did not exist in the intact family can raise expectations unrealistically to feed the remarkably high level of dissatisfaction expressed by men’s groups toward the FCtA, discussed below.

A founding judge of the FCtA wrote optimistically in 1980 that the 1975 Act was ‘modern, pragmatic and responsive to the mainstream of what Australia thinks about marriage and its failure.’³⁸ Unfortunately, its success is questionable, its remit having been continuously reviewed and amended in the last 30 years. The abolition of matrimonial fault has not dismissed pervading notions of blame, injustice and judgments about marital behaviour.³⁹ Most seriously, the risk of harm to children can be minimised.⁴⁰ The ongoing struggles of the FCtA may be symptomatic of problems with the legislation, but as an institution its credibility was undermined by the introduction of a Federal Magistrates Court in 1999.⁴¹ Far-reaching reforms have been brought in since 2006, previous attempts having been seen as failing to address public dissatisfaction. The operations of the FCtA were attacked in a well-publicised and lengthy essay as recently as 2005, just prior to the new reforms taking effect, and it remains to be seen whether this habitual criticism will cease and demands for constant scrutiny, debate and policy change ever be met.⁴²

³⁵ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 248-256

³⁶ J Dewar, ‘The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared—Twins or Distant Cousins?’ (1996) 10 *Australian Journal of Family Law* 18

³⁷ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 228-229

³⁸ Hon Justice Watson, ‘The Structure of the Family Court of Australia and Court Counselling – the Parramatta Experience’ (1980) 18(1) *Conciliation Courts Review* 53

³⁹ J Hirst, ‘The Kangaroo Court’ (2005)17 *Quarterly Essay* 1-85

⁴⁰ Discussed below.

⁴¹ Discussed below.

⁴² J Hirst, ‘The Kangaroo Court’ (2005)17 *Quarterly Essay* 1-85

SEPARATION BETWEEN FEDERAL AND STATE COURTS: PRIVATE AND PUBLIC LAW

In contrast, children at risk of abuse and in need of state protection (and their parents) are almost invisible. It could be argued that the Australian equivalent of care proceedings is not even ‘family law’. Comprehensive family law textbooks mention the state courts briefly, only to illustrate the fragmentation of the system.⁴³ In 2000, Australian family law courses were said to deal ‘merely with the law of marriage, divorce and ... ‘ancillary’ matters (that is, property and children)’.⁴⁴ A substantial contribution by AIFS and others has since expanded family law studies, concerned mainly with power-relations between adults, family violence and recognising new family forms, rather than the law operating in the state courts.

A utilitarian argument could be made that prioritising private law engages with the interests of more children, by enabling far wider support of, and investigation into, families in dispute, in comparison to the relatively low number of children subject to state care. Could intervention at the stage of family breakdown prevent children needing the attention of child protection agencies? More public interest in early intervention and family support in ‘private’ family crises can be advocated if we conceptualise relationship breakdown as a life event from which recovery of balance can be restored.⁴⁵ The problem is that the FCtA jurisdiction excludes children who are at a risk, but never come before a court in a private law dispute because they are not subject to competing interests of adult family members. These children are hidden from public view. The interests of families in private disputes have a higher profile than those whose cases come before the state courts. Furthermore, it appears that state child protection agencies are less pro-active than those in the UK.

A further distinguishing characteristic of the Australian family court system is its response to the needs of marginalised indigenous people.⁴⁶ This is a peculiarly Australian social problem of discrimination, although related to wider problems of diversity, pluralism and

⁴³ For example, B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (2008, OUP, Melbourne)

⁴⁴ R Graycar, ‘Law Reform by Frozen Chook: Family Law Reform for the New Millennium?’ (2000) 24 *Melbourne University Law Review* 737-755

⁴⁵ M Murch, ‘Cultural Change and the Family Justice System’ in G Douglas and N Lowe (eds), *The Continuing Evolution of Family Law* (Family Law, Bristol 2009) 131-132

⁴⁶ This term refers to aboriginal peoples of Australia and the Torres Straits Islands.

fragmentation.⁴⁷ Children in these groups are disproportionately represented in the state courts. There is a general legislative requirement that the court consider the child's cultural background in determining their best interests;⁴⁸ this is supplemented by a right for children with indigenous heritage to maintain a connection with their culture, and be supported in developing a positive appreciation of it.⁴⁹

In the examination below of the Magellan Project, it will be seen that the FCtA has improved powers regarding physical or sexual abuse of children, but most child protection concerns arise because of neglect. This brings us back to the question as to the extent that a public interest in the private lives of children is necessary to protect their welfare and enforce their rights. At federal level, the FCtA continues to struggle to prioritise the position of children in the context of adult disputes.⁵⁰

Similarly to England and Wales, the family courts are now separated from the majority of child support disputes, following the establishment of an autonomous administration system by the Australian child support agency.⁵¹ Advice on parenting and financial disputes is better integrated than here; for example the Family Relationship Centres have direct telephone lines through to the agency.⁵²

Although federal courts do not have jurisdiction in public law, it has been recognised since 1992 that amendments to the FLA in 1983⁵³ confirmed an inherent welfare jurisdiction similar to that of the Family Division of the High Court in England and Wales, for example in giving consent to medical treatment.⁵⁴ An attempt in 2003 to extend this *parens patriae* jurisdiction to the rights of children imprisoned in immigration detention centres brought the Chief Justice into conflict with Government policy, and was reversed by the High Court.⁵⁵ It

⁴⁷ A Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173; B Fehlberg and J Behrens *Australian Family Law: the Contemporary Context* (2008, OUP, Melbourne) 2-6

⁴⁸ s 60CC (3)(g) Family Law Act 1975 (as amended)

⁴⁹ s 60 B (3)(a) Family Law Act 1975 (as amended)

⁵⁰ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (AIFS, Melbourne 2009) 365

⁵¹ The Child Support Agency was established by the Child Support (Assessment) Act 1989

⁵² Discussed below and in Chapter Seven

⁵³ Now under s 67ZC Family Law Act 1975

⁵⁴ *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 175 CLR 218; *Re Alex (Hormonal treatment for gender identity dysphoria)* (2004) 31 Fam LR 503

⁵⁵ *B and B v Minster for Immigration, Multiculturalism and Indigenous Affairs* (2003) 30 Fam LR 181

has been argued that the *parens patriae* jurisdiction allows essential representation of the interests of young people in disputes with their parents, the state or the medical profession⁵⁶ but in practice it applies only to the latter.

FURTHER FRAGMENTATION WITH THE INTRODUCTION OF THE FEDERAL MAGISTRATES COURT

In the late 1990s the FCtA asked for a number of specialist magistrates to be available to assist with its workload.⁵⁷ Instead, a separate Federal Magistrates Court (FMC) was established, which has an overlapping jurisdiction with the two federal courts (civil and family) although most of its work has always been family proceedings.⁵⁸ The FMC has jurisdiction in divorce, smaller property disputes and parenting orders;⁵⁹ appeals go to the FCtA. The federal jurisdiction is shared between the two courts according to the complexity of the case and, possibly, the parties' ability to pay a higher level of costs in the FCtA.⁶⁰ The FMC has been found to be dealing with a substantial proportion of cases which featured serious violence issues.⁶¹

By 2008 the FMC was dealing with about 80 per cent of family applications.⁶² It shares premises and dispute resolution services with the registries but is separately staffed. Quite why a second layer of judiciary, dealing with lesser matters more expeditiously, required an entirely new layer of court, with a separate administrative structure, is unclear. It has been suggested that the decision was politically motivated, FCtA judges were unpopular with Parliament, and the Attorney General had differences of opinion with the Chief Justice at the time on thorny policy issues, as mentioned above.⁶³ The new court was intended to handle

⁵⁶ A Nicholson, 'Sixteen Years of Family Law' (2004) 18 *Australian Journal of Family Law* 131

⁵⁷ A Nicholson, 'Sixteen Years of Family Law' (2004) 18 *Australian Journal of Family Law* 131

⁵⁸ The court was established by the Federal Magistrates Act 1999 and its jurisdiction governed by the Federal Magistrates (Consequential Amendments) Act 1999

⁵⁹ Parenting orders are orders made about the exercise of parental responsibility, mainly about time to be spent with each parent, under the FLA 1975 s 64-65.

⁶⁰ Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia* (Commonwealth of Australia, Canberra, 2000) 20

⁶¹ B Smyth, L Moloney, R Weston, N Richardson, L Qu and M Gray, 'Allegations of family violence and child abuse in children's proceedings: A pre-reform empirical snapshot' (2007) 21 *Australian Journal of Family Law* 252

⁶² Federal Magistrates Court website <<http://www.fmc.gov.au/html/introduction.html>> Last accessed 24 July 2011.

⁶³ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 13; 74-80

more routine cases that did not require the full panoply of the FCtA, which could ‘focus on more complex matters appropriate to a superior court of record’.⁶⁴ The closeness of the functions of judges and magistrates is exemplified by the fact that the current Chief Justice of the FCtA, Diana Bryant, was previously the first Chief Federal Magistrate in the FMC from 2000-2004. The decision to set up the FMC was not without its critics. In 2002 Harrison claimed that the FMC’s separate administrative structure had increased overall federal expenditure.⁶⁵ Nicholson described ‘numerous opportunities for duplication, confusion and wastage’ despite the fact that personnel in each court attempted to co-operate.⁶⁶ Management and administration began to be centralised in 2008 and in late 2009 the government announced the merger of the FMC into the two Federal Courts.⁶⁷ This has not yet been achieved.

The FCtA and FMC cover all of Australia except the state of Western Australia, which instead established its own Family Court of Western Australia (FCWA). Although the FLA 1975 s 41 provided for family courts to be set up by all states, only this state used the provision, possibly because others were reluctant to take on long-term financial responsibility for a new layer of courts.⁶⁸ Historically, Western Australia has tended to develop separate systems because of the geographic distance from the population centres in other states. Cases in the FCWA are decided under the FLA 1975, and it therefore has a parallel jurisdiction to the FCtA.

CHILDREN’S COURTS OPERATING IN AUSTRALIAN STATES AND TERRITORIES

When the states referred their powers to regulate family cases to the federal government, they specifically excluded children’s welfare, retaining child protection functions at state level.⁶⁹ These split responsibilities have led the Australian Law Reform Commission to comment that state and federal intervention to protect family members:

⁶⁴ A Filippello, *Federal Magistrates Service: Implications for the Family Court* (Family Court of Australia, 2000) para 8

⁶⁵ M Harrison, ‘Australia’s Family Law Act: The First Twenty-Five Years’ (2002) 16 *International Journal of Law, Policy and the Family* 1-21 at 18

⁶⁶ A Nicholson, ‘Sixteen Years of Family Law’ (2004) 18 *Australian Journal of Family Law* 131

⁶⁷ Hon J Fogarty, ‘Why should the Federal Magistrates Court be abolished?’ (2009) 23(2) *Australian Journal of Family Law* 79

⁶⁸ J Wade, ‘The Family Court of Australia and Informality of Court Procedure’ (1978) 27 *International and Comparative Law Quarterly* 820-848

⁶⁹ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 33-34

...is beset by inconsistencies in policy, duplication of services and gaps in services. Agencies that are so disposed are able to play a waiting game ‘standing off’ and hoping another agency will assume responsibility for a particular child’s needs.⁷⁰

A FLC report following public consultation in 2000 conceded that the jurisdictional overlap resulted in ‘duplication, gaps, ambiguity, unintended consequences or confusion in responsibility’ and that ‘classification of matters into private and public law categories may be somewhat meaningless’ because of the frequency of violence in family disputes and parental disputes in child protection. Case studies showed that the welfare of some children was being compromised.⁷¹

FAMILY VIOLENCE AND CHILD ABUSE

This split jurisdiction causes trouble in cases where a protection order is made by a state-run magistrates court and a parenting order is made by the FCtA. An order for contact made by the FCtA takes priority over a protective order in state proceedings. The situation can arise where a parent seeks protection from violence by applying to the state court, while the violent parent applies at federal level for contact. Research studies have found widespread confusion and risk because these systems are not interdependent.⁷²

Provisions under FLA 1975 s 68 that allow orders at state and federal level to be made consistent are not routinely used. Studies have shown that parents, police and lawyers are confused by the overlap and misunderstand the provisions. Negotiating and implementing contact agreements while negotiating and enforcing protection orders is particularly problematic.⁷³

⁷⁰ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84, 1997) para 3.34

⁷¹ Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia* (Commonwealth of Australia, Canberra 2000) 7-8; M Harrison, *Finding a better way? A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra 2007) 1

⁷² Family Law Council *The Best Interests of the Child? The Interaction of Public and Private Law in Australia* (Commonwealth of Australia, Canberra 2000) ; F Kelly and B Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection’ (2002) *International Journal of Law Policy and the Family* 38

⁷³ M Kaye, J Stubbs and J Tolmie, *Domestic Violence and Child Contact Arrangements* (University of Sydney Legal Research Series 08/18, 2008)

Similar problems arise with cases of direct child abuse, as spelt out in a study by Kelly and Fehlberg of child protection cases that had been dealt with both in the FCtA and in either the Victorian or ACT state courts. Their most significant finding was that more than two-thirds of the child protection applications to the state courts were settled by a viable carer being identified who was willing to apply to the FCtA, so that the application to a state court led to a FCtA application. At this point the state agency would often withdraw. Unfortunately, these 'private' applications might not proceed, or might fail, but by that stage the protection authority had dropped out of the picture, and matters remained unresolved, with local files closed, and the child remaining in or being returned to the original situation.

Kelly and Fehlberg identified a number of reasons for this movement of cases from the state courts to the FCtA. The nature and duration of orders made at state level vary, but FCtA orders were seen by agencies as quicker to obtain and more durable. Once a viable carer has been found, the child is no longer deemed to be at risk of significant harm, and protection agencies rarely play a formal role in the FCtA proceedings. This adds to the workload of FCtA, which has to investigate child protection concerns without the evidence that would be available to a state court. Another disadvantage identified for the potential carer was their having to bear the costs of the court case. Their findings therefore support the perceptions of dodging responsibility expressed above.

Communication between the two courts was found to be poor, with examples of inter-parent disputes at the FCtA level running in parallel with protection agencies applying to state courts. The inter-action between the two courts can also originate at FCtA level, when it notifies a state authority of a child protection issue arising in a case, but commonly no action was taken in response. The protection authorities more often themselves referred cases to the FCtA, which was then unable to rely on the support of the state department in resolving issues that were no longer being heard by the children's court.⁷⁴ In their sample, children's court orders often included a direction to the approved carer instructing them to seek a FCtA order, although there was not necessarily any follow-through by any agency to ensure this

⁷⁴ F Kelly and B Fehlberg 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) *International Journal of Law Policy and the Family* 3 at 59

happened. Although their data is now more than ten years old, it appears that this movement of child protection cases from a public to private responsibility continues.⁷⁵

Kelly and Fehlberg's findings pre-date the dilemma now evident in public authorities in England and Wales promoting kinship care, without the level of financial support a child would receive in local authority foster care. The emphasis in the *Care Matters* agenda to place children with family or friends and avoid care applications⁷⁶ is a private solution to a public problem, but as these cases in Australia demonstrate, they are not necessarily durable solutions. In both Australia and in England and Wales, where the public duty to protect children means they have to be removed from home, this duty is increasingly being privatised into a search for placement where the State can withdraw not only its resources but also its professional support.⁷⁷

The FLC consultation on the split jurisdiction originally set out to examine overseas jurisdictions, but it was decided that this would be 'unlikely to have relevance to the Australian experience'.⁷⁸ This may be because of the thorny constitutional problems, rather than a disinclination to look abroad, because comparative methodology was employed in Harrison's 2007 report on less adversarial trials, where particular attention was paid to the German inquisitorial model.⁷⁹

The 2002 final report made a number of recommendations to address the danger to children who were not being protected because of the separation of Commonwealth and state responsibilities. It called for a new federal child protection service that would investigate matters referred by the FCtA in cases where allegations of serious child abuse were likely to be contested in proceedings and there was unlikely to be independent evidence available to the court.⁸⁰ Secondly, the FLC recommended changes in the law to allow an early decision to

⁷⁵ D Higgins and R Kaspiew, 'Mind the Gap...Protecting children in family law cases' (2008) 22 *Australian Journal of Family Law* 235

⁷⁶ Department for Children Schools and Families, *Children Act 1989 Guidance Volume 1 Court Orders* (DCSF, 2008) para 3.24

⁷⁷ Discussed in Chapter Seven

⁷⁸ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) 6 n 2

⁷⁹ Discussed below.

⁸⁰ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) 11

be taken in such cases as to which court would hear the entire case.⁸¹ Neither of these were implemented and they are now being re-visited by the Australian Law Reform Commission.⁸²

WHY DID THE FAMILY COURT OF AUSTRALIA FAIL TO GAIN LEGITIMACY?

The introduction of no-fault divorce brought a vast increase in the volume of petitions (more than doubling in the first year), unmatched by resources, a situation exacerbated by political arguments.⁸³ The progressive government which introduced the FLA 1975 was in office only between December 1972 and November 1975 and the new Court was therefore actually established under the succeeding conservative government. Senior figures in the new government had argued strongly against the Act and in a new era of financial stringency, allocating the financial resources originally earmarked for the FCtA was out of the question.⁸⁴

Administrative confusion and delay were utilised to support ideological criticism of the Court and no-fault divorce by pressure groups representing both men's and women's groups and religious fundamentalists.⁸⁵ Typically, the Court's supporters complain that funding restrictions have caused delays throughout its history,⁸⁶ but Star attributes the failure to the over-idealistic vision promoted by the promised 'helping court' which led to unrealistic expectations. No system can entirely neutralise the experience of family separation, and intervention cannot be timed to coincide with a stage at which parties are rationally planning their future arrangements. In particular, the sudden removal of fault left the new court unsure as to its legal functions. Now there was no innocent party, it was not clear whom the court was meant to be 'helping.'⁸⁷

Thus, we can see a classic example of the gap between formulation and implementation of social policy.⁸⁸ The initial lack of financial and ideological commitment to the ideals of the FLA led to both professional and public resistance to change; the new Court was undermined from its inception and has never fully recovered from its poor image. The policies may have

⁸¹ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) 14

⁸² Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report No.114, Commonwealth of Australia, Sydney 2010)

⁸³ J Boland 'Family Law: Changing law for a changing society' (2007) 81 *Australian Law Journal* 554-576

⁸⁴ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 101

⁸⁵ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 112-115

⁸⁶ D Truex, 'An Australian Perspective' in National Council for Family Proceedings, *Finer – 25 Years On? How close are we to establishing a Family Court* (NCFP, Bristol 1999) 6-11

⁸⁷ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 97-100

⁸⁸ As discussed in Chapter Four.

emanated from rational public discourse, but if the complexities and contradictions of people's life experience of marriage and divorce are not served by systems that can adapt to that lived experience, the solutions imposed by the State will not be accepted as legitimate. When debate is dominated by the loudest voices,⁸⁹ the openness (in Habermas' terms) of the forum is in doubt.

The 'helping court' was not a vision shared by lawyers or their clients, who retained an attachment to adversarial law.⁹⁰ The unrealised utopian expectations of the FCtA were exploited by religious groups and those who complained of gender bias. Journalists were able to report on estranged fathers with unfair child support obligations, chaotic scenes in unsuitable premises staffed by harassed and overworked personnel, and a barrage of criticism from lawyers resistant to change.⁹¹ Most complaints in the first years were about financial relief on divorce. Delay and pressure on litigants was endemic.⁹² At this stage, cases involving children were not singled out for criticism, and about two thirds of custody arrangements were agreed early in the proceedings, with half of the rest being settled by a counsellor. Of those cases that did get to court, in about half the custody of the child was awarded to the father.⁹³

Only five judges were initially appointed to the FCtA, and their tenure was uncertain. Their salaries remained at a lower scale than their counterparts in the Federal Court for about 20 years; having a consequent dampening effect on all salaries in the FCtA. A perception that the FCtA held less status than other courts was reinforced by its being headed by a woman as the first Chief Justice.⁹⁴ The scarcity of judicial time led to enormous delays, but the judges (although dedicated to the reforms) maintained traditionally adversarial procedures and were reluctant to devolve matters to the counsellors.⁹⁵ When one considers the pressures the judiciary were under to maintain the reputation of the court, it is not surprising they clung to a level of formality to give the proceedings legitimacy.

⁸⁹ See, for example, R Graycar 'Law reform by frozen chook: family law reform for the new millennium' (2000) 24 *Melbourne University Law Review* 737

⁹⁰ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 118

⁹¹ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 112-118

⁹² J Wade, 'The Family Court of Australia and Informality of Court Procedure' (1978) 27 *International and Comparative Law Quarterly* 820-848 at 834-5

⁹³ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 128

⁹⁴ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 104-106

⁹⁵ The counsellors' functions are discussed below.

In one article published early in the Court's history, an apparent lack of precision in applying the substantive law enshrined in the FLA was attributed to: lack of court time and facilities; pressure of public opinion, the vagaries of measuring human welfare; the lack of case law and the imprecision of some terms in the Act itself.⁹⁶ As Ingleby wrote some years later, the FCtA had 'something of an identity crisis', stemming in no small part from its ostensible 'informality'.⁹⁷

THE INFORMAL COURT – IDENTITY CRISIS

The FLA originally provided that matters were to be held in closed court, where lawyers and judges would not wear traditional court gowns and wigs, and would proceed without undue formality.⁹⁸

Writing in the very early days of the FCtA, Wade pointed out that court procedures cannot be 'informal' to the extent of being formless, but that the requirement of s 97(3) that matters proceed 'without undue formality' raised the question of what was 'undue'. What is really envisaged when people aspire to an informal court is not a complete loss of form, but a change in attitudes and values of the participants that transforms the court into a more accessible and sympathetic venue. Such perceptions of the extent of informality will vary amongst individuals.⁹⁹ This desire to change the court experience into one grounded in common-sense, rather than dominated by excessive legalism and exclusive terminology, reflects a loss of faith in a system which has become disconnected from the lifeworld of family, upholding rules of procedure for their own sake, instead of recognising them as a flexible mechanism to serve value-based law.¹⁰⁰

The non-robing provision was intended to make the court less intimidating,¹⁰¹ but it clearly irked other judges. In 1976, the High Court took an opportunity to express displeasure with

⁹⁶ J Wade, 'The Family Court of Australia and Informality of Court Procedure' (1978) 27 *International and Comparative Law Quarterly* 820-848

⁹⁷ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 99

⁹⁸ Family Law Act 1975 s 97

⁹⁹ J Wade, 'The Family Court of Australia and Informality of Court Procedure' (1978) 27 *International and Comparative Law Quarterly* 820-848

¹⁰⁰ J Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (MIT Press, Cambridge, Mass. 1999) 192; 275

¹⁰¹ Hon Justice Watson, 'The Structure of the Family Court of Australia and Court Counselling – the Parramatta Experience' (1980) 18(1) *Conciliation Courts Review* 53

the informality of the closed court, citing *Scott*¹⁰² and emphasising the necessity of open justice to prevent abuse and maintain public confidence in the judicial system. In particular, the way in which court formalities could be publicly observed was essential to the character of the court, to distinguish its processes from those of administrative officials: ‘To require a court invariably to sit in closed court is to alter the nature of the court.’¹⁰³ This illustrates that, from the outset, the concept of the informal, shop front, helping court was not universally accepted as a legitimate means of access to justice.

Furthermore, s 121, as originally enacted in 1975, prohibited publication of anything related to FCtA proceedings. A Joint Select Committee report published in 1980 concluded that a lack of access prevented scrutiny of the Court’s work.¹⁰⁴ Sections 97 and 121 were duly amended in 1983. Under s 97, proceedings are held in open court, with wide discretionary powers for the judge to exclude individuals, or restrict attendance to the parties only. The proscription against robing was removed in 1988, and judges and lawyers all now wear formal court robes.¹⁰⁵ What the judge wears continues to be highly symbolic in discussions on reform.¹⁰⁶

In the 1970s and 80s, media coverage of the FCtA had been ‘overwhelmingly negative’, partly because newspapers had regularly reported salacious details of divorce proceedings before the 1975 Act, and the imposition of a ban was resented.¹⁰⁷ As will be seen in Chapter Six, the legislative objectives of privacy are understandable, but in this context it led to complaints about lack of scrutiny of decision making.¹⁰⁸ Unfortunately the result was that the media could only report adversely on the externally unprepossessing premises, with anecdote from aggrieved parties and lawyers about what was happening inside.

¹⁰² *Scott v Scott* [1913] AC 417, discussed in Chapter Six

¹⁰³ *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 495; Gibbs J at 520

¹⁰⁴ Joint Select Committee on the Family Law Act, *Family Law in Australia Volume 1* (1980) Recommendation 59

¹⁰⁵ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 187

¹⁰⁶ P Fogarty, ‘Unacceptable risk – a return to the basics’ (2006) 20 *Australian Journal of Family Law* 249

¹⁰⁷ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 134-136;

P Nygh ‘Publicity and the Family Court’ (1998) 12 *Australian Journal of Family Law* 1

¹⁰⁸ J Wade, ‘The Family Court of Australia and Informality of Court Procedure’ (1978) 27 *International and Comparative Law Quarterly* 820-848

Following the crisis of public anger and the series of violent attacks on courts and judges, the premises were refurbished in the late 1980s.¹⁰⁹ The original plan had been for the registries to be established in accessible venues such as shopping centres, but the violence (which included a bombing incident that injured a judge and killed his wife) led to stringent security precautions being built in.¹¹⁰

Media discontent about reporting restrictions remained until an ‘exhaustive’ report published in 1997 concluded that more openness would further the administration of justice by the FCtA, but an absolute ban on identifying parties in matters relating to children should remain.¹¹¹ Section 121 was duly amended.¹¹²

Ingleby encapsulated the dilemma by describing the Court as suffering from an identity crisis in trying to establish itself as a specialist jurisdiction with features of protecting children’s welfare, informality and the concept of the ‘helping’ court.¹¹³ He asked whether the FCtA was a family organisation with the trappings of a court, rather than a court with specialist jurisdiction. This goes to the heart of the legitimacy of any court in the family justice system – is it a welfare or a legal service? For Ingleby however, the identity problem was highlighted by the closed court debate, and the potential benefits of demystification.¹¹⁴

Section 97(3) remains: that cases should proceed without undue formality, nor be protracted. One of the first FctA judges, Justice Watson, referred to its proceedings as being ‘not strictly adversarial but more in the nature of an inquisition followed by an arbitration’ but was chastised by the High Court as not being entitled to dispense ‘palm tree justice’.¹¹⁵ Nevertheless, Watson continued to refer to proceedings as inquisitorial, and *R v Watson* was later distinguished as applying only to property matters, when it was acknowledged that in cases relating to children the overriding principle of children’s best interests applied to both

¹⁰⁹ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 148

¹¹⁰ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 142-147; B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (Oxford University Press, Melbourne 2008) 58

¹¹¹ Hon IWF McCall, *Publicity in Family Law Cases: Report to the Attorney-General for the Commonwealth* (AGPS, Canberra 1997) cited in P Nygh, ‘Publicity and the Family Court’ (1998) 12 *Australian Journal of Family Law* 1

¹¹² As discussed in Chapter Six

¹¹³ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 97

¹¹⁴ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 99

¹¹⁵ *R v Watson ex p Armstrong* (1976) 134 CLR 248

procedural and substantive issues, and that such proceedings were not ‘strictly adversarial’.¹¹⁶ Harrison concludes that the FCtA has gradually emphasised the ‘less adversarial’ nature of children matters, while not entirely dispensing with traditional process.¹¹⁷ The ‘adversary system’ was a label used by Wade 30 years ago and repeated by Harrison, as meaning one where the judge plays a minimal part, and is under a duty to make a decision on the evidence before him or her, not to discover the truth.¹¹⁸ Wade suggested that ‘a lingering suspicion that lawyers have a vested interest in words and disputes’ might lead to the conclusion that they should be excluded altogether.¹¹⁹ Such a suspicion has lingered on, and influenced the development of the Less Adversarial Trial model.

THE FAMILY LAW REFORM ACT 1995

By the 1990s, parenting disputes were attracting more adverse attention than property cases, leading to the Family Law Reform Act 1995 introducing more directive shared parenting principles in the FLA. It has since been claimed that the 1995 Act was not ‘reform’, in that it did not respond to any identified legal problem, but only to relentless propaganda by fathers claiming bias against men by the FCtA.¹²⁰

Despite the promotion of ADR, it seems that publicity given to the new law led to an increase in litigation, rather than relieving non-resident parents’ distress, as Parliament had intended. The number of contact applications nearly doubled between 1994 and 2000.¹²¹ Rhoades’ view in 2000 was that the 1995 Act encouraged increased litigation by fathers who expected a 50-50 shared parenting order, exacerbated by weak provision for primary dispute resolution.¹²² Despite re-branding to ‘primary’ dispute resolution, ADR was still not the first

¹¹⁶ *Re P* (1993) FLC 92-376.; *D v Y* (1995) FLC 92-581

¹¹⁷ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 16

¹¹⁸ J Wade, ‘The Family Court of Australia and Informality of Court Procedure’ (1978) 27 *International and Comparative Law Quarterly* 820-848 at 839-840

¹¹⁹ J Wade, ‘The Family Court of Australia and Informality of Court Procedure’ (1978) 27 *International and Comparative Law Quarterly* 820-848 at 829

¹²⁰ R Graycar ‘Law Reform by Frozen Chook: Family Law Reform for the New Millennium’ 24 *Melbourne University Law Review* 737-755; H Rhoades (2000) ‘Child Law Reforms in Australia – a Shifting Landscape’ 12(2) *Child and Family Law Quarterly* 117

¹²¹ P Parkinson and B Smyth, ‘Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia’ (2004) 16(3) *Child and Family Law Quarterly* 289

¹²² H Rhoades, ‘Child Law Reforms in Australia – A Shifting Landscape’ (2000) 12(2) *Child and Family Law Quarterly* 117

port of call.¹²³ She commented that court orders were more prevalent in Australia than England and Wales because of the ‘settlement culture’ engendered by s 1(5) Children Act 1989. At that time, litigation was still the preferred method of resolution in Australia, only partly countered by reductions in legal aid eligibility.¹²⁴

Despite the FCtA being ‘opened up’ in 1983, the promotion of primary dispute resolution, and the ‘pro-contact’ paradigm introduced in 1995, the FCtA remained unpopular. Public dissatisfaction was taken up by policy-makers concerned about the decline in father-child relationships to lay the ground for yet more change, in both ADR and adjudication, introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006, following a parliamentary enquiry.

‘EVERY PICTURE TELLS A STORY’: THE PARLIAMENTARY ENQUIRY 2003

Regina Graycar explains how anecdotes repeated in the Australian media have influenced policy change, possibly more than research findings or official government statistical data have. She attributes this to the gendered nature of the discourses that characterise federal family law, retaining the Constitutional founding fathers’ conception of family – ‘anglocentric, nuclear, male-focused and heteronormative’.¹²⁵ Her observations are pertinent to the background to the 2006 Act, prefaced by claims by fathers’ pressure groups to have got the Prime Minister on their side when he identified a ‘hot button issue in the electorate’, announcing that the government was ‘looking to alter that [custody awarded to one parent] so the presumption is that it will be a shared arrangement...’.¹²⁶

Disappointment that the 1995 Act had failed to deliver ‘equal parenting’ was followed by a large-scale Parliamentary enquiry, *Every Picture Tells a Story*.¹²⁷ Studies indicated that about 30 per cent of children were still losing contact with their fathers.¹²⁸ The government was therefore not swayed entirely by unsubstantiated opinion, although Nicholson believes that

¹²³ Discussed in Chapter Seven.

¹²⁴ H Rhoades, ‘Child Law Reforms in Australia – A Shifting Landscape’ (2000) 12(2) *Child and Family Law Quarterly* 117

¹²⁵ R Graycar, ‘Law reform by frozen chook: family law reform for the new millennium’ (2000) 24 *Melbourne University Law Review* 737

¹²⁶ M Mottram, ‘Why Howard suddenly started to talk about custody battles’ *The Age* June 21 2003

¹²⁷ House of Representatives Standing Committee on Family and Community Affairs: *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (Parliament of the Commonwealth of Australia, Canberra 2003)

¹²⁸ D de Vaus, *Diversity and Change in Australian Families: Statistical profiles* (AIFS, Melbourne 2004)

complaints directed at the FCtA were by small groups of ‘disaffected men’ who had been given far more political attention than they warranted, and who could claim credit for parliamentary enquires that raised more questions than answers.¹²⁹

Parkinson and Smyth however found that there was a significant level of genuine dissatisfaction amongst mothers wanting more father-child contact, using household survey data that was not confined to pressure groups.¹³⁰ They attempt to analyse the paradox in fathers and mothers both complaining of too little father-child contact and suggest that professionals may try to fit all families into ‘standard packages.’¹³¹ They suggest that making ‘final’ orders is anachronistic; harking back to a time when custody was won by one party with the other having to accept ‘reasonable access’. This recalls Davis’s description of the main function of family court welfare officers in England being to mollify the ‘classical loser’.¹³² These findings support the drive to rid family dispute resolution of its adversarial elements - the winner-loser triad discussed in Chapter One.

The 2003 enquiry accepted the public perception of courts being too adversarial, pathologising parents, creating delay and expense.¹³³ Strenuous arguments for a presumption of equal parenting by men’s groups assigned blame for weakness in the 1995 changes to gender bias in the legal profession and the judiciary. Rhoades describes how the Committee ‘played to the gallery’ by endorsing views that equal parenting was a social reality rather than aspirational, and that the FCtA was expensive and divisive. She was therefore somewhat surprised by the compromise reached in the final report, rejecting a one-size-fits-all approach while trying to address both men’s calls for equality and women’s for safety.¹³⁴ Instead of a presumption of 50-50 time spent with each parent, the report recommended equal shared

¹²⁹ A Nicholson, ‘Sixteen Years of Family Law’ (2004) 18 *Australian Journal of Family Law* 131

¹³⁰ P Parkinson and B Smyth, ‘Satisfaction and dissatisfaction with father-child contact arrangements in Australia’ (2004) 16 *Child and Family Law Quarterly* 289 at 301

¹³¹ P Parkinson and B Smyth, ‘Satisfaction and dissatisfaction with father-child contact arrangements in Australia’ (2004) 16 *Child and Family Law Quarterly* 289 at 303

¹³² G Davis, ‘The Halls of Justice and Justice in the Halls’ in R Dingwall and J Eekelaar, *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 104

¹³³ R Hunter, ‘Close Encounters of a Judicial Kind: Hearing children’s “voices” in family proceedings’ (2007) 29 *Child and Family Law Quarterly* 203

¹³⁴ H Rhoades and S B Boyd, ‘Reforming Custody Laws’ (2004) 18 *International Journal of Law Policy and the Family* 119

parental responsibility.¹³⁵ This was implemented by the Family Law Amendment (Shared Parental Responsibility) Act 2006.

Whether this drive toward legal ‘shared parenting’ will lead to a cultural change in disrupting traditional gendered patterns of care, remains to be seen.¹³⁶ A statistical review in 2004 found that mothers spent more time caring for children than fathers, even when both were working full-time; the average time for mothers in couples being double that of fathers.¹³⁷

The enquiry heard 166 witnesses in public hearings and received over 1,700 submissions. Although its remit was to investigate equal parenting, the Committee took on the entire family law system, and paid more attention to personal complaints about the adversarial system, than to presenters of empirical research. Its primary concern was responding to the perceived need for fathers to continue a post-separation relationship with their children¹³⁸ The inquiry concurred with public perceptions that judges encouraged adversarialism and allowed courts to take too long, in contrast to ‘good’ dispute resolution practitioners.¹³⁹

Radically, the Committee hoped to remove judges almost altogether, concluding in emphatic terms:

...only a new non-adversarial administrative tribunal specifically established for determining disputes about future parenting arrangements will bring about any real change to the current domination of lawyers and courts in family disputes.¹⁴⁰

The report consequently recommended a new Families Tribunal, that would use a multi-disciplinary panel of lawyers, mediators and child psychologists to make binding decisions in family cases. Parties would have no right to legal representation, expert witnesses, or

¹³⁵ House of Representatives Standing Committee on Family and Community Affairs: *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (Parliament of the Commonwealth of Australia, Canberra 2003)

¹³⁶ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 235-8; 321-5

¹³⁷ D de Vaus, *Diversity and Change in Australian Families: Statistical profiles* (AIFS, Melbourne 2004)

¹³⁸ H Rhoades and S B Boyd ‘Reforming Custody Laws’ (2004) 18 *International Journal of Law Policy and the Family* 119

¹³⁹ R Hunter ‘Close encounters of a judicial kind: “hearing” children’s “voices” in family law proceedings’ (2007) 19(3) *Child and Family Law Quarterly* 283

¹⁴⁰ House of Representatives Standing Committee on Family and Community Affairs: *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (Parliament of the Commonwealth of Australia, Canberra 2003) 66

interpreters, who could be called solely at the discretion of the Tribunal.¹⁴¹ As Wade predicted thirty years ago, the lingering suspicion of lawyers had finally manifested itself in plans for their removal.¹⁴²

It is not entirely clear why the government rejected the Committee's recommendation for a new tribunal; the official response merely stating that the purposes of reform would be better served by community-based advice centres.¹⁴³ Possibly it would be unconstitutional for serious cases where a parent might be deprived of parental rights to be decided by an administrative tribunal.¹⁴⁴ A tribunal would only partly replace the federal courts and therefore add to the layers and possibly the expense of the system. Breaches of orders, a significant aspect, would still have had to be dealt with by courts.¹⁴⁵

THE FAMILY COURT AND THE 2006 ACT

The government subsequently planned a multi-million pound reform programme on post-separation parenting, including child support.¹⁴⁶ None of this money was directed at courts or legal representation.¹⁴⁷ The Family Law Amendment (Shared Parental Responsibility) Act 2006 avoided the introduction of a presumption of shared residence, and instead aimed to assist more fathers to remain involved in parenting; to reduce reliance on lawyers and to reduce the effects of conflict on children. ADR is now compulsory, through Family Relationship Centres or other family relationship services, before a court application is issued; hearings are preceded by counselling by family consultants within the court structure; and those cases that still remain are subject to a new form of judicial management, the Less Adversarial Trial.

¹⁴¹ House of Representatives Standing Committee on Family and Community Affairs: *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (Parliament of the Commonwealth of Australia, Canberra 2003) 93

¹⁴² J Wade, 'The Family Court of Australia and Informality of Court Procedure' (1978) 27 *International and Comparative Law Quarterly* 820-848

¹⁴³ Australian Government, *A new family law system: Government Response to 'Every Picture Tells a Story'* (Commonwealth of Australia, Canberra 2005)

¹⁴⁴ A Nicholson, 'Family law entering a tribunal too far' *Sydney Morning Herald* 30 December 2003; Letter to the Enquiry from the Administrative Review Council 17 Feb 2004

<<http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview>> Last accessed 18 June 2008.

¹⁴⁵ F Bates, 'Family law Reform in Australia: A Fractured Continuum' (2004) 6 *European Journal of Law Reform* 209 at 225

¹⁴⁶ Australian Government, *A new family law system: Government Response to 'Every Picture Tells a Story'* (Commonwealth of Australia, Canberra 2005)

¹⁴⁷ P Parkinson, 'Keeping in contact: the role of family relationship centres in Australia' (2006) 18(2) *Child and Family Law Quarterly* 157

A re-casting of the image of the FCtA might have been expected since the retirement of Alastair Nicholson and appointment of Diana Bryant (formerly the Chief Federal Magistrate) in 2004. At the time of her appointment she was described as ‘apolitical’, ‘unpretentious’ and ‘not expected to be outspoken like Chief Justice Nicholson’¹⁴⁸ But, even following the intensive inquiry, the FCtA continued to attract opprobrium, with an 80-page polemic by an academic historian, John Hirst in 2005. It is notable that this essay elicited responses from, amongst others, all three Chief Justices of the FCtA, past and present.¹⁴⁹

Cases that are not diverted, and remain to be adjudicated, are now subject to considerably more legislative direction than in English law. Parkinson contrasts the brevity of the s 1(3) Children Act 1989 welfare checklist with the voluminous lists for consideration to be applied in the Family Law Amendment (Shared Parental Responsibility) Act 2006.¹⁵⁰ Although the aim is to dispense with lawyers, the law has become increasingly more complex.¹⁵¹ Judicial discretion has been severely curtailed. The majority of separating parents who do not require a judge to determine arrangements negotiate in the shadow of increasingly prescriptive laws detailing Parliament’s intentions, directed as much at legal and mediation advisers as they are to judges.¹⁵² Unjust outcomes can result from flaws in the legislation or lack of legal aid to pursue a case, not only from judicial process.¹⁵³

The Committee’s aversion to the Court was instrumental in establishing an explicit diversionary policy with a compulsory pre-court procedure, buttressed by investment in a network of providers, the FRCs. Since July 2007 an application for a parenting order can be made only after obtaining a certificate from a registered dispute resolution service that an attempt at resolution has been made. Primary dispute resolution was re-named ‘family dispute resolution’.¹⁵⁴ The purpose is to agree a Parenting Plan, that can be endorsed by the

¹⁴⁸ F Shield and I Munro, ‘Cool head leaps into legal hotseat’ *The Age* 26 June, 2004

¹⁴⁹ E Evatt; A Nicholson; D Bryant and others, ‘Correspondence’ (2005) 18 *Quarterly Essay* 75-110

¹⁵⁰ P Parkinson, *Decision-making about the Interests of the Child: The Impact of the Two Tiers* (2006)

University of Sydney Legal Studies Research paper 06/29

¹⁵¹ J Dewar, ‘Can the centre hold?: Reflections on two decades of family law reform in Australia’ (2010) 24

Australian Journal of Family Law 139

¹⁵² P Parkinson *Decision-making about the Interests of the Child: The Impact of the Two Tiers* (2006) University of Sydney Legal Studies Research paper 06/29

¹⁵³ R Hunter, ‘Adversarial Mythologies: Policy Assumptions and Evidence in Family Law’ (2003) 30(1) *Journal of Law and Society* 156-176 at 163

¹⁵⁴ S 10 (F) FLA 1975

court. There are exceptions to this requirement in the case of violence or child abuse; the AIFS evaluation found that these exceptions were poorly understood.¹⁵⁵

If a case proceeds to court, parties must attend a process of family counselling with the family consultant, who prepares a report.¹⁵⁶ The meeting is not privileged, and the consultant gives evidence. Consent orders or court decisions can be made, but it is expected that most cases will be agreed and will not proceed past the resolution stage. Revisions of case management processes since 2001 have separated each case into an initial ‘resolution phase’ and, if necessary, a ‘determination phase’. If a matter remains contested, a case assessment conference is held to ensure all evidence is available.¹⁵⁷ The aim then is to dispose of the matter as a less adversarial trial.

The Children’s Cases Project and Less Adversarial Trials

‘The lighter, more contemporary and more fuel-efficient vehicle.’¹⁵⁸

This description of Less Adversarial Trials (LATs) symbolises a progressive 21st century approach to family justice, throwing off the heavy, anachronistic and resource-consuming chains of the past. There is pride in the new streamlined vehicle, but closer examination raises questions as to whether this serves families’ needs or, instead, economic systems.

By the late 1990s, a culture of non-compliance with FCtA directions had become entrenched, with high levels of late filing and contumacy.¹⁵⁹ The consequent strain on judges led to new rules in 2004 imposing better case management on lawyers. At the same time, the numbers of unrepresented litigants were rising. Litigants in person tended to be more likely to present the judge with volumes of material that dwelt on past events, and call witnesses who could not assist the court, lengthening the proceedings and causing further deterioration in

¹⁵⁵ R, Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, Melbourne 2009) 362

¹⁵⁶ S 10(B) FLA 1975

¹⁵⁷ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 21

¹⁵⁸ Justice Stephen O’Ryan speaking in 2006, cited in J Boland, ‘Family Law: Changing law for a changing society’ (2007) 81 *Australian Law Journal* 554-576 at 574

¹⁵⁹ Hon Justice Peter Rose, ‘The road to less adversarial trials and beyond (2007) 21 *Australian Journal of Family Law* 232

relationships.¹⁶⁰ It seemed that only a wholesale rejection of the adversary system was going to make the Court viable.

The Children's Cases project (CCP) laid the foundation for the LATs. The CCP began in New South Wales following a Practice Direction in 2004 by Chief Justice Alistair Nicholson, whereby a non-adversarial approach to parental disputes was piloted by judges in two registries. At the time of the 2003 parliamentary enquiry, Nicholson conceded that, despite the lengths to which the FCtA had gone to simplify procedures and encourage early resolution, the whole system relating to children needed an overhaul to focus attention on outcomes at an earlier stage.¹⁶¹ A study tour was undertaken by members of the judiciary to learn more about the European inquisitorial approach, paying particular attention to the German model. Watson had claimed in the early years 'the judge makes decisions using the adversary process only when it is finally necessary,'¹⁶² relying on informal surroundings and dispute resolution by the counsellors and registrars. This approach failed to gain legitimacy, as discussed, but neither did the return to formality appease the critics.

Although the 2003 inquiry accepted that lawyers are aggressively adversarial, this is not universally agreed.¹⁶³ In any event, legal aid had been restricted to such an extent that a significant proportion of litigants represented themselves. A less technical approach might be required to meet the needs of the self-represented litigant rather than to deflect the over-litigious lawyer. Supporters of the non-adversarial approach cited civil law reform in England and Wales, namely: 'the argument for the universal application of the full blooded adversarial approach is appropriate only if questions of cost and time are put aside.'¹⁶⁴

The CCP was used where the primary dispute resolution stage had failed, and required proactive judicial intervention. Parties who elected for the project agreed to the suspension of the rules of evidence, and to talk directly to the judge. The objective was to achieve better outcomes in terms of the child's wellbeing, with an underlying belief that prolonged

¹⁶⁰ A Nicholson, 'Sixteen Years of Family Law' (2004) 18 *Australian Journal of Family Law* 131

¹⁶¹ J E McIntosh, D Bryant and K Murray, 'Evidence of a Different Nature: The Child-responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46(1) *Family Court Review* 125

¹⁶² Hon Justice Watson, 'The Structure of the Family Court of Australia and Court Counselling – the Parramatta Experience' (1980) 18(1) *Conciliation Courts Review* 53

¹⁶³ R Hunter, 'Adversarial Mythologies: Policy Assumptions and Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156-176

¹⁶⁴ Lord Woolf *Access to Justice* 1996 TSO London, cited in Hon Justice Peter Rose, 'The road to less adversarial trials and beyond' (2007) 21 *Australian Journal of Family Law* 232

proceedings aggravate the conflict between parents, are not child-focussed and do not assist future co-operative parenting.

There are two linked evaluation reports on the CCP: the first by Jennifer McIntosh (McIntosh) the second by Rosemary Hunter, with McIntosh (Hunter).¹⁶⁵ Hunter's report raises more questions than McIntosh's, and has not been published in full. McIntosh monitored progress of 45 cases following the CCP, and a control group which followed the traditional procedure. Her report summarises findings of the new procedure as 'no further harm' to the adult relationship and to the children's adjustment. In comparison, the control group did not experience the court process as constructive, and some reported increased antagonism. She acknowledges that at that stage there may have been different characteristics between the group which elected for one scheme or the alternative.

When Davis studied family proceedings in England in the 1980s, he concluded that the court process had so little influence on the outcome, that the real test of its effectiveness was the parties' own experiences of it.¹⁶⁶ These early findings by McIntosh indicate that applying such a test might produce a positive result from the CCP. However, the report points out that the specialist approach by the family court judge is a 'loss of judicial impartiality.'¹⁶⁷ This suggests that judges could be more interventionist and directive than families might always be prepared to accept. The LAT hearing is described as a 'structured discussion', led by the judge.¹⁶⁸

Hunter compared 168 finalised CCP cases with the same number of non-CCP cases (part of this sample was used in the McIntosh report). The FCtA website states that she:

...similarly found that as a less adversarial and more child focused process, the CCP had the potential to assist parents to parent more cooperatively.

¹⁶⁵ J E McIntosh, *The Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child wellbeing - Final Report to the Family Court of Australia* (Family Court of Australia, 2006); R Hunter 'Child-related proceedings under PT VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) *Australian Journal of Family Law* 227

¹⁶⁶ G Davis, 'The Halls of Justice and Justice in the Halls' in R Dingwall and J Eekelaar, *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988)

¹⁶⁷ J E McIntosh, *The Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child wellbeing - Final Report to the Family Court of Australia* (2006) 38

¹⁶⁸ M Harrison *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 53

Professor Hunter also found that the CCP pilot resulted in a faster court process, and parties who had participated in CCP were generally more satisfied with that process than parties whose dispute was determined using a traditional adversarial approach.¹⁶⁹

Hunter stressed the limitations on generalising from the research sample. The CCP pilot involved participation by consent and a high degree of judicial and administrative attention. Take-up of the scheme was low; parents in the sample had fewer issues in dispute than the control group, and were less likely to be repeat litigators. Hunter does attribute the positive outcomes of the cases to the streamlined process, rather than the lesser complexity of the cases, but asks whether the LAT system will be as successful when it is applied universally, beyond this atypical sample.¹⁷⁰

The LAT approach is premised on setting aside conflict and mending the parental relationship but a case will not make progress unless any issues of domestic violence are identified and addressed at the very beginning of the process. In these types of cases, Hunter argues, the emphasis must shift from avoiding conflict to ensuring the safety of children and the abused parent. Considering the prevalence of allegations of abuse heard in the FCtA, the LAT system will be reliant on systems that can effectively ascertain this at the earliest stage.¹⁷¹ The process is assisted by an enhanced role for the independent representative (child's solicitor) and the family consultant. Hunter found that parents listened seriously to the consultants because of the authority given them by the judge, and generally the consultant's contribution was seen positively. There is however an impact on resources; the early involvement of the consultant was building up backlogs of work.

Hunter's findings agreed that parents' satisfaction was higher than in the control group. However, she made important caveats: the rate and sustainability of agreement rate was not as high as expected; the sample was unlikely to be representative of the majority of families; and the speed at which the CCP cases were dealt with cannot be replicated through the system. There were therefore doubts as to whether the benefits of CCP reported by McIntosh in expedited proceedings would be achieved to the same extent when all cases that resist primary dispute resolution became LATs conducted by all FCtA judges, not just those who were setting aside special time and commitment. Neither the impact of LATs on judicial time,

¹⁶⁹ <http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/>
Last accessed 9 April 2008.

¹⁷⁰ R Hunter 'Child-related proceedings under PT VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) *Australian Journal of Family Law* 227

¹⁷¹ R Chisholm, *Family Courts Violence Review* (Attorney General of Australia, 2009)

costs, legal aid, nor lawyers' practice could be predicted from the pilot. Consequently, Hunter questioned how far the findings about parental satisfaction could be generalised. She expressed particular concern about the lack of guidance on judges interviewing children. Overall, she found considerable diversity in judicial case management, drawn from the broadness of the legislation.

The CCP pilot ended in December 2005, to be immediately succeeded by LATs.¹⁷² This is now applied in all FCtA registries and the FCWA, although the FMC claimed its procedures already complied.¹⁷³ The aim is that the judge is in control of proceedings rather than the parties (about 40 per cent of whom are litigants in person¹⁷⁴) or lawyers.

Harrison's paper on LATs had claimed them as the answer to the problem that the common law requires an adversarial hearing, reliant on a contest on the evidence presented by two equally powerful voices. Such a system was not designed for cases involving children, especially when one or both parties do not have the means to purchase robust representation. The FLA was drafted in the belief that legal aid funding was an essential component.¹⁷⁵ Nor, of course, can such a system always take into account the child's own views. In any event, the proportion of cases that reach a judge are declining: just over 14,500 applications for a court order were made to all three Federal courts in 2008-2009, a reduction from nearly 19,000 the previous year, and 84% of these were heard in the FMC.¹⁷⁶ The solution of LATs is therefore directed at a small proportion of the population.

The evaluation of the 2006 reforms included a brief study on the LATs which validate the questions Hunter raised; the team found that although there was an improvement in the way court decisions focussed on the child, the LATs were hampered by increased delay; resource restrictions and variations in judicial case management.¹⁷⁷

¹⁷² Now Division 12A of Part VII of the FLA 1975

¹⁷³ R Hunter, 'Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) *Australian Journal of Family Law* 227

¹⁷⁴ J Boland, 'Family Law: Changing law for a changing society' (2007) 81 *Australian Law Journal* 554-576 at 572

¹⁷⁵ M Harrison *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 5

¹⁷⁶ R Kaspiew, M Gray, R Weston, L Moloney, K Hand, and the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, Melbourne 2009) 305

¹⁷⁷ R Kaspiew, M Gray, R Weston, L Moloney, K Hand, and the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, Melbourne 2009) 330

From family counsellors to family consultants

The role of family consultants as in-house experts has developed from that of family counsellors under the original 1975 Act.¹⁷⁸ Family consultants now appear to be highly valued by the courts and the public, although like others in the system are subject to resource constraints.¹⁷⁹ Although they can feel frustrated by the limited nature of services to which they can refer families with ongoing problems, generally consultants' posts are rewarding both in terms of remuneration and job satisfaction.¹⁸⁰ Hunter has observed that they are held in higher esteem than Cafcass officers are in England and Wales.¹⁸¹

Family counsellors used to undertake a two-stage function prior to the LAT. One counsellor would offer privileged mediation in the resolution phase and then a second would provide non-privileged assessment and reports.¹⁸² This has been expanded in the LAT into a longer-term relationship between one consultant and the parties, and their children.¹⁸³ Their work is more focused on high-conflict resolution, because the bulk of pre-court negotiations have been assumed by community services. Rather than a receptor of all the issues families previously brought to court, the consultant is now a more specialised facilitator, child advocate and provider of independent information to the court.¹⁸⁴ The court can also order counsellors to supervise its orders.

The consultant now has more responsibility for reporting on risk. In 2002, the FLC had published a report, *Family Law and Child Protection*, observing that 'the Family Court's counselling and mediation services are designed to promote conciliation, not fact-finding'.¹⁸⁵ This was in the context of the FCtA's struggle to address child protection in its decisions on parenting disputes, because a family counsellor was not expected to make a judgment about allegations of abuse. In the English courts an officer would have been expected to ask the

¹⁷⁸ FLA 1975 S 11 B

¹⁷⁹ R Kaspiew, M Gray, R Weston, L Moloney, K Hand, and the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, Melbourne 2009)

¹⁸⁰ Personal communication from Christine Midwood, Family Consultant, FCWA, 8 August 2008

¹⁸¹ R Hunter, 'Close encounters of a judicial kind: "hearing" children's "voices" in family law proceedings' (2007) 19(3) *Child and Family Law Quarterly* 283

¹⁸² B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 347

¹⁸³ Discussed below

¹⁸⁴ L Moloney and B Smyth, 'Family Relationship Centres in Australia: Reflections based on research and practice' (2004) 69 *Family Matters* 64-70

¹⁸⁵ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) 9

court to refer the question to the local authority for an investigation, or to make a finding of fact before s/he proceeded to negotiate contact.

Some members of the judiciary, dedicated to the ethos of the FCtA in its early days wrote fulsomely of the family counsellors.¹⁸⁶ In 1999, Truex commented that the notable difference in English courts was the lack of the multi-disciplinary and educative functions which in Australia ‘...under one roof benefit those who work there and the families they serve.’¹⁸⁷ Initially however, some judges were dubious about the role of the counsellor, and were not obliged to follow their recommendations.

Harrison wrote that this emphasis on settlement and recognition of the skills of non-legally qualified professionals distinguishes Australia from other common law jurisdictions. Reports by the family counsellors were a modification of the adversarial system because they are directed by the court, not by the parties, and the report writers were seen as distinctively expert witnesses on behalf of the court, rather than called by one party or the other.¹⁸⁸ This is not quite accurate; English courts would not accept that welfare officers are partisan, and rely heavily on their reports. Indeed, if the judge or magistrate decides against the officer’s recommendation, they are obliged to give their reasons.¹⁸⁹ While it seems that the social work professionals in Australian courts are valued more highly than their counterparts here, Cafcass officers are also neutral, not called by a party.

The retention and increased specialism of an in-house welfare team has added value to the conciliator/reporter in an increasing disparity of perception between Australian officers and their English equivalent in Cafcass.¹⁹⁰ Hunter explains:

In Australia it is more common to trust family reporters and distrust judges, while in England and Wales, CAF/CASS officers are distrusted but there seems to be greater trust reposed in judges... report writers in England and Wales tend to be seen as

¹⁸⁶ Hon Justice Watson, ‘The Structure of the Family Court of Australia and Court Counselling – the Parramatta Experience’ (1980) 18(1) *Conciliation Courts Review* 53

¹⁸⁷ D Truex, ‘An Australian Perspective’ in National Council for Family Proceedings, *Finer – 25 Years On? How close are we to establishing a Family Court* (NCFP, Bristol 1999) 6-11 at 10

¹⁸⁸ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra 2007) 16

¹⁸⁹ *Re V (residence order)* [1996] 3 FCR 101, [1995] 2 FLR 1010, [1996] Fam Law 78

¹⁹⁰ R Hunter, ‘Close encounters of a judicial kind: “hearing” children’s “voices” in family law proceedings’ (2007) 19(3) *Child and Family Law Quarterly* 283

operatives of the welfare state, whereas in Australia they are seen as skilled professionals.¹⁹¹

As Murch had observed years earlier, parents' perception of the professional status of the adviser is crucial.¹⁹² Although the English service was transferred from probation into the Lord Chancellor's Department in 2001¹⁹³ this did not appear to have changed the public face of the officer from the Foucauldian controlling family technician to the acceptable quasi-legal professional. On the other hand, much as the unpopularity of the Australian court rests with the poor image of the judiciary, it seems unlikely the counsellors were immune throughout its most turbulent years. They are only mentioned incidentally in the literature. As Star describes their progress, it has taken many years for family consultants to achieve the level of recognition described by Hunter. Just prior to the 1995 Act it seemed that 'the melding of lawyers and counsellors into a working unit' seemed even more unlikely than 20 years earlier.¹⁹⁴ Relationships had been riven with industrial strife, and there was conflict not only between counsellors and judges (described by one judge as 'brimstone and treacle'¹⁹⁵), but between layers in the court hierarchy.

Hunter's view is substantiated by a senior judge, Jennifer Boland who points out that expert witnesses are rare in parenting disputes because of the 'expert report' prepared by the consultant. External experts are more likely to be called on in property matters.¹⁹⁶ The terminology is significant; Cafcass officers, like local authority social workers are not called 'experts' in English courts, where the term refers to independent expert witnesses.¹⁹⁷

A probable reason for the difference in perception is that Australian practitioners have a wider professional background in either psychology or social work. Employment criteria for family consultants include postgraduate qualifications and considerable knowledge and

¹⁹¹ R Hunter, 'Close encounters of a judicial kind: "hearing" children's "voices" in family law proceedings' (2007) 19(3) *Child and Family Law Quarterly* 283

¹⁹² M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 140-144; and see J Hunt and J Lawson, *Crossing the Boundaries: the views of practitioners with experience of family court welfare and guardian ad litem work on the proposal to create a unified court welfare service* (National Council of Family Proceedings, Bristol 1999)

¹⁹³ Now situated in Department for Education in England and the Welsh Government Social Justice Department in Wales

¹⁹⁴ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 201

¹⁹⁵ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 111

¹⁹⁶ J Boland, 'Family Law: Changing law for a changing society' (2007) 81 *Australian Law Journal* 554-576 at 571

¹⁹⁷ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) para 4.227 et seq

experience in child development, assessment and conflict resolution.¹⁹⁸ In contrast, Cafcass practitioners must be registered as social workers, a profession with a low public image.¹⁹⁹

The family consultant's role has been augmented by a 'child-inclusive primary dispute resolution process,'²⁰⁰ known as the Child Responsive Program (CRP). This was implemented nationally in January 2008 after being piloted and evaluated. The program allows the family consultant to work on a case at the resolution stage, to provide earlier and better screening and support for parents. Brief assessments of the psychological adjustment of children, their attachment relationships and their feelings about different care options are summarised by the family consultant and discussed in an all-party meeting. The family consultant remains a 'constant presence for that family, to assist the parents to reflect on and plan for the child's needs'. The consultant can refer parties to community resources and facilitate implementation of orders. McIntosh Bryant and Murray concluded that parents who heard their own child's story through the consultant were better able to protect their children from the effects of conflict.²⁰¹ The evaluation report found that the intervention diverted 40% of cases away from litigation, with a 73% rate of durability of arrangements.²⁰²

CHILD PROTECTION IN AUSTRALIA

As has been mentioned, the FCtA faces another challenge, posed by the Constitutional separation of powers. The strain of the artificial division of public and private law has not only contributed to the troubles of the past decades, but continues to threaten the new reforms, because of the effects of the split jurisdiction in child protection.

Australian policy lies within the 'child protection orientation' of western countries such as the UK and the US, rather than the 'family service orientation' of countries in northern Europe. The former share historical roots in the child rescue movement of the late 19th century, with Australia establishing its own societies for prevention of cruelty to children.

¹⁹⁸ Federal Magistrates Court of Australia <<http://www.fmc.gov.au/html/jobs1a.html>> Last accessed 20 November 2007

¹⁹⁹ In England, a new College of Social Work is attempting to address this:

<<http://www.collegeofsocialwork.org/news.aspx?id=387>> Last accessed 24 July 2011

²⁰⁰ JE McIntosh, D Bryant and K Murray, 'Evidence of a Different Nature: The Child-responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46(1) *Family Court Review* 125

²⁰¹ JE McIntosh, D Bryant and K Murray, 'Evidence of a Different Nature: The Child-responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46(1) *Family Court Review* 125

²⁰² JE McIntosh and C Long, *The Child Responsive Programme operating within the Less Adversarial Trial: A follow up study of parent and child outcomes: report to the Family Court of Australia* (2007)

Social work started to become professionalised in the 1940s and was assumed by state agencies during the 1960s and 70s.²⁰³ All states have legislated to make reporting child abuse mandatory.

The FCtA accrued powers relating to marital causes through the states referring these powers to it. This left the states with residual powers to regulate actions taken by child protection authorities. They also retain responsibility for criminal prosecutions relating to offences against, or committed by, children. All states operate statutory child protection duties which aim to promote the best interests of children but, since the 1990s, state provision of youth services has been rolled back, and resources in child protection agencies reduced.²⁰⁴ Referrals have however increased.²⁰⁵ It appears that only about one fifth of referrals lead to any action by the agency concerned.²⁰⁶ This notification rate in the mid 2000s was almost nine times higher than in England.²⁰⁷ This may be an effect of mandatory reporting.

Alistair Nicholson has (subsequent to his retirement as Chief Justice) described the children's courts as 'grossly under funded to the point where it is impossible to obtain reliable statistics from them because their funding is insufficient to enable them to collect them.' Some cases in the FCtA featured child protection issues which had never been drawn to the attention of the authorities. He believed that figures indicating the rate of child abuse were likely to be too low.²⁰⁸ Reports on the jurisdictional overlap have identified resource shortages in the agencies as a primary factor in decision making in the Federal courts.²⁰⁹

At the end of the 1990s, the eight different systems meant it was '...difficult to generalise about child protection law in Australia', because there were different definitions and characterisations of child abuse as a social problem, so policies and legal responses varied

²⁰³ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) 11-12

²⁰⁴ J Irwin and F Waugh, 'Domestic violence: a priority in child protection in New South Wales, Australia?' (2007) 16 *Child Abuse Review* 311-322

²⁰⁵ D Higgins *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case management model* (Family Court of Australia, 2007) 180

²⁰⁶ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) 15

²⁰⁷ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) Although the referral rate in England has increased dramatically from 2009.

²⁰⁸ D F Brown and Z Endekov, *Childhood Abused: The Pandemic Nature and Effects of Abuse and Domestic Violence on Children in Australia* (Alannah and Madeline Foundation 2005) <<http://www.amf.org.au/>> Last accessed 15 April 2008

²⁰⁹ Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia* (Commonwealth of Australia, Canberra, 2000); F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) *International Journal of Law Policy and the Family* 38

across the jurisdictions. Parkinson attributed variations in the rate of reported abuse across the states to definition, rather than to incidence. This was particularly evident in the variation of reported emotional abuse.²¹⁰ However, legislative reform over the past few years appears to be drawing the systems closer together.

In comparing the eight systems in 2005, Bromfield and Higgins found the greatest discrepancy in intake procedures. However, case management systems were quite similar across Australia in terms of planning, assessment and review.²¹¹ This would suggest that, once a child has been accepted as in need of protection, the children's courts in all states would be hearing about similar care planning options.

A threshold test must be passed in each state jurisdiction to justify intervention to protect children. This is worded slightly differently in respective legislation. As discussed below, it is restricted to a risk of future serious harm, unlike the Children Act s 31 including in the grounds for a care order that the child 'is suffering or is likely to suffer significant harm'. In an international comparison, Hoyano and Keenan were still unable to discern a single 'Australian approach' to child protection law. However, statutory provision in five states incorporates a principle of 'least intrusive intervention', prioritising the child's need to maintain identity and continuity.²¹²

Despite the fragmentation of laws and practice, all states favour returning children to parental care or placing with the extended family, rather than adoption.²¹³ Certainly, Bromfield and Holzer's detailed report for a National Approach to Child Protection Working Group in 2008 makes little reference to permanent removal from parents, and notes that permanency planning is a relatively new concept in Australia, with more emphasis in state legislation on early intervention and reunification, and more general guidance on stability and continuity of care.²¹⁴

A striking feature of child protection in Australia is the disproportionate over-representation of indigenous children. The rate of children accommodated away from home, either

²¹⁰ P Parkinson, 'Child Protection law in Australia' in M Freeman (ed) *Overcoming child abuse: a window on a world problem* (Ashgate, Dartmouth 2000)

²¹¹ LM Bromfield and DJ Higgins, *National comparison of child protection systems* (AIFS, 2005)

²¹² L Hoyano and C Keenan *Child Abuse: Law and Policy across Boundaries* (OUP, Oxford 2007) 41-43

²¹³ Adoption is discussed later in this section

²¹⁴ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) 23-24

voluntarily or following a court order, rose by 104% between 1996 and 2007, but the rate of placement of indigenous children was eight times greater than for non-indigenous.²¹⁵ Although indigenous children make up only 3.6% of the child population, they make up 22% of children placed out-of-home. All states observe the Aboriginal Child Placement Principle, that indigenous children in care should be placed within the child's extended family; within the child's own indigenous community; and, failing that, with other Aboriginal people.²¹⁶ There are increasing difficulties finding enough adults who are the right cultural match.²¹⁷

Reasons for this over-representation have been summarised as: socio-economic disadvantages; the legacy of removal policies; more scrutiny of indigenous families by welfare departments; law being formulated in terms which fail to account for the distinctive nature of Aboriginal and Torres Strait Islander society; and pervasive notions of assimilation in child welfare, from policy and planning to casework and child care.²¹⁸ Mandatory reporting may also be a factor.²¹⁹ Over-representation in the child care system does not necessarily reflect actual incidence of abuse, but may indicate a higher level of welfare services expenditure that needs to be justified by categorising families needing support.²²⁰ Perhaps policy toward indigenous children is located in Fox Harding's third policy category (the defence of the birth family),²²¹ in an attempt to direct resources to redress some of the disadvantages of the indigenous population.

In the 1990s customary practices may have been seen as neglect through 'traditional Eurocentric child protection eyes'. Thorpe's research in Western Australia showed that the most likely outcome of an investigation was out-of-home care for an indigenous child, whereas this was the most unlikely outcome for a non-indigenous child.²²² Hoyano and Keenan conclude that the recognition that the use of powers to remove children have in the

²¹⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Australia's children: safe and well: A national framework for protecting children* (Discussion paper for consultation, 2008)

²¹⁶ F Lynch, *Australia needs a uniform approach to child-protection legislation* (The National Forum, 2002) <<http://www.onlineopinion.com.au/view.asp?article=1893>> Last accessed 24 July 2011;

P Ban 'Aboriginal Child Placement Principles and Family Group Conferences' (2005) 58(4) *Australian Social Work* 384-394

²¹⁷ L Bromfield and P Holzer, *A National Approach for Child Protection* (AIFS, Melbourne 2008) 8

²¹⁸ NSW - Aboriginal children's research project: Aboriginal Children in Substitute Care (Principal Report, Part 1, July 1982) cited in Law Reform Commission New South Wales Research Report 7: the Aboriginal Child Placement Principle (1997)

²¹⁹ L Hoyano and C Keenan *Child Abuse: Law and Policy across Boundaries* (OUP, Oxford 2007) 452-455

²²⁰ P Parkinson 'Child Protection Law in Australia' in M Freeman (ed) *Overcoming child abuse: a window on a world problem* (Ashgate, Dartmouth 2000)

²²¹ L Fox Harding, *Perspectives in Child Care Policy* (2nd edn, Longman, London 1997) Ch 4

²²² D Thorpe *Evaluating Child Protection* (Open University, Buckingham 1995) Ch 9

past been over-used with indigenous families has resulted in policy changes toward making this the last possible resort, and presumptions of children staying with their primary caregivers, supported by social workers if necessary.²²³

The question therefore arises as to whether little public attention is paid to the operation of the children's courts because Australian society does not value children of disadvantaged parents, or just because these courts are rarely likely to make orders which enable the State to permanently remove a child from his or her parent's care. In comparative studies published in 2000, Parkinson points out that coercive intervention through the children's courts is low in Australia, for example in New South Wales, when 45% of referrals were substantiated, only 5% proceeded to a court order.²²⁴

In common with the UK, Australia is increasingly becoming a globalised, mobile and multi-cultural society that 'results in a multiplicity of concurrent, and sometimes contradictory, values, lifestyles and practices' that impact on children's upbringing.²²⁵ Law will not be accepted as legitimate if it is based on the narrow values of one culture,²²⁶ and Habermas would see a loss of legitimacy giving rise to new social movements. As long ago as 1995, Alistair Nicholson (then Chief Justice) said

The traditional Anglo Saxon model of dispute resolution – and alternatives to it – may be unsuited to the beliefs and customs of newly arrived and indigenous peoples – yet we obviously neither can nor should provide an array of law within laws, or a variety of differing principles for different groups.²²⁷

However, both law and policy in Australia differentiate between indigenous peoples and other ethnic groups, because of a consciousness of the continuous and collective failure to integrate families into mainstream services. Reluctance to remove indigenous children from their families can be attributed to the shame of discredited past policies, but it seems that the Aboriginal placement principle may be influential throughout the whole of the child

²²³ L Hoyano and C Keenan *Child Abuse: Law and Policy across Boundaries* (OUP, Oxford 2007) 483-486

²²⁴ P Parkinson, 'Child Protection, Permanency Planning and Children's Rights to Family Life' in (2003) 17 *International Journal of Law Policy and the Family* 147-172

²²⁵ A Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173

²²⁶ A Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173

²²⁷ Cited in A Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173

protection system. Rather than the cultural relativism Nicholson warned against, non-intervention appears pervasive.

It is difficult to find any indication of concerns about the cost and length of child care proceedings in Australia, in contrast to current attention being paid in England and Wales to legal aid, case management systems in the courts, and the use of expert evidence.²²⁸ Although Hoyano and Keenan, in their evaluation of the use of expert evidence say ‘controversies over the probity of expert testimony are not limited to England’, they refer to only one other example, in Canada.²²⁹ Within the FCtA, family consultants are deemed ‘experts’, and the cost of their services can be controlled. In children’s courts, the absence of a threat to families of being irrevocably separated by a court decision seems to have kept the nature of proceedings relatively cheap and uncontroversial. Certainly, they do not feature publicly to the extent that FCtA cases do. In the absence of large-scale evaluations such as AIFS in 2010, we lack comparative data on outcomes for children in care proceedings in the English and Australian systems.

It is notable that the recent documents published on Australian child protection systems do not refer to the role of the courts. Each state has a children’s court, some of which are combined with the youth offending jurisdiction. Unlike the UK, all magistrates are salaried. The range of types of order is too large to be summarised here but there will be some discussion of the effects. The state agencies encourage family group conference-type arrangements.

The law of adoption is retained by the state Supreme Courts. The background to the law is very similar to English law. States introduced adoption legislation around the 1920s, followed by reform because of social changes and the decline in children being available for adoption.²³⁰ Despite the lack of reported cases on adoption, the Family Law Council notes in its 2007 Annual Report that adoption is among a number of nationally controversial issues.²³¹ However, media coverage indicates an interest in same-sex adoption and inter-country adoption rather than stories of permanent removal from parents. The concept of adoption

²²⁸ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) Part 4

²²⁹ L Hoyano and C Keenan, *Child Abuse: Law and Policy across Boundaries* (OUP, Oxford 2007) 919

²³⁰ HA Finlay, RJ Bailey-Harris and MFA Otlowski, *Family Law in Australia* (5th edn, Butterworths, Sydney 1997) ch 8

²³¹ Family Law Council *Annual Report 2006-7* (Commonwealth of Australia, 2007) 6

from care seems unfamiliar, and Hoyano and Keenan suggest that fostering is the preferred option.²³² Recently published figures indicate that adoption is rare: of 412 adoptions in 2009-2010, 54% were inter-country; 31 % by family and friends and only 15% were cases of ‘stranger adoption’.²³³

The functions of state courts come under little scrutiny; the power of the FCtA to make a parenting order that may result in loss of contact between a child and parent is seen as far greater. This could be because private law disputes affect more people and a wider cross section of society, parental separation being a classless phenomenon. Hence the more articulate and powerful in society have the means and the motivation to take matters into the public realm. It may also be because the majority of children subject to public law orders are indigenous. The lack of an expert witness industry and adoption targets may also be factors. The criteria for significant harm can be assessed by a state magistrate without relying on precedent set by a court at the level of the UK Supreme Court. For a number of reasons, the families in the public realm are ‘invisible’ and do not contribute to the discourse, while those in the private realm are able to make contributions in the public space.

The next section will consider the way in which the courts’ protective powers have increasingly been recognised as inadequate, because the distinction between public and private family matters is not one that accords with people’s experience. Despite the lack of attention to public law in the sense of child protection at state level, this has been one of the most significant concerns about the Federal courts during the last 20 or so years, repeatedly raised in research, practice and evaluation.

THE MAGELLAN PROJECT : ‘Where public and private law intersect’

The evaluation of the Magellan Project identifies its role ‘where public and private law intersect’ in the FCtA.²³⁴ When the FLC investigated this intersection between 1998 and 2002, the ‘Magellan list’ operated in Victoria only. The scheme has since been extended by all-state agreement. New South Wales was later in agreeing than the others, and provided the control sample for the evaluation. The acceptance of the Magellan Project shows how consensus can be reached on agreed values, protecting children, and adapting the system to

²³² L Hoyano and C Keenan, *Child Abuse: Law and Policy across Boundaries* (OUP, Oxford 2007) 455

²³³ Australian Institute of Health and Welfare, *Adoptions Australia 2009-10*

<<http://www.apo.org.au/research/adoptions-australia-2009-10>> Last accessed 22 December 2010

²³⁴ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 33-35

tackle the faultline of the public-private separation. It is an impressive achievement. This section will cover the development of Magellan and the extent to which it is meeting the needs identified in the FLC report.

THE FAMILY LAW COUNCIL REPORT: 'FAMILY LAW AND CHILD PROTECTION'

The report published in 2002 explained:

‘There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the Family Law Act. Council’s research and consultations on this issue indicate that the problems in the present system are very serious indeed. Reform is urgently needed, and will require a commitment from governments both at State and Federal levels, to deal with the systemic problems which arise, in no small measure, from the allocation of responsibility between State and Territory authorities, and the Federal government, under the constitutional arrangements existing in Australia.’²³⁵

Thus the FLC encapsulates the major difficulties caused by the structural division in Australia between public and private law which hinder the protective function of the FcTA.. The first problem is the court’s limited jurisdiction in proving abuse. Findings about allegations of sexual abuse are not to be made, unless necessary in making a decision in the child’s best interests. Resolution of an allegation against a parent was subservient and ancillary to the decision to be made about the child. The test was solely whether there was an unacceptable risk of abuse in the future.²³⁶ As explained extra-judicially by a former FcTA judge: ‘...because the emphasis is on the child and unacceptable risk, it is usually neither necessary nor desirable for a trial Judge to make positive findings of abuse.’²³⁷ The principle was extended in later cases to other types of child abuse and to domestic violence.²³⁸ Despite this restriction, there was a popular (probably mythical) theory that false allegations of sexual abuse were rife in the court.²³⁹

A second difficulty was the ‘pro-contact culture’ introduced in 1995.²⁴⁰ (This has since been compounded by the 2006 Act). Harrison feared that the 1995 Act encouraged judges to make contact orders in risky situations, based on her observation that the rate of suspended or

²³⁵ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) 15

²³⁶ *M v M; B v B* (1988) 12 Fam LR 606 (Aust HC)

²³⁷ P Fogarty, ‘Unacceptable risk – a return to the basics’ (2006) 20 *Australian Journal of Family Law* 249

²³⁸ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (Oxford University Press, Melbourne 2008) 286

²³⁹ S Jenkins, *Are Children Protested in Family Courts? A Perspective from Western Australia* Conference paper (2003) <<http://www.aic.gov.au/conferences/2003-abuse/jenkins.html>> Last accessed 10 June 2008

²⁴⁰ H Rhoades, ‘Posing as Reform: The Case of the Family Law Reform Act’ (2000) 14 *Australian Journal of Family Law* 142-159

discharged contact orders since the change had not risen at the same rate as the rate of reported abuse.²⁴¹

Similarly to the line taken in the FCtA cases, state legislation does not require the protection agency to act if a child *has* been abused, but rather if s/he is *at risk* of future abuse, because there is no parent able and willing to protect them. This rules out any power to intervene in an inter-parent dispute, because there will be one parent expressing their wish to protect the child from the other.²⁴²

The FLC concluded that the FCtA must be in a position to receive information about abuse and that the only solution was a new investigation service to investigate allegations.²⁴³ This was because the protective duties of state agencies did not correspond with the protective function of the court. Under FLA 1975 s 67, any officer in the court has reasonable grounds for suspecting that a child ‘has been abused, or is at risk of being abused’, is under a duty to notify the state welfare department, although they have only a discretionary responsibility to make a referral if they suspect the child is subject to ill treatment or psychologically damaging behaviour.²⁴⁴ The court can request the intervention of the state authority in any proceedings, but the Act states that the officer ‘may’ intervene, in which case he or she will be made a party.²⁴⁵ The FLA imposed no duty on the state agency to respond to the court’s referral; nor were matters reported as abuse necessarily interpreted as such under state legislation.

Whether or not a notification arising out of proceedings was investigated by child protection authorities depended on a number of factors, including: the seriousness of the reported concern and competing demands upon scarce resources.²⁴⁶ The FLC attributed this to the FLA definition of child abuse under s 67 being wider than that used in state legislation. Neither a notification of historical allegations that a child had been abused, nor an allegation of ‘non-serious’ abuse, met the states’ legislative requirement to intervene only if there is an

²⁴¹ M Harrison, ‘Australia’s Family Law Act: The First Twenty-Five Years’ (2002) 16 *International Journal of Law, Policy and the Family* 1-21 at 18

²⁴² D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 45

²⁴³ Family Law Council, *Family Law and Child Protection Final Report* (Commonwealth of Australia, Melbourne 2002) 10-11

²⁴⁴ FLA 1975 s 67ZA(2), 67ZA (3)

²⁴⁵ FLA 1975 S 91(B)

²⁴⁶ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 29

existing risk of harm.²⁴⁷ If both parents are dysfunctional, judges have to order residence with the parent who is the ‘least worst option’.²⁴⁸

The FLC concluded that state agencies could not be expected to provide an investigation and reporting service for every allegation of abuse which came to their attention pursuant to the notification requirements of the FLA: ‘The mission of child protection authorities is governed by their legislation. That legislation does not require them to be an investigatory service for all allegations of abuse which may be notified to them.’²⁴⁹

A separate but linked problem is the impact on children of family violence. Australian research reflects findings in other jurisdictions on the impact of inter-parental violence on children’s emotional development, and as an indicator of direct child abuse.²⁵⁰ Brown’s research confirmed that the FCtA had become:

...a major forum for the resolution of family violence issues, with child, spousal, and other family-related violence becoming a major component of the court’s workload - its core business, in effect. Furthermore, the Family Court was being used as an integral part of the child protection system by parents, other family members, and the child protection services themselves.²⁵¹

The latter point relates to the trend identified by Kelly and Fehlberg for state agencies to direct cases into the FCtA, discussed earlier.

This presented a major difficulty for the FCtA because it was known that family violence was prevalent in the most intractable cases. A report by Brown and colleagues in 1998 showed that, although only a small proportion of total applications to the court involved family violence, by the stage of the pre-hearing conference, this proportion rose to a half.²⁵²

²⁴⁷ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 35

²⁴⁸ C Caruana, ‘Round-up of developments in family law’ (2009) 83 *Family Matters* 52

²⁴⁹ Family Law Council, *Family Law and Child Protection Final Report* (Commonwealth of Australia, Melbourne 2002) 46

²⁵⁰ JE McIntosh, ‘Thought in the Face of Violence: A Child’s Need’ (2002) 26 *Child Abuse and Neglect* 229; B Fehlberg and J Behrens *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 192-3

²⁵¹ T Brown, ‘Magellan’s Discoveries’ (2003) 40(3) *Family Court Review* 320-328 at 322

²⁵² T Brown, ‘Children and Family Violence in the Family Court: Research into Action’, Paper given at AIFS Conference, 25-27 November 1998

Furthermore, the FLC found that notifications of child protection issues arising out of FCtA proceedings were not always taken seriously by the state child protection authorities, which tended to interpret them as part of a litigation strategy by parents.²⁵³

The FLC report therefore concluded that the Court needed its own investigation facility, a new federal child protection service, to assist it in arriving at the decisions in the child's best interests. Secondly, the FLC also wanted state child protection authorities to be able to take the lead in resolving child protection concerns arising in the course of parenting disputes, by amending the law to allow children's courts to make FLA parenting orders where these would resolve the child protection issues. Both of these measures were intended to bring an end to the existing duplication and allow matters to be dealt with by one court.

Unfortunately the FLC recommendations appear to have been overtaken by the government response to the anti-Family Court lobby and the 2003 enquiry. The FLC's view that the public/private dilemma was the most urgent to be addressed was lost amongst the evidence to the enquiry, discussed above. Evidence was given about family violence - figures presented to the enquiry by the court showed that 67% of judicially determined cases in the first half of that year had involved allegations of abuse.²⁵⁴ Just prior to the 2006 amendments to the FLA coming onto effect, another study found high levels of prevalence and severity of allegations, with almost half the cases in its sample of applications that reached judicial determination containing allegations of violence.²⁵⁵ An analysis of international and Australian research in 2007 found variations in the rate of abuse issues in applications from two to six per cent, although this increased to 23% in highly conflicted cases, with the rate of proved falsely-made allegations at one to two per cent.²⁵⁶

Parliament came to a compromise between the 50-50 lobby and safety concerns in response to the 2003 enquiry. The court will depart from equal parenting time if there are issues of

²⁵³ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra 2002) Ch 12 para 3.12

²⁵⁴ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 22

²⁵⁵ B Smyth, L Moloney, R Weston, N Richardson, L Qu and M Gray 'Allegations of family violence and child abuse in children's proceedings: A pre-reform empirical snapshot' (2007) 21 *Australian Journal of Family Law* 252

²⁵⁶ Moloney L, Smyth B, Weston B, Richardson N, Qu L, and Gray M, *Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study* (AIFS Research report no.15, Melbourne, 2007)

violence that impact on the amount of time to be spent with each parent.²⁵⁷ The problems created by this presumption were investigated in 2010; the report concluded that it should be modified as it places children at risk because the practices and procedures of the courts are not encouraging victims to disclose family violence.²⁵⁸ The Attorney General accepted ‘a false idea had taken hold in the community that fathers were entitled to a 50-50 time split’.²⁵⁹ The Australian Law Reform Commission published a report in late 2010 containing 187 recommendations²⁶⁰ and amending legislation to place more weight on protection from harm was initiated in 2011.²⁶¹

FROM MAGELLAN LIST TO MAGELLAN PROJECT

The Magellan List was initiated in the Melbourne (Victoria) Registry in 1998. The project applied to all parenting disputes where there were allegations of ‘serious physical or sexual abuse’ of children. The FCtA initially referred the case to Victoria’s child protection agency for investigation, with a report due back within five weeks. The difference between the Magellan report and the standard state report (if indeed one was provided) was that the Magellan report detailed the department’s actions and views, not simply an outcome of the investigation as ‘substantiated or ‘unsubstantiated’, because the latter does not give the FCtA the evidence it needs to resolve the case in the child’s best interests.²⁶² If this did not lead to a safe agreement, the court would order a report from a family consultant and hold an informal pre-hearing review followed, if necessary, by a formal trial of the issues. A lawyer was appointed for the child, funded by Victoria’s legal aid system. Although exact cost comparisons were not possible, the indications were that the total cost of legal aid was less than average for this type of dispute. One aspect described as ‘critical’ was the ‘un-capped’

²⁵⁷ B Smyth, L Moloney, R Weston, N Richardson, L Qu and M Gray ‘Allegations of family violence and child abuse in children’s proceedings: A pre-reform empirical snapshot’ (2007) 21 *Australian Journal of Family Law* 252

²⁵⁸ R Chisholm, *Family Courts Violence Review* (Attorney General of Australia, 2009)

²⁵⁹ C Overington, ‘Separated fathers face access changes after Chisholm Report’ *The Australian* 28 January 2010

²⁶⁰ Australian Law Reform Commission, *Family Violence – A National Legal Response* (Commonwealth of Australia, Sydney 2010)

²⁶¹ Family Law Amendment (Family Violence) Bill 2011

< <http://www.austlii.edu.au/au/legis/cth/bill/fllavaomb2011623/>> Last accessed 24 July 2011

²⁶² D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 179

legal aid funding available to every child, and to those adults who were eligible on means tested grounds.²⁶³

The project was seen as successful by families and the courts.²⁶⁴ This led to a recommendation that Magellan be extended nationally.²⁶⁵ By 2005 it was extended to FCtA cases originating in all other states, and evaluated in 2008. The evaluation report found that cases on the program were settled more quickly and less resource-intensively than other similar cases (although some families interviewed found difficulty in obtaining therapeutic services for their children).²⁶⁶ The report concluded that Magellan was an effective case-management response to allegations of serious abuse against children. Cases took an average of seven months to complete, four month less than the non-Magellan average.²⁶⁷

All cases where a question about serious child abuse arises, on which the court requires information before it can make a decision, are now known as ‘Magellan cases’. In this way, the FCtA is able to meet its enhanced public responsibility in what came before it as a private matter.

The Magellan evaluation report emphasises the dichotomy between public and private aspects of the court systems. It differentiates the role of the FCtA to resolve private law issues in children’s best interests from that of child protection departments and criminal courts to protect children. The intersection of these functions requires a system to coordinate information when trying to resolve private family law disputes. It is based on the legal presumption that it is in the best interests of children to know and have a relationship with both parents, with the paramount need to be protected from harm. Higgins acknowledges the context of awareness of both the seriousness of abuse and the difficulty in proving it, because

²⁶³ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 169

²⁶⁴ Brown, T., with Sheehan, R., Frederico, M., Hewitt, L. (2001). *Resolving Violence to Children, an Evaluation of Project Magellan*, Family Violence and Family Court Research Program, Monash University, Clayton Vic., cited in T Brown, ‘Magellan’s Discoveries’ (2003) 40(3) *Family Court Review* 320-328

²⁶⁵ Family Law Pathways Advisory Group, *Out of the Maze: pathways to the future for families experiencing separation* (Commonwealth of Australia, 2001)

²⁶⁶ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 165-168

²⁶⁷ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 176

‘the private nature of this type of criminal behaviour results in a lack of evidence to the criminal standard of proof’.²⁶⁸

However, there are some shortcomings. Magellan does not relate to the majority of children’s court cases, which are brought on grounds of neglect, nor does it use a wider definition of abuse to include the impact of domestic violence.²⁶⁹ Rather, it concentrates on what is termed ‘serious’ abuse; sexual abuse or extreme physical cruelty. Significant risk factors do not expedite an investigation or short-term protection plan unless they are specifically identified as coming within the Magellan category. This leaves the emotional and physical well-being of a wider number of children unprotected.²⁷⁰

Kelly and Fehlberg’s study of cases that were heard in both the Victorian Children’s Court and the FCtA between 1997 and 1999 showed that only a very small minority of children in Magellan cases were already subject to applications to the children’s court. These few tended to be teenagers with behavioural problems, whereas most cases initiated in the children’s court related to young children at risk of abuse.²⁷¹ These findings suggest that by the stage that evidence of risk was available to the FCtA from older, troubled children, this had rarely come to the prior attention of child protection authorities. The exceptions were when the FCtA case had been instigated by a child protection agency which had identified a viable alternative carer for a young child. Higgins’ 2007 evaluation does not include any data about the age profile of children in Magellan cases.

There is still a statutory duty on personnel in the Family Court to refer less ‘serious’ matters to the child protection agency, which presumably (in the absence of a Magellan direction) is still unlikely to investigate. Research in NSW found that children and their mother who were referred to child protection authorities were unlikely to receive protective intervention or support.²⁷²

²⁶⁸ D Higgins *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case management model* (Family Court of Australia, 2007) 175

²⁶⁹ T Brown, ‘Magellan’s Discoveries’ (2003) 40(3) *Family Court Review* 320-328

²⁷⁰ B Smyth, L Moloney, R Weston, N Richardson, L Qu and M Gray ‘Allegations of family violence and child abuse in children’s proceedings: A pre-reform empirical snapshot’ (2007) 21 *Australian Journal of Family Law* 252

²⁷¹ F Kelly and B Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection’ (2002) *International Journal of Law Policy and the Family* 38 at 57-8

²⁷² J Irwin and F Waugh, ‘Domestic violence: a priority in child protection in New South Wales, Australia?’ (2007) 16 *Child Abuse Review* 311-322

As Hunter points out, a judicial decision is the only proper outcome of a child abuse allegation.²⁷³ It is therefore not compatible with the Family Dispute Resolution model. Secondly, Magellan cases are not considered compatible with the Less Adversarial Trial, because this relies on a relaxation of rules of evidence.

IS MAGELLAN AN END TO FRAGMENTATION?

Brown stated in 2003 that the FCtA was to be congratulated on being the first court internationally to introduce a specialised programme for children in contact and residence disputes where child abuse allegations had been made.²⁷⁴ Certainly the evaluations do indicate that there has been remarkable progress in the ten years since she wrote that more than 77% of referrals from the FCtA to state agencies resulted in responses of ‘no action’.²⁷⁵ The primary success is however the mechanism whereby child protection referrals are dealt with more expeditiously, and produce reports that are helpful in planning safely for children. Over-stretched children’s services departments in England and Wales are also unlikely to prioritise referrals emanating from family disputes, seen as matters of private law. However we do not have the same structural problem; a court hearing a Children Act 1989 s 8 application can make findings on allegations of child abuse and domestic violence and their impact on the child. It could therefore be argued that a Children Act s 7 report suffices. Where Magellan does appear to have notable advantages is the speed and efficiency of a process based on recognition of the expert status of the family consultant and the availability of legal aid to all children and parents. Thus, a process designed to address fundamental flaws in the Australian court system may be helping that minority of children who are subject to serious abuse gain access to better integrated multi-disciplinary process than here. A child on the Magellan list is allocated a family consultant, who is seen by the court as an expert, as well as an independent lawyer. On the other hand, the range of ongoing therapeutic options available is limited.

²⁷³ R Hunter, ‘Adversarial Mythologies: Policy Assumptions and Evidence in Family Law’ (2003) 30(1) *Journal of Law and Society* 156-176

²⁷⁴ T Brown, *Project Magellan* Paper presented at a conference: Child Sexual Abuse: Justice or Alternative Resolution, Australian Institute of Criminology, Adelaide 1-2 May 2003

²⁷⁵ T Brown, *Children and Family Violence in the Family Court: Research into Action* Paper presented at a conference: Changing families, challenging futures, Australian Institute of Family Studies, Melbourne 25-27 November 1998

One aspect that is difficult to reconcile is that the Magellan Program is still described as adversarial, and outside the LAT structure. This is because the judiciary do not accept that a finding of abuse can be made on hearsay evidence.²⁷⁶ Given that such a high proportion of cases that reach the adjudication phase involve abuse allegations, it is difficult to see how the LATs can be used effectively. Oddly, there is no reference to this in the exception to Magellan in Harrison's 2007 blueprint for LATs.²⁷⁷ Furthermore, some judges see Magellan as the 'poor relation' of the LAT and CRP, which can put more emphasis on the child's needs through the intensive work by the family consultant.²⁷⁸

CONCLUSIONS

The FCtA has been the focus for continuous attacks since its formation. At one extreme were the bombings and murders of the early 1980s, for which no-one has ever been charged, so it is still not known if they were random attacks by aggrieved litigants or organised sabotage. The Court was the subject of 11 parliamentary enquiries and referrals to the Australian Law Reform Commission between 1997 and 2006.²⁷⁹ Its judgments have also been subject to a number of constitutional challenges taken to the High Court, and the FLA itself has been subject to more amendments than any piece of Australian legislation apart from tax and social security law.²⁸⁰ Judicial discretion has been incrementally circumscribed since 1975. There has been a shift from public complaints about finance and property matters to parenting.

It is evident from Star's history that the FCtA was denigrated as less than a 'black letter' court. To counteract this, the refurbished buildings became, if anything, more traditional, with a re-introduction of formal court dress and traditional seating arrangements.²⁸¹ The brave attempt at the 'helping court' produced wistful or envious reactions from the post-Finer campaigners in England.²⁸² It would however seem that, on balance, the legislative unification of public and private law within the civil courts under the Children Act 1989 has

²⁷⁶ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case management model* (Family Court of Australia, 2007)

²⁷⁷ M Harrison *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra, 2007) 22-23

²⁷⁸ D Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case management model* (Family Court of Australia, 2007) 154-156

²⁷⁹ J Boland, 'Family Law: Changing law for a changing society' (2007) 81 *Australian Law Journal* 554-576 at 564

²⁸⁰ F Bates, 'Family law Reform in Australia: A Fractured Continuum' (2004) 6 *European Journal of Law Reform* 209

²⁸¹ L Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne 1996) 185; 210

²⁸² D Truex, 'An Australian Perspective' in National Council for Family Proceedings, *Finer – 25 Years On? How close are we to establishing a Family Court* (NCPF, Bristol 1999)

been more successful than the Australian venture. The reforms here had the advantage of not being associated with divorce law reform and its attendant controversies. Specialist judiciary and legal professions have become established in both jurisdictions, alongside an acceptance of a dedicated social work service. However the reverse perceptions identified by Hunter of the value of judges and lawyers on the one hand, and the non-legal adviser, on the other, seem to have become entrenched.

Since 1975, the legislation has become so complex that even lawyers find it difficult to understand and explain to their clients. The Court, rather than successive legislators, appears to have taken the flak. Paradoxically, the increase in complexity has been accompanied by a drive to marginalise lawyers. The aim is a cultural shift away from seeing parenting disputes as a legal issue. Most cases are to be kept out of court, and most of those that remain are LATs. The victory of the social sciences over the law would appear to be irreversible, but this has been backed by investment in high quality alternative services.²⁸³ The Family Justice Review Panel is enthusiastic about the way FDR is working in Australia,²⁸⁴ but this seems almost pointless when there is no intention to spend a similar amount of money in investing in an alternative system.

Ingleby examined the problem of the fragmentation of the Australian court system as a number of sources of normative order: the different levels of government order and the various social formations that make up other systems of ordering such as families, schools, and other relationships.²⁸⁵ Fehlberg and Behrens' textbook features a pervading theme of fragmentation in Australian law and policy.²⁸⁶ While other jurisdictions are also fragmented, the Australian constitution structure appears a permanent barrier to cohesion.

The FLC summarised options for reform to address the split jurisdiction in 2002:²⁸⁷

1. A unified court at federal level. This would be politically cumbersome as amending the Constitution can only be done by referendum; only 8 out of 44 Commonwealth referenda have been passed.²⁸⁸

²⁸³ To be discussed in Chapter Seven

²⁸⁴ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) Part 5

²⁸⁵ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993)

²⁸⁶ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008)

²⁸⁷ Family Law Council, *Family Law and Child Protection* (Commonwealth of Australia, Canberra, 2002)

2. Devolving all the FCtA powers to the states
3. Cross vesting, where the FCtA would have jurisdiction in any case which raised issues at both federal and state level. This was held unconstitutional in 1999.²⁸⁹

This chapter has shown that the relegation of child protection at state level has produced a different set of problems to those in English law. The Magellan scheme is a huge advance but has its limitations. With the policy emphasis so definitely in favour of diverting cases away from the FCtA, it seems unlikely that the structure will ever be adapted to allow child protection cases to get into the hands of the higher judiciary. The 2010 Law Reform Commission report contains 187 recommendations, including new compulsory duties on state authorities to provide reports to the FCtA and powers for the FCtA to make orders placing children in state care.²⁹⁰ However, the first stage, of agreeing a common interpretive framework for defining and addressing of violence, is still awaiting Parliament.²⁹¹

In England, the Children Act 1989 brought together private and public applications within one court system, with unifying principles that theoretically place children in both types of proceedings under the same lens. At present, care proceedings can only (with some exceptions) be applied for in the family proceedings court, and divorce can only be granted in the county court, reinforcing the class disparity identified in the Finer Report. A combination of factors, including the public preferring to avoid using courts associated with criminal cases and solicitors preferring the administration of justice by the professional judiciary has resulted in a decline in private law application to the magistrates. In Australia, the FCtA acquired jurisdiction in private law from state courts through legislative provision. As we move toward a unified court structure in England and Wales, we may achieve a less fragmented family justice system here than Australia.

Thirty years after the introduction of no-fault divorce and the ‘helping court’, the Australian family justice system had not achieved greater legitimacy than the English system. The establishment of a specialist family court seems, if anything, to have focussed political and public distrust on those who worked within it. The result, from the 2003 Parliamentary

²⁸⁸ B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 31

²⁸⁹ *Re Wakim* (1999) 198 CLR 511

²⁹⁰ Australian Law Reform Commission, *Family Violence – A National Legal Response* (Commonwealth of Australia, Sydney 2010)

²⁹¹ Family Law Amendment (Family Violence) Bill 2011

< <http://www.austlii.edu.au/au/legis/cth/bill/fllavaomb2011623/> > Last accessed 24 July 2011

enquiry, is a substantial policy investment in a range of alternative dispute resolution services. These have not suffered the lack of funding and support that the FCtA experienced at its inception.

The unpopularity of the FCtA was reflected in questions about its constitutionality in its early days; and Fehlberg and Behrens suggested that the relentless diversion now pursued by the Australian government could meet the same fate. They thought that a challenge might be made to the High Court on the grounds that federal judicial power must be exercised with due procedural process lacking in the LATs.²⁹² It seems that family court proceedings have gone full circle back to the informality that caused such confusion in the Court's early days. However, the new model benefits from a sounder infrastructure than the FCtA had in the 1970s and should be better placed to fulfil aspirations; it may not attract the same level of opprobrium. The legitimacy issue has been called into question by Crowe.²⁹³ If the new model has consensual support based on an open policy-making process, it may satisfy Habermas' ideal speech situation, and have a strong grounding in norms and values. Such a position of strength would make it more resistant to the inevitable individual cases of grievance than the previously weak model.

The FCtA became the symbol for anything that was ever perceived as wrong in Australian family law: no-fault divorce; fathers' feelings of loss of control; mothers' fears for their own and their children's safety; and an extended wrangle over child support. These are acknowledged by some within the Court as intrinsic to the 'blunt instrument' of the law when dealing with relationship breakdown and disputes over family property and parenting arrangements.²⁹⁴ The reasons that the FCtA became the target included its initial lack of resources, the hostility of the legal establishment and the ever-increasing momentum of complaints fostered by pressure groups and the media. All of these brought considerable pressure on politicians, evident in continuous policy review that restricted judicial power.

In retrospect, we can see that, although the radical nature of the FLA 1975 had some grounding in citizens' lifeworld of experience and moral attitudes, its intentions were undermined by the systems of economics and power that had become separated from its

²⁹² B Fehlberg and J Behrens, *Australian Family Law: the Contemporary Context* (OUP, Melbourne 2008) 355

²⁹³ J Crowe and R Field, 'The Problem of Legitimacy in Mediation' (2007) *Contemporary Issues in Law* 48-60

²⁹⁴ Hon A Nicholson and M Harrison, 'Family Law and the Family Court of Australia: Experience of the First 25 Years' (2000) *Melbourne University Law Review* 30

values. This is a pattern repeated in welfare-state capitalism. The question now is whether the replacement of the discredited 1970s ideal will be more stable. Despite some reactionary voices,²⁹⁵ no-fault divorce and the current child support mechanism do now appear to be accepted. By 2004, only ‘some of the religious right and the men’s groups still hanker after a return to it [the pre-1975 position]’.²⁹⁶ A consensus also appears to have been achieved regarding the resolution and determination stages of the private law disputes. The test will be whether the gender issues, and a growing recognition of children’s rights, are more effectively addressed. This will depend largely on the quality of the professionals entrusted with the resolution stage, and a freedom from bureaucratic target-setting in the determination stage.

²⁹⁵ J Hirst, ‘The Kangaroo Court’ (2005) 17 *Quarterly Essay* 1-85

²⁹⁶ A Nicholson, ‘Sixteen Years of Family Law’ (2004) 18 *Australian Journal of Family Law* 131

CHAPTER SIX
PUBLICITY AND PRIVACY IN FAMILY COURTS
CONTENTS

THE PROBLEM OF SECRECY	212
DEVELOPMENT OF THE LAW IN ENGLAND AND WALES	213
<i>ATTENDING COURT HEARINGS</i>	214
<i>PUBLICITY ABOUT COURT PROCEEDINGS</i>	217
Judicial Proceedings (Regulation of Reports) Act 1926	218
Children and Young Persons Act 1933	218
Magistrates Courts Act 1980	219
Administration of Justice Act 1960	219
Children Act 1989	221
<i>ACCESS TO DOCUMENTS AND SHARING INFORMATION RELATING TO FAMILY PROCEEDINGS</i>	223
<i>THE IMPACT OF HUMAN RIGHTS LEGISLATION</i>	225
PRIVACY, SECRECY, OPENNESS AND TRANSPARENCY	230
<i>PRIVACY</i>	230
<i>SECRECY</i>	234
<i>CONFIDENTIALITY</i>	237
<i>OPENNESS</i>	238
<i>TRANSPARENCY</i>	241
CHILDREN'S RIGHTS TO PRIVACY	243
CONSULTATION ON LEGAL REFORM	248
1989 – 2005	248
2006 – 2010	252
OTHER JURISDICTIONS	257
CONCLUSIONS	258

THE PROBLEM OF SECRECY

Hearings in family courts are usually held in private, and there are legal restrictions on what information about these cases can be reported or shared. This can lead to accusations of ‘secret’ courts, not properly accountable to the public. This perception was one element in the distrust of the Family Court of Australia in its difficult early years, only partly resolved.¹ Allegations of secrecy have recently moved to the forefront of campaigns by the media and by pressure groups that criticise the family courts in England and Wales. This development has been reflected, a little, by professional concern about a lack transparency in process, but to a greater extent by policy makers, leading to a succession of consultations and reforms since 2004.

The law here is complex, but the main issue is that in almost all cases, publication of any information about family proceedings (unless specifically allowed by the court) is contempt of court, under the Administration of Justice Act 1960 s12. Furthermore, publication of any details that may identify that a child is subject to an application under the Children Act 1989 is, under s 97 of that Act, a criminal offence. As will be seen in this Chapter, high profile campaigns and the lengthy series of consultations in the past seven years have not changed that position.

Does the law protect privacy as a value or right accorded to children and families, or does it conceal what should be in the public domain? The problem of secrecy is relevant to this thesis for three reasons: that it is such a loudly vocalised complaint about the system; the extent to which private family problems are relevant to the public domain; and the way in which the discourse on ‘transparency’ fell so far short of the ideal speech situation. While Habermas’ theories would suggest that court systems should be as open as possible in order to achieve legitimacy, it will be seen that the very process that should have been a rational debate on the balance between privacy and publicity was obfuscated and unsuccessful.

Since the growth of communication technology during the 20th century, individuals sense the intervention of the state in their family lives and may be unwilling to accept decisions seen not just as resolving disputes about specific families, with their own particular problems, but as an exercise in state power imposing collective norms in the name of the wider public. The

¹ Discussed in Chapter Five

rise of individualism and the erosion of professional status have contributed to a more questioning attitude to traditional institutions. Assumptions that details of proceedings should be private have therefore been challenged. Dissatisfaction with the courts extends beyond parties who were aggrieved by outcomes of cases, to a general public questioning of the legitimacy of the court system.

This Chapter will explain the law on publicity of family court proceedings; compare secrecy, privacy, confidentiality, transparency and openness; discuss children's rights to privacy; and finally the recent reforms.²

At the time of writing, only one step in the promised reform process has been implemented, and references to hearings held 'in private' still apply, although since 27 April 2009, it is easier for journalists to be present at private hearings.³ The terms 'in chambers', '*in camera*' and 'in private' tend to be used interchangeably in cases and statute. *In camera* refers to the judge or magistrate ordering the court to be closed to the public for the whole or part of the hearing. A hearing in chambers may be held in the judge's chamber or in the court room, but wigs and gowns are not worn and there is a wider right of audience to solicitors and paralegals.⁴ The practical effects, of excluding the public, are the same.⁵

DEVELOPMENT OF THE LAW IN ENGLAND AND WALES

Traditionally, matters before the court affecting wards of court were seen as 'truly private affairs'⁶ as part of the protective *parens patriae* jurisdiction. At the beginning of the 20th century it was also recognised that children brought before JPs should have some protection from the public gaze.⁷ The idea of shielding cases involving children extended across social class; even those from deviant families deserved a degree of protection, perhaps with an eye on improving the prospects of rehabilitation. There were long-held assumptions that details of families in trouble were not matters of public interest.

² Where indicated, some legislation has been amended by provisions in the Children Schools and Families Act 2010 which are not yet implemented, so the original provisions are still in force.

³ Family Proceedings (Amendment) (No 2) Rules 2009 SI 2009/857, now Family Procedure Rules 2010, Part 27

⁴ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) 12

⁵ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 72-80

⁶ *Scott v Scott* [1913] AC 417

⁷ Children Act 1908 s 111

The law was reviewed in detail in by a LCD consultation paper in 1993, and was set out in tabular format in a DCA consultation paper in 2006.⁸ The following sections set out the law relevant to cases involving children, beginning with who can attend court and then explaining what can be publicly reported.

ATTENDING COURT HEARINGS

It is still recognised that it was a family law case, namely a nullity petition brought by Mrs Scott in *Scott and Scott* in 1911, that produced the definitive enunciation of the common law position regarding the conduct of proceedings in public, proclaiming the principle of open justice.⁹

In *Scott*, the House of Lords recognised only three exceptions to the general rule that courts should sit in public. These were proceedings relating to: wards of court; persons of unsound mind, and matters of trade secrets. There was no power to sit in private merely if the nature of the evidence (in this case, regarding the husband's alleged impotence) was unsavoury or indelicate. Lord Haldane cited the Matrimonial Causes Act 1857 s 46 as ending the practice in the ecclesiastical courts of obtaining evidence in marital causes through examination in private.¹⁰ Section 46 required all witnesses to be sworn and cross-examined in open court. Consequently, although the PDA had granted Mrs Scott's decree *in camera*, it had no jurisdiction to do so, and her subsequent distribution of a transcript was held by the House of Lords not to be in contempt of court. However, Jaconelli points out that the *ratio* is limited; none of the six judgments addressed the question of whether a member of the public could have attended the hearing, and neither of the parties contested the validity of the decree. Furthermore, some of the judgments suggested that if it had been correct practice to hold the hearing *in camera*, then Mrs Scott's circulation of written details *would* have been contempt.¹¹ Although the case is cited as authority for the court doors to be open, the application was actually Mr Scott's attempt to have Mrs Scott and her solicitor committed for contempt because she gave copies of the transcript to a few relatives.¹²

⁸ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993); Department for Constitutional Affairs *Confidence and confidentiality: Improving transparency and privacy in family courts* (2006 Cm 6886) 80-89

⁹ [1913] AC 417

¹⁰ As noted in Chapter Three

¹¹ Although actions similar to Mrs Scott's would now amount to an offence under the Judicial Proceedings (Regulation of Reports) Act 1926. The law relating to reporting proceedings is dealt with below.

¹² J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 6-7

In 1967, the High Court, hearing an application for a declaration of legitimacy, noted that legislation¹³ had been introduced to remedy the situation regarding nullity in *Scott*, but as no similar legislation existed in respect of legitimacy hearings, the judge did not have jurisdiction to hear proceedings in chambers, even where this lack of privacy would reasonably deter the litigant from pursuing her remedy.¹⁴ The fact that the mother was bringing the action on behalf of her two infant children, and had said she would withdraw the application if the court was not cleared, did not accord them similar protective consideration as wards of court, nor to assert their rights as litigators.¹⁵ There is evidence in the judgment of judicial concern about the potential harm to the children, and the judge did ask anyone present who was not directly concerned to leave. One wonders whether any onlookers were prurient enough to withstand the force of this judicial request.

From 1857, divorce cases had been conducted in open court, although judges would occasionally attempt to obtain evidence in private, when witnesses were unable to face a full courtroom. There was apparently no authority for them to do so, and the practice was probably not widespread.¹⁶ The impact of publicity on the social standing and careers of parties, especially co-respondents, could be disastrous. The requirements for proof of adultery provided ready material for newspapers.¹⁷ Reporting restrictions introduced in 1926 and the widening of the grounds for divorce to those which do not involve scandalous narratives have reduced the attraction for press and public.¹⁸ For the past 30 years, undefended divorce petitions have been processed by the district judge reading the papers under the ‘special procedure’, with only the decree being pronounced in open court.¹⁹ These rules differentiate between a routine administrative procedure and a matter to be tried. If the divorce is defended (which is now virtually unknown) evidence is to be heard in open court.²⁰

Applications under the Children Act 1989 (to the county court or High Court) are heard in chambers unless the court otherwise directs.²¹ This was declared compatible with Article 6

¹³ Although nullity proceedings are still held in open court, evidence relating to sexual relationships is heard in private (now s 48(2) MCA 1973)

¹⁴ *B (otherwise P) v Attorney General* [1965] 3 All ER 253 This type of case may also now be heard *in camera*: s. 60(4) Family Law Act 1986

¹⁵ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 169

¹⁶ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 193-194

¹⁷ Chapters Three and Four above

¹⁸ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 195

¹⁹ Family Procedure Rules 2010 r 7.20

²⁰ Family Procedure Rules 2010 r 13.19

²¹ Family Procedure Rules 2010 r 27.10

ECHR in 2002.²² The two exceptions contained in Article 6(1) reflect the themes of safeguarding the privacy of the parties to an action, and ensuring that publicity will not act as a deterrent to the administration of justice.²³ Since April 2009, accredited members of the media can attend these hearings, unless the judge rules against this.²⁴

The press had been allowed to attend family proceedings courts (FPCs) before 2009, although magistrates had a duty to exclude them from any Children Act proceedings if they considered it 'expedient in the interests of the child'.²⁵ In contrast to the higher courts, the default position was that the press could be present, and if they were, a decision had to be made by the magistrates before they could be excluded. Attendance by the wider public is restricted to 'any other person whom the court permits who are deemed to have adequate grounds for attendance'.²⁶ It has been suggested that this latter category would include researchers and trainee lawyers.²⁷ This system originated in the establishment of the juvenile courts in 1908, when it was felt that young people's cases should be heard in a less public arena than the full magistrates' court.²⁸ Despite this, FPCs were rarely attended by the media.²⁹

Adoption cases are also heard in private.³⁰ Appeals on children and adoption matters can be heard in private but decisions are usually given in open court. As oral evidence is rarely given in the Court of Appeal, the conduct of appeals is within the control of the judiciary to greater extent than the lower courts, where witnesses are present. The Supreme Court is open to the public; sessions are filmed and judgments are placed on its website.

In *Cliberry v Allan* in 2002, the Court of Appeal distinguished between the power of the High Court to exclude the public from any type of family proceedings, in order to provide 'a measure of privacy', from the provisions of the Administration of Justice Act 1960 s 12, which dealt with 'a measure of confidentiality'. In other words, there may be advantages of a private hearing other than preventing publicity. Butler Sloss P. stated that there was no

²² *B v UK* [2002] 2 FLR 261, [2002] EHRR 19

²³ J Jaconelli *Open Justice* (OUP, Oxford 2002) 157

²⁴ Now Family Procedure Rules 2010, Part 27

²⁵ Magistrates Court Act 1960 s 69; Children Act 1989 s 97

²⁶ Magistrates Courts Act 1980 s 69(2)

²⁷ N V Lowe 'Publicity in Court Proceedings concerning Children' (1981) 145 *Justice of the Peace* 256 cited in Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) 26

²⁸ As discussed in Chapter Four

²⁹ HC Committee on Constitutional Affairs, *Family Justice the Operation of the Family Courts Revisited* (HC 1086-II, 2006) Q 42

³⁰ Adoption and Children Act 2002 s 101

objection to family courts hearing cases in private and excluding the public where the 1991 Rules permitted them to do so.³¹

Both *Scott* and *Clibbery and Allan* concerned a party legitimately present who then reported on proceedings, rather than the problem of parties being aware of strangers in the court room. Nevertheless, these are the leading cases on the question of who can attend. This gives the impression that concerns about attendance only, rather than attendance linked to onward transmission of information, are usually resolved.

To summarise: until 27 April 2009,³² the court rules allowed family proceedings to be held in private, with discretion to allow members of the public in. The press were entitled to attend FPCs. Since April 2009, they can also attend county court and High Court hearings (other than adoption).³³ Courts have always been able to lift these restrictions on application. Limits on who can be present in the courtroom potentially restricts the information which can then reach the public domain, but there are separate laws relating to reporting or sharing information. As will be seen, this distinction means that giving journalists the right to attend court has not led to substantially increased or improved publicity about proceedings.

PUBLICITY ABOUT COURT PROCEEDINGS

A range of statutory restrictions on what can be reported from the family courts has developed over the past 80 years. These will be summarised chronologically in this section. Before the mid-19th century, matrimonial actions in the ecclesiastical courts were held in private, and divorce by Act of Parliament was rare.³⁴ Actions for criminal conversation could attract enormous amounts of publicity, and press reporting has long been viewed as a social problem.³⁵ Although there is some evidence of concern about the impact on the children of the parties,³⁶ the predominant fear was the corruption of public morals by the ‘penny dreadfuls’. This is expressed by Jaconelli as an awareness that the newly literate working classes were being provided with salacious information about those who were supposed to be

³¹ [2002] EWCA Civ 45, [2002] 1 FLR 565 per Butler Sloss P at para 50

³² Accredited press representatives may attend hearings (other than adoption). This is explained in the later section on consultation on reform.

³³ Family Procedure Rules 2010, Part 27

³⁴ Chapter Three above

³⁵ L Stone, *Road to Divorce* (1990) Ch 9; as discussed in Chapter Three

³⁶ S Cretney “Disgusted, Buckingham Palace...”: Divorce, Indecency and the Press, 1926’ in *Law, law Reform and the Family* (Clarendon, Oxford 1998)

their social superiors.³⁷ His view is substantiated by Cretney's research into the origins of the Judicial Proceedings (Regulation of Reports) Act 1926.³⁸

Judicial Proceedings (Regulation of Reports) Act 1926

This Act introduced the first restrictions on reporting. Section 1(1)(b) restricts the publication of details in divorce or nullity proceedings by making it unlawful to 'print or publish' anything other than names, addresses and occupations of parties and witnesses; concise statements of matters in which evidence has been given, legal submissions and the court judgment. There are exemptions for the law reports and professional publications. The policy behind the 1926 Act is explored in an essay by Cretney, whose description of the struggle between the moralising upper class and the press barons, foreshadows the current polarisation between those appalled by what they see as a gutter press and the nature of much of the coverage in formerly venerable institutions like *The Times* and the BBC.³⁹ Cretney concludes that the Act has been largely ineffective.⁴⁰ A recent example is the lack of any action being taken in response to breaches of the Act with widespread publicity about Paul McCartney and Heather Mills' divorce case (where there was a young child of the family) while it was ongoing.⁴¹

Children and Young Persons Act 1933

Where children are involved in non-criminal proceedings, any court may make an order under Section 39(1) Children and Young Person Act 1933 directing that no newspaper report reveal identifying details of any child concerned in the proceedings. This has recently been used to protect the identities of children in inquest and judicial review proceedings.⁴²

³⁷ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 196

³⁸ S Cretney "Disgusted, Buckingham Palace...": Divorce, Indecency and the Press, 1926' in *Law, law Reform and the Family* (Clarendon, Oxford 1998)

³⁹ At the time of writing, this struggle is focussed on the issues of celebrities being granted injunctions to stop the media naming them in stories about extra-marital affairs.

⁴⁰ S Cretney "Disgusted, Buckingham Palace...": Divorce, Indecency and the Press, 1926' in *Law, law Reform and the Family* (Clarendon, Oxford 1998)

⁴¹ H Muir and O Gibson, 'Trial by headline - McCartney divorce turns toxic as Mills documents published' *Guardian* 19 October 2006

⁴² For example, *Re LM (Reporting Restrictions: Coroner's Inquest)* [2007] EWHC 1902 (Fam); [2008] 1 FLR 1360; *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin); [2007] 3 FCR 754

Although it is listed in the 2006 table⁴³ of relevant legislation, it is not used in family proceedings because of the blanket provision of the Administration of Justice Act 1960, discussed below.

Magistrates Courts Act 1980

Restrictions on reporting family proceedings in magistrates courts are contained in the Magistrates Courts Act 1980 s 71.⁴⁴ This makes it unlawful for the press or broadcast media to publicise anything beyond a strict list of particulars. The effect is that evidence cannot be reported, although the nature of the case, points of law and the decision can.

Therefore, although the press can attend FPCs, the details they can report are restricted in a similar way to the 1926 Act. There are no reported cases on the working of this section. Applications to the FPCs under the Children Act 1989 and Adoption and Children Act 2002 are however subject to further restrictions under section 97, discussed below, and to the Administration of Justice Act 1960 if the hearing is held in private. The cumulative effect is that very little can be reported about children in the FPC, unless allowed by the magistrates.

Administration of Justice Act 1960

All court hearings held in private are subject to the Administration of Justice Act 1960 (AJA 1960) s12. This states that publication of information about proceedings held in private is not contempt of court unless they were: within the inherent jurisdiction; were brought under the Children Act 1989 or Adoption and Children Act 2002; or related to the maintenance or upbringing of a minor.⁴⁵ Otherwise, unless expressly forbidden by the court, what is heard in private can be published without being in contempt. Family proceedings which don't involve children may be held in private but may still be reported.⁴⁶

Section 12 appears under a Part of the 1960 Act headed 'contempt of court, habeas corpus and certiorari', clearly an administrative provision. The purpose of the section was to clarify

⁴³ Department for Constitutional Affairs *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886, 2006) 80-89

⁴⁴ This is still in force, although repealed by the Children Schools and Families Act 2010, not yet implemented.

⁴⁵ Administration of Justice Act 1950 s 12(1), still in force although repealed by the Children Schools and Families Act 2010, awaiting implementation.

⁴⁶ *Cliberry v Allan* [2002] EWCA Civ 45, [2002] 1 FLR 565 (Discussed above)

that publishing details of matters heard in private was contempt of court only in certain circumstances.⁴⁷ Parliament's intention was to remove confusion identified in a report on the existing law of contempt, rather than impose new restrictions.⁴⁸ It has been emphasised that the intention and effect of s 12(4) is that publication is *only* in contempt of court if it would have been so, prior to the 1960 Act.⁴⁹

The judge has an unfettered discretion under s 12 to grant leave to release information.⁵⁰ In wardship, the judge was to have the child's interests in the forefront of his considerations, as well as the public interest, in ensuring that frankness prevailed by preserving confidentiality, but the public interest in using information in other proceedings and 'all the circumstances of the case' would be considered.⁵¹

However, in 1992, Waite J expressed the view that the primary purpose of the privilege of confidentiality was not that it belonged to the child, but 'to protect the court in the exercise of its paternal functions'.⁵² Moriarty's evaluation of the law (prior to the Human Rights Act 1998) concludes that s 12 protected the confidentiality of proceedings, and only incidentally the child.⁵³ Waite J's statement on wardship:

The mere status of being a ward of court does not confer on a child any right, as such, to have its affairs cloaked in secrecy. The privilege of confidentiality is that of the court, not of the child, and the primary purpose of that privilege is to protect the court in the exercise of its paternal functions.⁵⁴

was applied by the President, Sir Stephen Brown, to a FPC decision to allow disclosure of the guardian's report to a family centre.⁵⁵ However, Connell J alluded to s 12 having an additional function because 'it is usually not in the best interests of the child for the nature of

⁴⁷ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) 19-21

⁴⁸ J Jacconelli *Open Justice* (OUP, Oxford, 2002) 84; M Tugendhat and I Christie; *The Law of Privcy and the Media* (OUP, Oxford 2002) 490-492

⁴⁹ *Re F (A Minor) (Publication of Information)* [1977] Fam 58 [1976] WLR 813

⁵⁰ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) 21

⁵¹ *Re F (A Minor) (Publication of Information)* [1977] Fam 58; [1976] 3 WLR 813, approved by the House of Lords in *P v Liverpool Daily Post and Echo Newspapers PLC* [1991] 2 AC 370, [1991] 2 WLR 513

⁵² *Re X (Minors) (Wardship: Disclosure of Documents)* [1992] Fam 124, [1992] 1 FLR 84

⁵³ J Moriarty, *The Interaction between Media Law and the Child, Child Law and the Media* Unpublished PhD thesis dated October 1998. Accessed 3 June 2005-14 July 2005, Ch 4

⁵⁴ *Re X (Minors) (Wardship: Disclosure of Documents)* [1992] Fam 124 at 127, [1992] 2 WLR 784

⁵⁵ *Re C (Guardian ad litem: Disclosure of Report)* [1996] 1 FLR 61

the disagreements between those close to him and the problems which those disagreements create in his young life to be exposed to public view.⁵⁶

It was also argued before the Court of Appeal more recently in *Clayton v Clayton* that s 12 was to be narrowly construed to safeguard the integrity of the court process itself, an argument impliedly accepted Potter P, in his judgment.⁵⁷ In *Medway Council v G and others*, the President allowed an agreed summary of concluded care proceedings to be published by *The Times*, because the paper had already been publishing ill-informed claims about a contact dispute that led to the child being subject to a care order.⁵⁸ Full judgments were also published in these cases, both of which had involved international abduction; the identity of the child in *Medway* could still be protected but the child in *Clayton* had been subject of a widely publicised search. In both cases, the court was attempting to strike a balance between limiting the amount of publicity to which the respective children were being exposed and the accusations of secrecy being made by some of the parties and the organisations supporting them.

Section 12 prevents the publication of judgments and restricts discussion of the facts and evidence in the case, but does not in itself prevent publication of the names of the parties, the child or the witnesses. In *Kelly v BBC* a 16-year-old ward of court wanted to give an interview to the BBC.⁵⁹ Munby J explained the limits of s 12 as protecting the privacy and confidentiality of documents on the court file, and what has gone on in the court room. It did not prevent publication of the fact that wardship proceedings are on foot, nor prevent identification of the parties or even the ward, nor reporting on the ‘comings and goings of the parties and witnesses’, nor anything happening in the court precinct, outside the room where the judge is conducting proceedings. However the section cannot be seen in isolation because it inter-relates with the other statutory reporting restrictions discussed here.

Children Act 1989

Section 97(2) created an additional offence (originally applicable only to the FPCs but extended to other courts):

⁵⁶ *Official Solicitor v News Group Newspapers and another* [1994] 2 FLR 174

⁵⁷ *Clayton v Clayton* [2006] EWCA Civ 878, [2007] 1 FLR 11

⁵⁸ *Medway Council v G and others* [2008] EWHC 1681 (Fam), [2008] 1 FLR 1687

⁵⁹ [2001] Fam 59, [2001] 1 FLR 197

No person shall publish any material which is intended, or likely, to identify:

- (a) any child as being involved in any proceedings before [the High Court, a county court or] a magistrates court in which any power under this Act [or the Adoption and Children Act 2002] may be exercised by the court with respect to that or any other child; or
- (b) an address or school as being that of a child involved in any such proceedings⁶⁰

The provisions of s 69 and s 71 Magistrates Courts Act (discussed above) are now subject to s 97.⁶¹

Consequently, the media can report certain limited details but none which might identify a child. The court may lift these restrictions wholly or partly, if satisfied that the welfare of the child requires it.⁶² The position has always been that the media could apply for permission to publish parts of evidence, for example if journalists were shown court documents by parties during an investigation.⁶³ In *Clayton v Clayton*, the Court of Appeal ruled that s 97 ceased to have effect at the end of proceedings, so continued protection of identity requires an application for an injunction at the end of the hearing.⁶⁴

According to the 1993 LCD report:

The various provisions are presumably cumulative in their effect so that if proceedings are lawfully heard in private and if reporting is covered by one of the provisions in section 12, then it will be a contempt of court to publish even those details which the statutory provision would allow.⁶⁵

This has been disputed on the basis that it is confusing to try to interpret the law as cumulative, when s 12 demarcates contempt while s 97(2) creates a criminal offence.⁶⁶ There were practical problems with this accretion of legislation, because it took Munby J 34

⁶⁰ Words in brackets added by the Access to Justice Act 1999 s 72 and Adoption and Children Act 2002 s 101(3) respectively.

⁶¹ Children Act 1989 s 97 (8)

⁶² Children Act 1989 s 97(4)

⁶³ *Official Solicitor v News Group Newspapers and another* [1994] 2 FLR 174

⁶⁴ [2006] EWCA Civ 878, [2007] 1 FLR 11

⁶⁵ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) 24

⁶⁶ J Dixon 'Children and the statutory restraints on publicity' (2001) *Family Law* 757

paragraphs to explain it in 2004.⁶⁷ It is reasonable to find that recent consultation papers call for a rationalisation of the law.⁶⁸

ACCESS TO DOCUMENTS AND SHARING INFORMATION RELATING TO FAMILY PROCEEDINGS

The previous section dealt with reporting court cases and making information available in court reports, the press and broadcast media, and generally in the public arena. The provisions of the AJA 1960 s 12 and Children Act 1989 s 97 apply to disclosing information about cases in the sense of publishing or reporting them to the general public. This chapter has raised the question of whether restricting who attends court and what is said about the case protects the parties or, alternatively, the process. Another aspect of the legal controls was that, until recently, they applied very strictly to sharing information with third parties for specific, perhaps supportive purposes. It is this aspect of the legislation that has proved easiest to reform.

Under Family Proceedings Rules 1991 r 4.23, access to court documents was strictly limited, so that leave of the court had to be obtained if papers were needed by anyone other than a party, their lawyer, the guardian, the legal aid authority, a court welfare officer or an instructed expert. This meant that leave had to be obtained for example in police investigations,⁶⁹ or by a social services department after a mother had made admissions to a guardian *ad litem*,⁷⁰ a guardian's report for the court to a local authority family centre,⁷¹ or a Cafcass officer to social services.⁷² It is now obvious that this situation posed serious obstacles to information sharing amongst agencies charged with protecting children. However, the 1993 LCD consultation did not identify this as an issue; it dealt only with access to documents as a source of wider publicity.⁷³

The issue of communication of court documents came to a head in March 2004 when the case of *Kent County Council v B* highlighted the practical and probably unintended effects of the

⁶⁷ *Kent County Council v B* [2004] EWHC 411; [2004] 2 FLR 142 paras 56-90

⁶⁸ Five government policy documents issued between 2005 and 2010, as explained below.

⁶⁹ *Re EC* (Disclosure of material) [1996] 2 FLR 725; *Re W (Minors)* (*Social worker*) [1998] 2 FLR 135

⁷⁰ *Oxfordshire CC v P* [1995] Fam 161, [1995] 1 FLR 552

⁷¹ *Re C (Guardian ad litem)* (*Disclosure of report*) (1996) 1 FLR 61

⁷² *Re M (A Child)* (*Children and Family Reporter: Disclosure*) [2002] EWCA Civ 1199, [2002] 2 FLR 893

⁷³ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) paras 4.33-4.66

legislation.⁷⁴ A solicitor acting for a mother in care proceedings had passed on information about expert evidence in the case to her sister, an MP who was at that time Solicitor General; she in turn passed this on to the Minister of State for Children. This occurred during an urgent government review into care cases which turned on medical evidence following allegations of over-reliance on medical experts in criminal proceedings.⁷⁵ In a lengthy analysis of the law relating to access to family court documents, Munby J concluded that the solicitor's actions amounted to 'publication' within the meaning of s 12 and found her guilty of contempt.⁷⁶ In his view, 'publication' covered almost any form of communication about the case and s 12 applied, whether or not the child was identifiable.

This judgment increased awareness that the law might prevent constituents obtaining assistance from their MP when family proceedings were involved.⁷⁷ Furthermore, the right to representation by a lay adviser or McKenzie friend (a growing trend because of reduced legal aid, and a service often provided by fathers' groups) in family cases was uncertain because court documents could not be shared.⁷⁸ Other problems identified were the inaccessibility of case files for research purposes or professional matters such as complaints investigation by the Law Society. Even a parent who consulted a close relative for help was technically in breach.

Following the judgment, the Department for Education and Skills put forward proposals to amend s 97 (2) so that a criminal offence would only be committed by publishing identifying material to the general public, and AJA 1960 s 12(4) to clarify that it would not be a potential contempt to publish information that is authorised by court rules. The courts would retain their jurisdiction to authorise, or restrict, disclosure of information in individual cases. Both these sections were amended by the Children Act 2004, and a consultation paper was issued in December 2004 to formulate the details of the new rules, with the responses published in July 2005.⁷⁹

⁷⁴ *Kent County Council v B* [2004] EWHC 411; [2004] 2 FLR 142

⁷⁵ see *R v Angela Cannings* [2004] EWCA Crim 1; [2004] 1 WLR 2607

⁷⁶ The solicitor had also passed details to the press; she had not obtained leave of the court to do either.

⁷⁷ HC Committee on Constitutional Affairs, *Family Justice: The operation of family courts* (HC 116-II, 2005) Q52

⁷⁸ *Re G (A Child) Litigants in Person* [2003] EWCA Civ 1055; [2003] 2 FLR 963

⁷⁹ Department for Constitutional Affairs, *Disclosure of Information in Family Proceedings Cases involving Children* (CP 37/04, 2004); *Disclosure of Information in Family Proceedings Cases involving Children: Response to the public consultation* (Cm 6623, 2005)

The relevant legislation was amended to allow disclosure by parties in family proceedings to groups such as McKenzie friends; mediators; counsellors, and close family members, for the purposes of support and advice.⁸⁰ Court documents could also be disclosed to MPs and some other elected representatives, the police and professional regulatory authorities.⁸¹

FPR 1991 r 4.23 was repealed in October 2005 and replaced by rule 10.20A which introduced a complex matrix of what and to whom information could be given. The provisions were lengthy, but the Court Service produced a helpful leaflet for the public setting out what could and could not be shared. When the provisions were extended under the Family Proceedings (Amendment) (No.2) Rules 2009/857 [rule 4\(b\)](#) in April 2009, the leaflet was not republished. This suggests that while the 2005 reforms helped clarify the law, the same might not be said of the 2009 reforms.

This process during 2004-2005 can be seen as a successful exercise in public consultation in that it led to reform of arcane rules. It was the precursor to a series of further less satisfactory consultations on the wider and more controversial issues of access to and reporting of the courts, under the banner of ‘transparency’.⁸²

THE IMPACT OF HUMAN RIGHTS LEGISLATION

The law on attending and reporting court proceedings was affected by the Human Rights Act 1998, as Articles 6, 8 and 10 of the European Convention on Human Rights are relevant. As already mentioned, family hearings being held in private is not incompatible with Article 6(1).⁸³

Parents, children and witnesses may have competing rights to privacy under Article 8 and various parties might claim the right to freedom of expression under Article 10.

(Although media interests are more correctly described as rights of information, rather than expression.⁸⁴)

⁸⁰ Children Act 2004 s 62

⁸¹ Family Proceedings (Amendment no. 4) Rules 2005; Family Proceedings (Miscellaneous Amendments) Rules 2005 came into force on 31 October 2005.

⁸² Discussed below.

⁸³ *B v UK* [2002] 2 FLR 261, (2002) 34 EHHR 19

⁸⁴ P Birkinshaw ‘Freedom of information and openness: Fundamental human rights? (2006) 58 *Administrative Law Review* 177, discussed below.

Prior to the implementation of the Human Rights Act 1998, freedom of speech usually outweighed other interests, apart from the statutory exceptions (as discussed in the preceding sections).⁸⁵ The exception was where the court exercised its inherent jurisdiction, or in wardship cases, to take the child's interests into account.

If the child was a ward of court, then the court's supervisory power was exercised to balance his or her interests with rights to free speech. In *Re X (a minor) (wardship; injunction)*, the case of Mary Bell's baby daughter, a ward of court in 1984, the High Court had power to impose an injunction *contra mundum*, Balcombe J specifically referring to prevention of the harm that could come to the child if her parentage became known.⁸⁶ However, we can see from this extract from his judgment (at 1426) that it is the court process that was the deciding factor, not the baby's position:

I am satisfied that, without an order of the court, there is nothing which would prevent a newspaper, television station or radio station, or any other medium from publishing the present identity of Mary Bell, or of the child or of the child's father. The authority for that general proposition is to be found in the decision of the Court of Appeal in *Re F (a minor) (publication of information)* [1977] 1 All ER 114 at 122, [1977] Fam 58 at 88, where Lord Denning MR said:

'But none of those old cases considered the publication of information relating to a ward of court. There is no suggestion anywhere that it was a contempt of court to publish information about *the ward herself*, be it favourable or adverse, helpful or injurious to her. But there are cases to show that it was a contempt of court to publish information relating to the *proceedings in court* about a ward.' (Lord Denning's emphasis.)

Scarman LJ said ...at 93):

'It is, I think, a necessary implication in all the speeches in *Scott v Scott* ... that the cloak of secrecy was available to conceal from the world not the life story of the ward, but only so much of it as was properly to be regarded as the subject of the proceedings.'

He followed that up, after referring to a statutory provision, with these words ... at 99):

'As I read the section [AJA 1960 s 12], what is protected from publication is the proceedings of the court: in all other respects the ward enjoys no greater protection against unwelcome publicity than other children.'

⁸⁵ *Mrs R v Central Independent Television* [1994] Fam 192; 2 FLR [1994] 151

⁸⁶ [1984] 1 WLR 1422

Moreover, the status of being a ward of court did not of itself prohibit publicity about the ward. In *Kelly v the BBC*⁸⁷ a 16-year-old ward was permitted to give an interview to the BBC without court permission because he wanted to; under the court's 'protective' jurisdiction, his welfare was to be balanced with his right of freedom of expression, but the former was not paramount. Only if the matter before the court involved the care or upbringing of the child, was his or her welfare paramount. This categorisation was made in *Re Z (a minor) (identification: restrictions on publication)*; ⁸⁸ the court's power was 'protective' under the inherent jurisdiction but 'custodial' only if the matter related to his care or upbringing. Although the child's welfare was paramount in 'custodial' cases, care or upbringing was defined very narrowly and excluded the potentially damaging effects on a child of publicity about other family members.⁸⁹

Re Z clarified that the inherent jurisdiction to protect children from publicity was not restricted to wards.⁹⁰ The child was not a ward of court, but both parents had obtained an injunction under the inherent jurisdiction protecting her against press intrusion, which the mother now wanted to vary to enable a TV programme to be made about the child's education. (Both had previously been featured in the media because the father was a government minister.) The Court of Appeal held that the mother's plans were within her exercise of parental responsibility under the Children Act 1989 and the child's welfare was its paramount consideration; it upheld the full injunction.

The inherent jurisdiction to restrict publicity about children was overhauled in the light of the Human Rights Act 1998 in *Re S (Identification: restrictions on publication)*.⁹¹ A psychiatrist's report warned that the young child in question was already at risk of mental illness and that publicity about his mother and deceased brother would be significantly harmful. The House of Lords was unanimous that earlier cases need not be considered because the jurisdiction to restrict publicity is now derived from Convention rights, but they applied a similar balancing exercise. More weight is given to Article 10 if there is a question of restricting reports of a criminal trial (the child was subject to care proceedings but it was the detail of his mother's trial where his children's guardian sought an order for

⁸⁷ [2001] 1 All ER 323

⁸⁸ [1997] Fam 1; [1996] 1 FLR 191

⁸⁹ *Mrs R v Central Independent Television* (1994) Fam 192; 2 FLR [1994] 151

⁹⁰ [1997] Fam 1; [1996] 1 FLR 191

⁹¹ [2004] UKHL 47, [2005] 1 FLR 591

anonymity.)⁹² This attitude reflects Jaconelli's view that the desirability of exposure of the criminal process is deeply-entrenched in our legal system. It is unfortunate for the family that the House of Lords in this case considered the involvement of the child to be 'indirect' as he was not seen as a victim, despite the clear evidence of the serious risk that publication posed.

As discussed below, privacy includes the development of autonomy, not just being left alone. Indeed, the European Court has held that:

Private life...includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.⁹³

This means that serious consideration needs to be given to the lack of choice for a young child unable to manage the consequences of decisions that are out of his hands. In *A Local Authority v W and others*,⁹⁴ *Re S* was distinguished on the ground that the family had already been subject to publicity whereas in the later case the children might still be effectively shielded from any such fall-out. The President, Sir Mark Potter, did not accept the argument put forward on behalf of the newspaper that a photograph of the mother was essential to the public's understanding of the issues in the criminal case.⁹⁵

Apart from wardship and inherent jurisdiction cases, Children Act 1989 applications have also been reviewed in the light of the Human Rights Act 1998. In a detailed review of the legislation in *Norfolk County Council v Webster and others*, Munby J allowed representatives of the media to attend and report on care proceedings in respect of a five-month-old child, specifically allowing the publication of the names and photographs of the child and his parents.⁹⁶ Two of the factors considered in the balancing exercise between Articles 6, 8 and 10 were the child's rights under Article 8 to keep his private life private by preserving the confidentiality of his personal data, and his rights under Article 6 to a fair trial by maintaining the privacy of the proceedings. It was submitted on behalf of the child, through his guardian, that media attention would be detrimental to the family and divert the parents' attention from

⁹² R Taylor, 'Re S(A Child) (Identification: restrictions on publication) and A Local Authority v W: Children's privacy and press freedom in criminal cases' (2006) 18(2) *Child and Family Law Quarterly* 269

⁹³ *Botta v Italy* (1998) 26 EHRR 241 at 32-33

⁹⁴ *A Local Authority v W, L, T and R (by her children's guardian)* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1

⁹⁵ *A Local Authority v W, L, T and R (by her children's guardian)* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1 at para 63

⁹⁶ *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146

him at a crucial stage of the assessment. Munby J concluded that the risks to the child were speculative. In his view, there had already been considerable publicity which had not damaged the child and additional risks of exposure to further publicity were unlikely. Even if the existing order remained in place there was no guarantee it would effectively restrain publicity. Secondly, the restraints sought by the guardian would be a disproportionate interference with the rights of the applicants (the BBC and the Daily Mail). Furthermore, the parents were entitled to argue their case in their own name and not under a pseudonym; the release of the family surname having ‘little discernible effect’ on the child.

The case has a number of distinctive features: the parents alleged a miscarriage of justice; the matter had already had extensive press and television publicity at the instigation of the parents; and they themselves were asking for publicity to continue. In this context, Munby J stated that there was a need for the full facts to emerge in a way which would command public confidence in the judicial system. The judgment seems to assume that whatever facts might emerge about the parents, the long-term impact on the child’s life of these being public knowledge weighed less in the balance than the risk of ongoing speculation. This case illustrates that the Convention fails to stop interests of adults and of the system being prioritised over those of the child. It seems that only in cases where young people are old enough to communicate their wishes to the court that their right to privacy will be accepted as including control over information.⁹⁷ It is particularly worrying that the impact on care planning for infants is ignored.⁹⁸

The judgment in *Re Z* contrived to make the question of publicity one of parental responsibility and therefore subject to section 1 of the Children Act 1989.⁹⁹ It has been argued that the courts were still keen to trump Convention rights with the welfare principle,¹⁰⁰ but in the light of subsequent cases, this approach seems unlikely to be taken. The incorporation of Article 8 at least means that the privacy rights of the child, family and witnesses are now taken into account in decisions about publicity. Most children in court cases are aged less than five; they cannot articulate their rights. It will be argued below that children’s privacy rights are to be taken as seriously as those of adults, but it will be seen that

⁹⁷ See *Re Child X (residence and contact: rights of media attendance – FPR Rule 28.4)* [2009] EWHC 1728, 2 FLR 1467

⁹⁸ A Paddle, ‘Will transparency compromise children’s welfare?’ Speech to Care & Health Conference on Opening up the Family Courts (London, 30 October 2006)

⁹⁹ *Re Z (a minor) (identification: restrictions on publication)* [1997] Fam 1, [1996] 1 FLR 191

¹⁰⁰ H Fenwick ‘Clashing Rights, the Welfare of the Child and the Human Rights Act 1998’ (2004) 67 *Modern Law Review* 889-927

they are being relegated in the clamour for publicity. First, the basis of a legal right to privacy will be discussed.

PRIVACY, SECRECY, OPENNESS AND TRANSPARENCY

The debate about opening up the family courts is being conducted in the public realm but being skewed by the language used to suggest polar opposites: secrecy and openness. Rather, secrecy is at one end of a continuum from deliberate concealment through to complete openness. Secrecy is the term used by the media in direct contrast to openness but misses the shades of privacy in between. What this chapter is concerned with is firstly, the private nature of family life and children's rights to develop autonomy without adverse interference, and secondly, the extent to which the court system and professionals working within it need to be subject to public scrutiny. This section therefore begins with privacy, moves on to secrecy, then looks at how these relate to transparency and openness.

PRIVACY

Legal and philosophical debate on privacy was intensive in the latter part of the 20th century and was bound up with protection of privacy by the law, necessitated by the development of advanced technological means of surveillance. There is no common law right to privacy, and the early literature is from the USA. The starting point is the famous article by two lawyers from Boston USA, Warren and Brandeis, published in 1890,¹⁰¹ prompted by Warren's objections to newspaper reports about his wife's social life and a family wedding.¹⁰² They perceived gossip about their personal lives as a type of assault. Their tone is dramatic: they feared for the health of the nation, because gossip dwarfs and usurps intelligent thought and aspiration, trivialising and belittling sensibility, enthusiasm and generosity. They called privacy the 'right to be let alone'.¹⁰³ This definition has been subject to considerable discussion, refinement and expansion ever since.

A tort of privacy was subsequently established in US law, and cited as the basis of a number of important US Supreme Court decisions on personal choice, such as *Roe v Wade* and *Griswold v Connecticut*.¹⁰⁴ These confirmed the legal right to freedom of choice in abortion

¹⁰¹ S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193

¹⁰² W L Prosser 'Privacy' (1960) 48 *California Law Review* 383

¹⁰³ T Cooley, *Law of Torts* (2nd edn. 1888) 29 cited in S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193

¹⁰⁴ 410 U.S. 113 (1973); 381 U.S. 479 (1965)

and contraception respectively. Consequently, the right to privacy has considerable importance for women, despite its patriarchal origins in the Warren and Brandeis' 'a man's home is his castle' concept, with its inherent danger of cloaking domestic abuse.¹⁰⁵

The US tort was based on protection from four types of interference: intrusion upon the plaintiff's seclusion or solitude; public disclosure of embarrassing private facts; publicity which places the plaintiff in a false light; and appropriation for the defendant's advantage, of the plaintiff's name or likeness.¹⁰⁶ This categorisation was incorporated into the Restatement (Second) of Torts but is subject to an inherent conflict with the First Amendment right to freedom of expression.¹⁰⁷ This tension is now replicated in the English courts' application of ECHR Article 8, and responding media claims that the courts are inventing a law of privacy.

The classic literature on morals and rights in privacy generated by Warren and Brandeis is compiled in a 1984 collection edited by Schoeman.¹⁰⁸ The contributors are from disciplines of philosophy, law, and political science, reflecting the close links between the values base and legal rights. Warren and Brandeis' definition was a claim against unwelcome publicity. This was varied subsequently by writers who looked at control; for example, Fried saw privacy as: 'the control we have over information about ourselves'¹⁰⁹ and Parker as: 'control over when and by whom.. (we) can be seen or heard...by others.'¹¹⁰ More recently, a British writer, Westin, has come to the fore as one of the leading authorities on the law of privacy. This moves us from privacy as protection within Prosser's four categories, which are still relevant in an age of 'media saturation'¹¹¹ to the age of surveillance technology; this is where Westin specialises, and has produced the following widely quoted definition of the right to privacy as:

...the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.¹¹²

¹⁰⁵ See J Inness *Privacy, Intimacy and Isolation* (OUP, New York 1992); R Gavison 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1-45; S Gallagher, *A Man's Home: Re-thinking the Origins of the Public/Private Dichotomy in American Law* <<http://www.historyofprivacy.net/>> Last accessed 3 April 2011

¹⁰⁶ W L Prosser (1960) 'Privacy' (1960) 48 *California Law Review* 383

¹⁰⁷ J Grant 'Victims, offenders and other children: a right to privacy?' 1992 19 *American Journal of Criminal Law* 485; J Moriarty *The Media and Children's Privacy: Lessons from American Law* Paper delivered to the Child Exploitation and Media Forum 1997, London 11 March 1997

¹⁰⁸ FD Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP, Cambridge 1984)

¹⁰⁹ C Fried 'Privacy [a moral analysis]' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984) 209

¹¹⁰ RB Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275-296 at 281

¹¹¹ Munby J in *Kelly v BBC* [2001] Fam 59 at 76, 1 FLR 197

¹¹² A Westin, *Privacy and Freedom* (Atheneum, New York 1967) 7

These control-centred definitions cover both rights to be free *from* interference and spread of personal information and rights *to* self-regulation of communication and disclosure of information on one's own terms.¹¹³ They can be applied to a child's freedom from unwanted media coverage and freedom to present their own version of events, as in *Kelly v BBC* and *Re Roddy*.¹¹⁴

From a Kantian perspective, privacy is a universal value, accorded to each person because s/he is an end in her/himself and an autonomous agent, not because of status. The underlying morality is that we must be able to control our privacy, 'but in most developed societies the only way to give a person the full measure of both the sense and the fact of control is to give him a legal right to control.'¹¹⁵ A legal right to privacy can follow only from the community's moral convictions of the good of its own members. Although it is necessary to impose boundaries on privacy, for example on one person's privacy to protect another's, this limits it only as a social right, and does not diminish its moral status.¹¹⁶ This accords with Goffman's theories on subjective feelings of autonomy and choice being essential to identity and inextricable from power relationships.¹¹⁷ The right to be let alone is therefore reconceived as a necessary status to reach informed decisions. This right seems especially applicable to a child who is developing his or her personality toward achieving moral autonomy.¹¹⁸

The only essay in Schoeman's collection that specifically mentions children is Fried's 'Privacy [A Moral Analysis]' written in 1968, in which he explicitly includes children as 'persons' in the Kantian sense of possessing fundamental rights that cannot be overridden for utilitarian reasons. This principle of morality is the basis of the concept of justice and underlies concepts of love, friendship and trust, which depend on respect of the privacy of all persons, by state and citizen.¹¹⁹

¹¹³ A Schafer (1980) 'Privacy: a philosophical overview' in D Gibson (ed) *Aspects of Privacy Law: Essays in honour of JM Sharp* (Butterworths, Toronto 1980) 9

¹¹⁴ *Kelly v BBC* [2001] Fam 59, [2001] 1 FLR 197; *Re Roddy (a child) (identification: restrictions on publication)*; *Torbay Borough Council v News Group Newspapers* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949

¹¹⁵ C Fried 'Privacy [a moral analysis]' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984) 219

¹¹⁶ LC Velecky, 'The concept of privacy' in Young JB (ed) *Privacy* (Wiley, New York 1978) 31

¹¹⁷ C Fried 'Privacy [a moral analysis]' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984)

¹¹⁸ As discussed below

¹¹⁹ C Fried, 'Privacy [a moral analysis]' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984) 206-207

Benn also moved on from utilitarian theories by seeing *covert* invasion of privacy as an assault on the dignity of the subject, even where they are not aware of it.¹²⁰ An individual is compromised if he can be ambushed at any moment by knowledge held by others emerging without warning, or if decisions and judgments are being made about him on the basis of information he has not voluntarily shared.¹²¹ Privacy helps shield us from the views and criticisms of others, enabling us to develop our own ideas and become more self-reliant.¹²²

Parties in court proceedings are vulnerable to the threat of uncontrollable publicity. Practitioners who work with children who are subject to care orders when they were too young to participate know that the information has to be disclosed to them in a timely and sensitive manner.¹²³ This links to a utilitarian view of the adverse impact on the individual of discovering their history in the wrong way. Taking Benn's view, any decision made about a child would be a transgression on their moral rights if they were too young to control the information, but decisions must be made by professionals if parents are not keeping their children safe. Benn's theory reminds us that we owe it to children to restrain our power and respect their right for us to keep our discussions about them to the minimum necessary.

Writing in 1964, Bloustein saw the power and impact of the mass media as posing far greater, 'significant and everyday threats to personal dignity and individuality' than had been possible by gossip in previous eras. Therefore, in the US, the right to sue for defamation by 'simple word of mouth or turn of the pen' has been succeeded by a right to privacy, essential to resist 'degradation of personality by the public disclosure of private intimacies.'¹²⁴ Also in the 1960s, Goffman foresaw new techniques in data storage and retrieval allowing access to a person's remote and forgotten past, meaning we would be unable to change our own and

¹²⁰ SI Benn, 'Privacy, freedom and respect for persons' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984)

¹²¹ A Schafer 'Privacy: a philosophical overview' in D Gibson (ed) *Aspects of Privacy Law: Essays in honour of JM Sharp* (Butterworths, Toronto 1980) 17-18

¹²² SI Benn 'Privacy, freedom and respect for persons' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984) 241-242

¹²³ A Paddle, 'Will transparency compromise children's welfare?' (Speech to Care & Health Conference on Opening up the Family Courts, London, 30 October 2006)

¹²⁴ E Bloustein, 'Privacy as an Aspect of Human Dignity: An answer to Dean Prosser' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984)

others' definitions of ourselves.¹²⁵ This observation was prescient of the Facebook era; young people can be trapped by labels from their past.

Singer's more recent review of privacy in the modern technological and social context, sees the loss of dignity, autonomy and respect by violations of privacy as undermining rational agency by slow degrees. In particular, he cites Rosen's use of the 'synecdoche',¹²⁶ where we remember one salient feature and confuse that with the whole identity, where not all the facts or the context are presented to us, or our small attention span prevents informed judgments.¹²⁷ Many of the current objections to media access arise from criticism of the ethics and standards of reporting; this will not be expanded on here. Whatever the standard of reporting, young people are themselves aware of the danger of individuals being judged on too little information.¹²⁸

The question is whether having control over information about oneself is privacy or secrecy.

SECRECY

Ethical concepts of privacy and secrecy were distinguished by Bok in *Secrets*, first published in the US in 1982 and cited by many writers as the principal work on this topic.¹²⁹ Her opening words evoke the power of secrecy in a more dramatic way than is found amongst descriptions of privacy, and may explain why secrecy is the preferred emotive term used by the media and those campaigning for reform.

We are all, in a sense, experts on secrecy. From earliest childhood we feel its mystery and attraction. We know both the power it confers and the burden it imposes. We learn how it can delight, give breathing-space, and protect. But we come to understand its dangers, too: how it is used to oppress and exclude; what can befall those who come too close to secrets they were not meant to share; and the price of betrayal.¹³⁰

¹²⁵ C Fried 'Privacy [a moral analysis]' in FD Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge 1984) 221 n 18

¹²⁶ From the term meaning a figure of speech which uses a part to describe the whole.

¹²⁷ I Singer, 'Privacy and Human Nature' *Ends and Means* (electronic journal, Aberdeen University), citing J Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Random House, New York 2000) < <http://www.abdn.ac.uk/philosophy/endsandmeans/vol5no1/singer.shtml>.> Last accessed 24 July 2011

¹²⁸ J Brophy, *The views of children and young people regarding press access to family courts* (Office of the Children's Commissioner, London 2010)

¹²⁹ S Bok, *Secrets: on the Ethics of Concealment and Revelation* (OUP, Oxford, 1984)

¹³⁰ S Bok, *Secrets: on the Ethics of Concealment and Revelation* (OUP, Oxford, 1984) xv

Bok explains privacy as the condition of being protected from unwanted access by others, whereas secrecy includes a trait of intentional concealment. These concepts can overlap in the private lives of individuals, where secrecy guards central aspects of identity and provides an additional shield, should privacy fail to protect. There is potential for greater overlap between the concepts within a group, than with individuals. Collectively, members' own sense of privacy blends with an enlarged private sense of the group and develops identities and boundaries of its own. Large scale secrecy that uses the language of privacy, with metaphors of personal space and sanctuaries, to personalise collective enterprises should not go unchallenged. Throughout the book, she highlights the greater danger of secrets held by organised groups in contrast with personal secrets shared by small numbers of individuals.

Bok's work is therefore a useful point of reference for principles of what should and should not be revealed about court cases. Conflicts over secrecy are about the power to control the flow of information. We lack power if we have no capacity for secrecy or control over how others see us, but we can also lack power if we have no insight into what others might conceal. Consequently she believes it is a mistake to ascribe a value to secrecy; there are issues of both legitimacy and danger in control of openness and there should be no moral presumption either way. Arguments in favour of each must be considered. Secrecy linked to power means there must be accountability and safeguards because collective secrecy brings added opportunity for misuse of power and exercise of poor judgment.¹³¹

Those who believe that the core function of the family justice system is to protect vulnerable parties¹³² may see the media label 'secrecy' being attached irresponsibly to matters which are better labelled 'private'. However, organisational secrecy is anathema to the spirit of the free press. The ethical position of secrecy set out by Bok can be extended to privacy. She would give more weight to arguments which favour individual control over secrecy and openness in personal matters, but believes that the exercise of collective power shifts the burden of proof on to those who exercise it.¹³³ To return to the quotation above, secrecy can be used to oppress and exclude. We might empathise that most individuals feel powerless when confronted by a rank of professionals with their own codes, allied to large-scale systems, such as the courts.

¹³¹ S Bok, *Secrets: on the Ethics of Concealment and Revelation* (OUP, Oxford, 1984) 106

¹³² For example, A Paddle, 'Will transparency compromise children's welfare?' (Speech to Care & Health Conference on Opening up the Family Courts, London, 30 October 2006)

¹³³ S Bok, *Secrets: on the Ethics of Concealment and Revelation* (OUP, Oxford, 1984) 110

Kelly, a psychologist, distinguishes between privacy and secrecy on the ground that the former is about unwarranted intrusion, whereas the latter shows a conscious awareness of a valid interest of others. She gives an example of HIV status being private but becoming a secret if it might be a danger to others, with the individual having to continuously process the information from their own point of view and that of others.¹³⁴ In her research amongst university students she found that the most commonly kept secrets related first to sexual and romantic relationships and secondly to things that would make them look maladjusted, such as mental health problems, convictions of personal inadequacy and feelings of loneliness and failure.¹³⁵ Of course, it is unsurprising that these are matters that would figure highly in a typology of secrets that average young people would want to keep. How difficult then will it be for young parents to work collaboratively with the authorities in improving their parenting and keeping their children safe, revealing and conceding their own inadequacies in court proceedings with journalists present? How will young people subject to proceedings cope with the knowledge that these details were made available to the public, and can probably still be found?

Psychologists believe that keeping secrets is stressful, but that the key to relieving these stresses is finding an appropriate non-judgmental confidant, either personal or professional.¹³⁶ Unfortunately, the systemic split between specialist witnesses being called on to give expert advice to the court and the availability of confidential therapeutic assistance means that family secrets may not be addressed in the most positive way for the individuals concerned. Putting these in the public spotlight may bring some benefits to a victim through public acknowledgment of their suffering and the shaming of the perpetrator. However, individual cases would need to be dealt with sensitively; the time needed for parties to work through these issues may not fit with the 24-hour news timescale of the media. It is already evident that journalists cannot afford the time to sit through an entire case.¹³⁷

Campaigners for more publicity in family courts do not base their claim on exposing personal secrets, but on the secrecy of the system. As previous sections have shown, the law does protect the court as much as, or even ahead of, the parties. The rationale is that justice can

¹³⁴ AE Kelly, *The Psychology of Secrets* (Kluwer Academic, New York 2002) 3-5

¹³⁵ AE Kelly, *The Psychology of Secrets* (Kluwer Academic, New York 2002) 7-15

¹³⁶ AE Kelly, *The Psychology of Secrets* (Kluwer Academic, New York 2002) 216-217

¹³⁷ J Rozenberg, 'Why newspapers lack interest in court reporting' *Law Society Gazette* 26 November 2009

only be administered if the parties and witnesses can speak frankly before the court, but this leads to suspicion. The dilemma is whether the law can be changed to separate out secrets into what are essentially private or of public interest.

Bok explains that to deliberate, to reason, to seek to justify in public, are all ways of stating and testing views and making them open to inspection and criticism. Here, she reflects Habermas' theory of the ideal speech situation. Furthermore, Bok maintains that a government always has an interest in secrecy and the public always in openness,¹³⁸ linking with Birkinshaw's argument for effective freedom of information.¹³⁹

CONFIDENTIALITY

Even when Bok was writing in the early 1980s, professional confidentiality could not realistically be claimed as an absolute duty, 'no longer what it was when lawyers or doctors simply kept to themselves the confidences of those who sought their help.'¹⁴⁰ The modern complexities of information-sharing are now reflected in detailed ethical codes of practice.

Once we venture into the public arena of the courts, are we expected to forgo our right to privacy, in the interests of openness? When we consult a state-funded physician or social worker, we do not abandon our expectations of confidentiality. It is part of the ethos of the welfare state that citizens can engage with public services without being stigmatised. We can still expect a degree of confidentiality from professionals, but there is a danger that the most vulnerable families, in court proceedings, are deemed to have lost their rights of privacy, and those who advise them are compromised.

Clark attempts a general definition of the ethic of confidentiality in social and health services as an undertaking offered that:

...the personal information that the worker gathers about the client will not be communicated to other persons or organisations except with the client's consent and only insofar as strictly necessary for the agreed purposes of the work in hand.¹⁴¹

¹³⁸ S Bok, *Secrets: On the ethics of concealment and revelation* (OUP, Oxford 1984) 177

¹³⁹ Discussed below

¹⁴⁰ S Bok, *Secrets: On the ethics of concealment and revelation* (OUP, Oxford 1984) 117

¹⁴¹ C Clark, 'Against Confidentiality?' (2006) 6 (2) *Journal of Social Work* 117 at 118

Lawyers and experts commissioned by the courts are also bound by professional codes. In *Re Child X*, applications were made by media organisations to report proceedings about a parenting dispute where the father was a celebrity. A child psychologist who was an expert witness had sought his professional body's advice, because he would not be able to follow his profession's ethical code of agreeing with the child what would be shared with others.¹⁴² Expert witnesses foresee that parents will tell them less.¹⁴³

Clark sees confidentiality as a means to balance three rights: privacy, safety, and the public good. He distinguishes between private as 'secluded' and private as 'non-public' to argue that individuals who seek help from the public sector do not lose their rights to protective privacy. Professional decisions on compromise are made only when the rights of safety and the public good are also engaged.¹⁴⁴ In the same way, we should resist attempts to remove privacy rights from individuals who enter the public arena of the courts. Most will not be there through their own volition, and those who have instigated proceedings might be denied access to justice and due process if they were discouraged by the prospect of undue publicity.

On the other hand, it is difficult for institutions to maintain legitimacy if they are perceived as citing 'privacy' and 'confidentiality' to hide their decision-making processes. The question is whether 'openness' is the only solution.

OPENNESS

Notwithstanding the House of Lords exemption of wards of court from the principle of open courts, the *Scott* judgments contain several references to the essential nature of open justice. For example, Lord Atkinson conceded that distress might be suffered by witnesses and parties, but the public trial is the 'best security for the pure impartial and efficient administration of justice, the best means for winning for it public confidence and respect'.¹⁴⁵ More dramatically, Lord Shaw quoted Bentham: 'Publicity is the very soul of justice, it is the keenest spur to exertion and the sure of all guards against improbity. It keeps the judge

¹⁴² *Re Child X (residence and contact: rights of media attendance – FPR Rule 28.4)* [2009] EWHC 1728; [2009] 2 FLR 1467

¹⁴³ D Glaser, 'Media Access to Expert Reports: a Child and Adolescent Mental Health Perspective' (2009) 39 *Family Law* 311

¹⁴⁴ C Clark, 'Against Confidentiality?' (2006) 6 (2) *Journal of Social Work* 117 at 127-130

¹⁴⁵ *Scott v Scott* [1913] AC 417 at 463

himself, while trying, under trial’¹⁴⁶ Interestingly, Viscount Haldane justified the exclusion of the public from cases involving wards of court on the basis that the wardship jurisdiction was parental and administrative, rather than disposing of a question of law.¹⁴⁷ This is an early indication of the view that resolving family disputes is not a judicial task. In that context, is ‘open justice’ relevant?¹⁴⁸ Administrative decision making perhaps requires a different perspective.

In the 1980s, Lord Diplock repeated that open courts discipline the judiciary to ‘keep the judges themselves up to the mark’ and that ‘the evidence and argument should be publicly known so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification.’¹⁴⁹ The media have been referred to as ‘trustees’ and ‘the eyes and ears of the public.’¹⁵⁰

The call on the family justice system to be less ‘secret’ reflects society’s increased expectations that its institutions should be open, exemplified by the introduction of the Freedom of Information Act 2000, which gives citizens a right to information held by a public body. Advice to the public on using the Act states that it:

...gives people a general right of access to information held by or on behalf of public authorities. It is intended to promote a culture of openness and accountability amongst public sector bodies, and therefore to facilitate better public understanding of how public authorities carry out their duties, why they make the decisions they do, and how they spend public money.

This guidance goes on to say:

The Freedom of Information Act does not apply to courts and tribunals. This is because all information contained in ‘court records’ is exempt from disclosure under the Act by virtue of section 32. There would therefore be no point in making them subject to the Act.

However, administrative information about courts and tribunals will be available from the government department that sponsors the court or tribunal in question.¹⁵¹

In his text on the law of freedom of information, Birkinshaw explains that the Freedom of Information Act 2000 was introduced in the wake of public dissatisfaction with the closed

¹⁴⁶ *Scott v Scott* [1913] AC 417 at 477

¹⁴⁷ *Scott v Scott* [1913] AC 417 at 437

¹⁴⁸ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 15

¹⁴⁹ *Home Office v Harman* [1983] 1 AC 280 at 316; 2 WLR 338

¹⁵⁰ Sir John Donaldson MR, *Attorney-General v Guardian Newspapers (no 2)* [1990] 1 AC 109, 3 WLR 776

¹⁵¹ <<http://www.dca.gov.uk/foi/yourRights/coverageguide.htm#cti>> Last accessed 12 July 2011

nature of government decision making in scandals such as the Matrix Churchill and BSE inquiries and the Shayler trial.¹⁵² He wrote:

The provision of information has always been at the centre of the relationship between government and society; provision of information has always been instrumental in the way government institutions have been created or allowed to develop. Such developments have occurred to fulfil public expectations in oversight, accountability, explanation or legitimacy for the exercise of power.¹⁵³

Thus in a modern democracy citizens expect their elected representatives to be accountable by full information being available, because to be informed is to be empowered.

Birkinshaw calls on Habermas's ideal speech situation as a theoretical basis for freedom of information. The premise is that all participants in discourse have the same opportunity to debate and justify, according to reasoned argument without external pressure or domination. Even so, he concedes that secrecy or a quest for privacy may be essential to our individual development at times. He echoes Bok on the differences between protection of individual and collective privacy:

Protection of an individual's confidentiality and privacy are often necessary to protect that individual's integrity and identity. Over protection of government information can be destructive of integrity and identity.¹⁵⁴

In Birkinshaw's view, Habermas would accept that there must be spheres of our personal lives that can legitimately be kept secret such as intimate relationships and medical facts. He is more concerned with sensitive negotiations and investigations in the public interest, commercial development of products because long-term planning and development would not happen if they were unprotected by laws of copyright and intellectual property.¹⁵⁵ As discussed above, personal development also needs private space in which to flourish.

Birkinshaw makes a very useful contribution toward understanding the ideal speech situation as a more tangible concept. There needs to be a balance between openness and secrecy in public life, but as we cannot be omnipresent during institutional decision-making processes,

¹⁵² P Birkinshaw, *Freedom of information: The law, the practice and the ideal* (3rd edn, Law in Context, Butterworths, London 2001) 1-7. These matters related to sale of armaments to Iraq; government response to a bovine epidemic; and prosecution of a former MI5 officer, respectively.

¹⁵³ P Birkinshaw, *Freedom of information: The law, the practice and the ideal* (3rd edn, Law in Context, Butterworths, London 2001) 7

¹⁵⁴ P Birkinshaw, *Freedom of information: The law, the practice and the ideal* (3rd edn, Law in Context, Butterworths, London 2001) 454

¹⁵⁵ P Birkinshaw, *Freedom of information: The law, the practice and the ideal* (3rd edn, Law in Context, Butterworths, London 2001) 19-20

we need to be confident that government policies on our behalf are being developed by rational communication. Therefore the ideal speech situation is satisfied where processes are seen to be even-handed and above board.¹⁵⁶ Because citizens' resources are limited, the operations of government and agencies may need to be observed by the press and condensed into an accessible form. This can justify giving the press favourable treatment over members of the general public in attending certain types of court,¹⁵⁷ and appears to be the thinking behind the 2006 consultation paper describing the media as the 'proxy for the public'.¹⁵⁸

Although disquiet about the level of administrative secrecy in the UK which led to the freedom of information legislation is acknowledged by Jaconelli in his critique, *Open Justice*, he challenges the assumption that 'publicity is an unalloyed benefit in the administration of justice'.¹⁵⁹ He focuses on criminal trials, and the deep-rooted idea of a trial as a public spectacle in which press exposure now plays a large part in the punishment of the accused. He concludes that there is little empirical evidence that an open court leads to a higher quality of justice, or indeed what effect the degree of openness of proceedings has on individual behaviour.¹⁶⁰ However, Jaconelli's work clearly illustrates the prevalence of a fundamental belief in the necessity of open courts, which he acknowledges is difficult to dislodge.

We can conclude that what is required of court systems is that the public is confident that decisions are made within rationally-agreed frameworks. The correct term for this approach is not 'openness' but 'transparency'.

TRANSPARENCY

'Openness' and 'transparency' are used interchangeably in the policy documents issued by the government on this topic.¹⁶¹ The latter term is a relatively recent one, apparently derived from European Union law, and they are not synonymous. The arguments for transparency are to enhance meaningful participation in democracy and to support the constitutional functions

¹⁵⁶ P Birkinshaw, *Freedom of information: The law, the practice and the ideal* (3rd edn, Law in Context, Butterworths, London 2001) 25-27

¹⁵⁷ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 24-27

¹⁵⁸ Department for Constitutional Affairs *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886 2006) 45

¹⁵⁹ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 1

¹⁶⁰ J Jaconelli, *Open Justice* (OUP, Oxford, 2002) 353-355

¹⁶¹ For example, Ministry of Justice, *Family Justice in View* (Cm 7502) at pages 4; 6; 7; and 8

of bodies charged with law-making or administrative oversight.¹⁶² The legacy of Habermas can be seen. EU institutions are required to demonstrate transparency in order to be accountable, and this has been described as an umbrella term for five values:

1. Access to documents or information
2. Knowledge about who makes decisions and how
3. Comprehensibility and accessibility to the structures of the decision-making framework
4. Public consultation
5. A duty to give reasons.¹⁶³

Birkinshaw distinguishes access to information as one component of transparency; the latter ‘entails conducting affairs in the open *or* (my emphasis) subject to public scrutiny’. Not all business can literally be conducted in public; transparency is achieved through keeping observable records, providing reasonable explanations for decisions, giving adequate reasons for decision taken against individuals, making processes of law-making as accessible and comprehensible as possible. He summarises transparency as combating complexity, disorder and secrecy. Although similar, openness goes further, beyond access to documents to opening up processes and meetings of public bodies to allow us to see government at work.¹⁶⁴

We can see from this wider analysis, that it is transparency that is required of family courts, not openness. It is the process in which we must have confidence; we do not need to see the personnel at work. In the same way, the health service is funded by the state, and there is public interest in knowing that surgery is correctly carried out, but we do not expect to personally observe the operation, nor to have it reported in the press.

Birkinshaw argues that some cases which turn on Article 10, freedom of expression, are in truth about freedom of information. As Lord Steyn comments,

...freedom of speech is the lifeblood of democracy. The free flow of information and idea informs political debate. It is a safety valve ... acts as brake on the abuse of

¹⁶² D Chalmers, C Hadjiemmanuil, G Monti and A Tomkins, *European Union Law: Text and materials* (CUP, Cambridge, 2006) 317-18

¹⁶³ D Chalmers, C Hadjiemmanuil, G Monti and A Tomkins, *European Union Law: Text and materials* (CUP, Cambridge, 2006) 317-18

¹⁶⁴ P Birkinshaw ‘Freedom of Information and Openness: Fundamental human rights?’ (2006) 58 *Administrative Law Review* 177

power by public officials. It facilitates the exposure of errors in the governance and administration of justice in the country.¹⁶⁵

Birkinshaw concludes that access to information confers legitimacy; we are only full citizens if we have information about the way power is wielded on our behalf. He wants freedom of information to be accorded status as a fundamental right but, as such, it will always be qualified. Therefore, claims that freedom of information can be used to invade privacy for salacious, profit-driven, reasons must be taken seriously, and laws drawn up carefully: 'let the case for reform be made and justified publicly.'¹⁶⁶ In Lord Donaldson's words:

...the public interest in investigation, publication and comment may in some circumstances override the right of individuals to confidentiality, but an understandable and sometimes reasonable desire to satisfy the public curiosity never can.¹⁶⁷

It is worrying that, in pursuing arguments for transparency in family courts, the consultation and subsequent legislative process failed to make or justify the case publicly, nor to identify the public interest. This will be discussed after the next section, because the changes in policy must be seen in the context of the particular relevance of the right to privacy for children.

CHILDREN'S RIGHTS TO PRIVACY

It has been acknowledged throughout this chapter that the privacy of adult parties and witnesses has been accorded some degree of legal protection, in accordance with rights based on the moral concepts of privacy, as well as the administrative requirements of the courts. It has however emerged that there is less certainty in asserting these rights for children and young people. The classic Warren and Brandeis definition reflects ideals of privacy embodied in the US political system for adult men, gradually extended to women. As recently as the 1980s, when the views of Goldstein, Freud and Solnit prevailed, it was acceptable to merge the child's interests with the parents in a family unit resistant to state interference.¹⁶⁸ Even

¹⁶⁵ *R v Secretary of State for the Home Department, ex parte Simms and another* [2000] 2 AC 115 at 126, [1999] 3 WLR 328

¹⁶⁶ P Birkinshaw, 'Freedom of Information and Openness: Fundamental human rights?' (2006) 58 *Administrative Law Review* 177

¹⁶⁷ Lord Donaldson MR in *Re C (a Minor) (Wardship: Medical Treatment) (No 2)* [1990] Fam 39 at 46; [1989] 3 WLR 252

¹⁶⁸ GB Melton, 'Minors and Privacy: Are Legal and Psychological Concepts Compatible?' (1993) 62 *Nebraska Law Review* 455-493

now that children's rights are articulated, the problem remains that most children are powerless to enforce them.¹⁶⁹

Recalling that privacy rights consist both of being shielded (which can come within the child protection and welfare paradigms) and being in control of one's own personal information (which raise problems about children's participation), there are particular obstacles to enforcing children's rights. When the state interferes with family life because parents' and their children's rights are in potential conflict, it takes on a heavy responsibility for ensuring that the correct balance is struck.

More widely than the court setting, increased awareness of the technological potential to invade children's privacy has raised concerns about insufficient attention being paid to obtaining their consent to information sharing.¹⁷⁰ It should not be assumed that young people growing up in a surveillance society are becoming accustomed to the idea that they have little control over their personal data. It has been acknowledged that children and young people are less resilient to embarrassment than adults; 'children have their own standard for humiliation'. Melton concluded in the early 1980s that ambivalence about the personhood of young people led to their privacy rights being marginalised in the US legal system.¹⁷¹ The Supreme Court in the 1990s recognised that young offenders and young victims required more protection because psychological damage from publicity could harm the rehabilitation process.¹⁷² Recent research in the UK found that young people faced an additional barrier to achievement if they were labelled as 'care leavers'.¹⁷³

Fundamentally, privacy is significant in children's development of a sense of themselves as separate from and connected to individuals and groups, to 'feed back into their sense of self-esteem and help define the ranges, limits, and consequences of individual autonomy within

¹⁶⁹ J Fortin, *Children's Rights and the Developing Law* (3rd edn. Cambridge University Press, Cambridge 2009) 12

¹⁷⁰ T Dowty and D Korff, *Protecting The Virtual Child: The Law and Children's Consent to Sharing Personal Data* (Action on Rights for Children, London 2009)

¹⁷¹ GB Melton, 'Minors and Privacy: Are Legal and Psychological Concepts Compatible?' (1993) 62 *Nebraska Law Review* 455-493 at 493

¹⁷² J Grant, 'Victims, offenders and other children: a right to privacy?' (1992) 19 *American Journal of Criminal Law* 485

¹⁷³ The Prince's Trust, *Looking beyond the label: public attitudes toward young people in care* (The Prince's Trust, London, 2004)

our society.’¹⁷⁴ While young, their capacity to set their own level of privacy is minimal but as they get older, privacy takes on meaning as active choice and is consequently an important marker of self-determination.¹⁷⁵ These ideas follow Piaget’s theories of moral development in children, and it follows that young children will not yet be in a position to make meaningful choices. However, it is not just a matter of short-term protection; we must consider the long-term impact on children who will be affected in later life by the way they discover their life-story, and the effect publicity had on planning for their care.¹⁷⁶

Moriarty also differentiated between a need to respect the privacy of adolescents and younger children, the former requiring protection while they develop moral autonomy but which for the latter may be meaningless or unnoticed. On the other hand, she believes the media have a role in ‘monitoring the rights of the vulnerable’, who may need protection as individuals within their own family or in their relationship to the state.¹⁷⁷

In 1993, the LCD Review stated that it was ‘generally accepted wisdom’ that publicity is harmful to children’s welfare.¹⁷⁸ This reflects the traditional view as expressed by Lord Donaldson, ascribing a child centred objective to AJA s 12:

The family is essentially a private unit and this is particularly the case in relation to the children of the family. The accident that, usually through no fault of their own, outside agencies, whether the courts or local authorities, are called upon to intrude into the family unit in the interests of the welfare of the children should never of itself be allowed to deprive the children of the privacy which they should and would have enjoyed, but for that intrusion. This is recognised by Parliament and led to the enactment of s. 12.¹⁷⁹

In other words, few children choose to have their future arrangements settled by a court, whereas arguably their parents have forgone their full privacy rights by invoking the jurisdiction. Moriarty (in anticipation of the Human Rights Act 1998) saw this attitude as an outdated part of the *parens patriae* jurisdiction which she proposed replacing with an

¹⁷⁴ M Wolfe, ‘Childhood and Privacy’ in I Altman and J Wohlwill (eds) 1978 *Children and the Environment* (Plenum, New York 1978) 189

¹⁷⁵ GB Melton, ‘Minors and Privacy: Are Legal and Psychological Concepts Compatible?’ (1993) 62 *Nebraska Law Review* 455-493 at 487-488

¹⁷⁶ A Paddle, ‘Will transparency compromise children’s welfare?’ (Speech to Care & Health Conference on Opening up the Family Courts, London, 30 October 2006)

¹⁷⁷ J Moriarty, ‘Children, Privacy and the Press’ (1997) 9(3) *Child and Family Law Quarterly* 217

¹⁷⁸ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) para 3.14

¹⁷⁹ *Re M and N (Wards) (Publication of Information)* [1990] Fam 211, [1990] 1 FLR 149 at 164

approach based on children's rights to privacy alongside their rights to participation.¹⁸⁰ Her work is an in-depth study combining media law and child law, which she saw, at that time, operating separately and potentially in conflict, with the basis of media law's freedom of expression failing to engage with child law's welfare principle and the inherent jurisdiction pre-dating children's participation rights. Since her work, the courts have had the opportunity to balance the Convention rights of freedom of expression with privacy. She cites Bloustein and Inness in support of her argument for children to be free of non-consensual media publication of personal details.¹⁸¹ Moriarty concluded that the law accorded children no right to privacy, only to protection.¹⁸² The cases suggested to her that AJA s 12 codified the common law to protect proceedings, not children.¹⁸³

Moriarty concluded that children do have a peculiar need for privacy, which should be acknowledged as a right, rather than being based on welfare and what she termed the 'publicity power' of the inherent jurisdiction. She believed that this right could be balanced with competing interests in open justice by delivering anonymised judgments in open court.¹⁸⁴ (Her analysis thereby ignores the implications of lack of the child's control over what other are saying about them). She recommended an independent post holder who would act on behalf of children whose lives were or were likely to be exposed in the media. Moriarty's solution has the attraction of being available to any child being exploited by adults in breach of their privacy and/or participation rights, whether within or outside any court proceedings.

Moriarty called anonymity the 'identification solution', dividing the facts from the identification of parties.¹⁸⁵ She saw two disadvantages, firstly that the media make stories more effective by using names and pictures, and secondly the problem of 'jigsaw identification' referred to in the Calcutt Report.¹⁸⁶ In her case study of the Thompson and Venables case, she saw the naming of the two boys at the end of the case as a way that 'the

¹⁸⁰ J Moriarty *The Interaction between Media Law and the Child, Child Law and the Media* Unpublished PhD thesis dated October 1998, accessed 3 June 2005-14 July 2005

¹⁸¹ J Moriarty (ibid) ch 3

¹⁸² J Moriarty (ibid) 151

¹⁸³ J Moriarty (ibid) 178; 169

¹⁸⁴ J Moriarty (ibid) 219

¹⁸⁵ J Moriarty, *The Interaction between Media Law and the Child, Child Law and the Media* Unpublished PhD thesis dated October 1998, accessed 3 June 2005-14 July 2005, 187

¹⁸⁶ Home Office *Report on Privacy and Related Matters* Chair: Sir David Calcutt (1990, Cmnd 1102). This led to the establishment of the Press Complaints Council.

media can reclaim them on behalf of the public, imposing its own supervision on them.¹⁸⁷ In this way, identifying an individual is powerful and makes them an actor in the drama.

George and Roberts point out that anonymity only keeps a person's identity secret, not information about their private lives.¹⁸⁸ Unease has been expressed about details of children's lives being encapsulated on the internet, even by parents who do not name their children. Many newspaper columnists write about their own family lives, and their stories are no longer yesterday's newspaper wrapping today's fish and chips. One suggestion has been to allow young people to have items removed once they are older.¹⁸⁹

Similarly to Moriarty, some members of the judiciary¹⁹⁰ take the view that children who are too young to be what might be termed 'rational choosers' have not yet developed a claim to privacy, and hence no enforceable right. This cannot be correct; although it is older children who will be affected by knowing people can read about and discuss their lives, and who may feel powerless and assaulted, younger children also have privacy rights beyond welfare. There is the danger of 'ambush', discussed above. Furthermore, planning for the child's future may well be affected and his/her capacity for autonomy compromised before s/he even begins to strive for rational agency.

It can also be argued that other effects of more publicity of court proceedings, such as delays while lawyers argue about what can be made public and increased reluctance for medical witnesses to give expert evidence, may well impact adversely on children's rights to a fair trial. These may be unintended consequences of policy at a time when policy emphasis is so strongly directed at reducing delay and expenditure.¹⁹¹ As the United Nations Convention on the Rights of the Child becomes more influential,¹⁹² the implications of Articles 3 (the best interests of the child); 12 (right to participate and be represented); 13 (right to information) and 16 (right to privacy) will need to be considered.

¹⁸⁷ J Moriarty, *The Interaction between Media Law and the Child, Child Law and the Media* Unpublished PhD thesis dated October 1998, accessed 3 June 2005-14 July 2005, 235

¹⁸⁸ RH George and C Roberts, *Media reporting of family court cases* (Family Policy Briefing 6, University of Oxford Department of Social Policy and Social Work 2009) 6

¹⁸⁹ S Butterworth, 'They write you up your mum and dad' *Guardian* 16 March 2009

¹⁹⁰ For example, Munby J in *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, as noted above.

¹⁹¹ Family Justice Review *Interim Report* (Ministry of Justice, 2011)

¹⁹² Especially in Wales, where the Welsh Government increasingly pays regard to the Convention.

Although anonymity is not an answer in any event, it is not wanted by the media if they are writing about celebrities. The Editors Code states that: ‘Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child’s private life.’¹⁹³ However, the media may argue that there is public interest in the story about the parents. Until recently the courts made no explicit distinction for children of famous parents. In *Re Z*, Ward LJ resorted to the welfare principle of the Children Act 1989 to make a prohibited steps order preventing a child of a politician from being filmed in a documentary about her health and education needs.¹⁹⁴ An indication of greater judicial sensibility toward children’s rights was shown in *Murray v Big Pictures (UK) Limited* where the Court of Appeal held that it was at least arguable that the baby son of the children’s author, JK Rowling, had a reasonable expectation of privacy, as would the child of a parent not in the public eye, and that the High Court judge had not paid sufficient attention to the fact that the appellant was a child. The law should protect children from intrusive media attention, in this case from being photographed in a public place.¹⁹⁵ In *Re Child X*, the President, Sir Mark Potter, held that the law relating to attendance at court was to be applied in the same way for a child whose name would invoke media interest as for any other child. The only reason for media interest in the case was the identity of the father, but in the event, the media were excluded following evidence of the adverse effect publicity was already having on the child.¹⁹⁶

CONSULTATION ON LEGAL REFORM

1989-2005

Although objections to the closed nature of family courts have become vociferous only recently, there is a history going back to the time of implementation of the Children Act 1989, when the courts were aware of the conflicting ideals of privacy and publicity after doubts raised by the Cleveland child abuse cases. Apparently, it was felt that the press had played an important part in questioning the evidence, being able to comment because the children were not wards of court.¹⁹⁷ However, the 1993 LCD Review cites the Cleveland

¹⁹³ Press Complaints Commission <<http://www.pcc.org.uk/cop/practice.html>> Last accessed 12 July 2011

¹⁹⁴ *Re Z (a minor) (identification: restrictions on publication)* [1997] Fam 1; [1996] 1 FLR 191

¹⁹⁵ [2008] EWCA Civ 446, [2008] 2 FLR 599

¹⁹⁶ *Re Child X (residence and contact: rights of media attendance – FPR Rule 28.4)* [2009] EWHC 1728, [2009] 2 FLR 1467

¹⁹⁷ M Wright, ‘The Press, Children and Injunctions’ (1992) *Modern Law Review* 857

Report as recommending an automatic ban on identifying children in family proceedings.¹⁹⁸ Another example of the benefits of publicity was raising awareness about a surrogacy arrangement that gave the impetus for the Warnock Committee on Human Sterilisation and Embryology beginning work in 1984.¹⁹⁹

There is no reason given in the 1993 Review as to what prompted it, apart from inconsistency in the law, nor is there any trace of what became of any responses to it. In 2004, Dame Elizabeth Butler-Sloss, President of Family Division, mentioned that she did not know what had happened to it.²⁰⁰ The authors of the paper are unnamed, and it has not been possible to discover why nothing followed. Comment can be found in *Cliberry v Allan* where Thorpe LJ says:

The result was an extremely thorough and scholarly paper. I believe that there were widespread responses to the consultation paper. Certainly the Family Division bench, of which I was then a member, submitted a paper supported by a substantial majority of the judges of the Family Division and the district judges of the Principal Registry. It is to my mind a matter of regret that the Government did not carry this initiative forward.²⁰¹

The 1993 Review gave three arguments in favour of open justice in the context of Article 10 ECHR: enabling scrutiny of the administration of justice; enabling public discussion of matters of public interest that come before the courts and facilitating public knowledge of and interest in proceedings. For example, it cited Mrs Justice Booth in 1987 attributing ‘lax and sloppy advocacy’ in ancillary relief hearings to the exclusion of the press.²⁰² It noted that the question of what constitutes a question of public interest is a vexed one.²⁰³ The Review argued that law and practice was inconsistent, anomalous and fragmented. It concluded that the law should be rationalised, but that the current balance between openness and confidentiality was generally accepted and that change for its own sake was not recommended.²⁰⁴

¹⁹⁸ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) para 1.7

¹⁹⁹ M Wright, ‘The Press, Children and Injunctions’ (1992) *Modern Law Review* 857

²⁰⁰ HC Select Committee on Constitutional Affairs, *Family Justice: The operation of family courts* (HC 116, 2005) Ev 13 Q46

²⁰¹ *Cliberry v Allan* [2002] EWCA Civ 45, [2002] 1 FLR 565 at 96

²⁰² Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) para 3.6; see also J Jaconelli *Open Justice* (OUP, Oxford, 2002) 38

²⁰³ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) paras 3.3-3.11

²⁰⁴ Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings, a consultation paper* (1993) para 5.9

After 1993, individuals and organisations claiming to represent fathers' rights began to make complaints about secrecy. This is exemplified by Dr Pelling's long-running campaign for open hearings of his applications for section 8 orders. In 1997, Dame Elizabeth Butler Sloss summarised his arguments that principles of open justice obliged each court to hear each case in public as follows:

...the right of the public to know what is going on, criticism of secret justice, the dangers of hearing cases in private without the scrutiny of the public and the press, the inability of litigants in person to get experience in conducting child cases, or to find out what the judge is like. He suggested they were rotten laws and a rotten use of discretion.²⁰⁵

Nevertheless, she held that the court was bound by the rules to hold cases in private, with discretion to deliver judgments in open court if there were matters of public interest. Lord Justice Thorpe described Dr Pelling as an active member of a fathers' pressure group, and suggested that these concerns were not held by the wider public. In the following decade, the fathers' rights movement achieved a far higher profile.²⁰⁶

In 2004, the government moved quickly following *Kent County Council v B*,²⁰⁷ to remedy the confusion about using information about a court case for narrower purposes, such as help from an MP or McKenzie friend. Section 62 was added to the Children Act 2004 and the DCA issued a consultation paper, *Disclosure of information in family proceedings cases involving children*.²⁰⁸ The government response was published in July 2005.²⁰⁹ Fifty-seven responses had been received, generally in favour of enabling better advice and support for parties as well as for professionals who required access for research or regulatory purposes. The consultation was explicit that these relatively uncontroversial proposals were not intended to address disclosure to the media.²¹⁰

It would be wrong to attribute all complaints about restricted access to court proceedings to the fathers' lobby, although this is still dominant. Women's Aid drew attention to the

²⁰⁵ *Re P-B (A Minor: Hearings in open court)* [1996] 2 FLR 765 at para 60

²⁰⁶ R Collier, '“The Outlaw Fathers Fight Back”: Fathers' Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform – Reflections on the UK Experience', in R Collier and S Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006)

²⁰⁷ *Kent County Council v B* [2004] EWHC 411 (Fam); [2004] 2 FLR 142

²⁰⁸ Department for Constitutional Affairs *Disclosure of information in family proceedings cases involving children* (CP 37/04, 2004)

²⁰⁹ Department for Constitutional Affairs, *Disclosure of information in family proceedings cases involving children: Response to the public consultation* (Cm 6623, 2005)

²¹⁰ The 2005 reforms are discussed above.

potential risk to parties in cases that were not subject to public scrutiny, claiming that, in five cases where children were murdered by a parent during a contact visit following a court order, the courts and professionals were escaping accountability because the facts of the cases could not be publicised.²¹¹ Other pressure groups claimed that innocent parents were having their children taken into care. Members of the judiciary were tiring of being accused by conspiracy theorists. In a speech to lawyers in 2005, Munby J reiterated a point he had earlier made about one father in a contact hearing:

Those who without justification attack the family justice system can all too easily do so by feeding the media tendentious accounts of proceedings while hypocritically sheltering behind the very privacy of the proceedings which, although they affect to condemn, they in fact turn to their own advantage. It is all too easy to attack the system when the system itself prevents anyone correcting the misrepresentations being fed to the media.²¹²

An increasing number of judgments were given in open court, in an attempt to dispel some potentially inaccurate perceptions. Where there had already been considerable, possibly unavoidable, publicity, the courts acceded to requests to lift reporting restrictions in order to redress to some extent the mis-information already in the public domain.²¹³ Judgments in High Court cases which had not been in the news but where the judge wanted to bring attention to issues of public interest in contact disputes were delivered in open court without identifying the parties.²¹⁴ Public awareness of such cases was influential in the campaign for the enforcement of contact provisions contained in the Children and Adoption Act 2006.

There were indications in *BBC v Rochdale MBC*, that the High Court was giving serious consideration to young people's right to freedom of expression, even where this might pose problems in maintaining the quality of evidence required from professional witnesses. The social workers could not rely on the court to keep their identities protected many years after they had worked with children who were now adult and wished to speak to the media about their experiences.²¹⁵ This judgment emphasised that such protection was accorded to social workers only where it was still necessary to prevent identification of children. The court noted the argument that there was a shortage of experienced social workers throughout the

²¹¹ H Saunders, *Twenty-nine child homicides* (Women's Aid Federation England, Bristol 2004) 10

²¹² Mr Justice Munby, 'Access to and reporting of family proceedings' (2005) 35 *Family Law* 945-954 at 951

²¹³ For example, *Blunkett v Quinn* [2004] EWHC 2816 (Fam), [2005] 1 FLR 648; and *Re Wyatt (a child) (medical treatment: parents' consent)* [2004] EWHC 2247 (Fam), [2005] 1 FLR 21

²¹⁴ *V v V (Contact: implacable hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851 and *Re D (A Child) (Intractable Contact Dispute: Publicity)* [2004] EWHC 1215, [2004] 1 FLR 1226

²¹⁵ *BBC v Rochdale Metropolitan Borough Council* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101

country and that unwelcome publicity might be a further disincentive to working with children, but was not prepared to look more widely at the interests of those children.

The Select Committee on Constitutional Affairs reviewing family courts in 2004 heard from a number of campaigners for more open courts as well as senior judges who hoped that reporting routine cases might banish the distorted views obtained from reading partial information about the more extreme situations that reach the higher courts.²¹⁶ The Committee concluded:

A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary. This would make it possible for the public to have a more informed picture of what happens in the family courts, and would give the courts the 'open justice' which characterises our judicial system, while protecting the parties.²¹⁷

However when the issue was re-examined by the Committee in 2006, it heard evidence that the busy Inner London Family Proceedings Court, although already 'open' was rarely visited by journalists. There had been a three-week 'flurry' after the earlier Committee report.²¹⁸

These more complex complaints were not addressed by section 62, but further consultation on 'opening up' the family courts was promised in spring 2006.²¹⁹ Although the extent to which there was genuine public demand for more knowledge about courts was doubtful, the debate so far appears to have been relatively open and methodical.

2006-2010

The DCA (succeeded by the Ministry of Justice) issued three documents: a consultation on proposals in July 2006;²²⁰ a response, with new proposals in March 2007;²²¹ and another

²¹⁶ HC Committee on Constitutional Affairs, *Family Justice: The operation of family courts* (HC 116-II, 2005) Q 45-55 (9 November 2004)

²¹⁷ HC Committee on Constitutional Affairs, *Family Justice: The operation of family courts* (HC 116-I, 2005) para 144

²¹⁸ HC Committee on Constitutional Affairs, *Family Justice the Operation of the Family Courts Revisited* (HC 1086-II, 2006) Q 42

²¹⁹ Harriet Harman, Solicitor-General, Hansard HC 12 January 2006 col 166-168

²²⁰ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886, 2006)

consultation on a third set of proposals in June 2007.²²² The 2006 consultation paper stated that there had been a loss of public confidence in the family justice system.²²³ No evidence was provided about the numbers of people who do complain about their experience of family courts.²²⁴ Nevertheless, the Department aimed to end secrecy by implementing a series of proposals to make the law more consistent by lifting some of the restrictions on access to the courts. The most radical proposal was to allow, with some safeguards, media attendance and reporting of cases at all levels of court, as ‘proxy for the public’.²²⁵ Overall, the impression was given of an attempt to address adult grievances, with little weight being given to the impact on children who are the subject of proceedings. For example, the section headed ‘Protecting the privacy of families, especially children’ in fact makes no reference at all to children.²²⁶

The DCA did create a young people’s on-line forum to accompany the consultation. but there was no mechanism to ascertain the age of those who posted responses. The Department recorded only 26 responses in its summary, giving quotes from two individuals, who both opposed allowing the media a right to attend hearings. The report concludes that the response rate was disappointing.²²⁷

During the consultation process, the Minister for Justice stated categorically on several occasions that the family courts would be ‘opened up’ to the media.²²⁸ It was therefore something of a surprise when the 2007 response to the consultation set out proposals to rationalise the law, *without* giving the media rights to attend court. Lord Falconer, then Lord Chancellor explained that the 2006 paper had invited participation by young people, and that the media would not be given automatic access to family courts because most responses,

²²¹ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts: response to consultation* (Cm 7036, 2007)

²²² Ministry of Justice, *Confidence and Confidentiality: Openness in family courts – a new approach* (Cm 7131, 2007)

²²³ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886, 2006) 10

²²⁴ J Brophy and C Roberts, ‘Openness and transparency’ in family courts: what the experience of other countries tells us about reform in England and Wales (University of Oxford, 2009) 5

²²⁵ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886, 2006) 45

²²⁶ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 6886, 2006) 39-40

²²⁷ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts: response to consultation* (Cm 7036, 2007) 74-75

²²⁸ See for example, speech to the National Family and Parenting Institute 5 October 2006 and other speeches at <http://www.harrietharman.org/speeches_and_reports> Last accessed 24 July 2011.

especially from young people, were against it, and ‘children must come first’.²²⁹ Instead, the Department was to take ‘a new approach’ by providing better information about what happens in family courts, short of allowing the media to attend proceedings, concluding that the right balance was between providing more information about proceedings at all levels to users and the public and giving courts the discretion on who should be able to attend.²³⁰ Further consultation consisted of four ‘tick-box’ questions on disclosure and the decision in *Clayton*.²³¹ Although it had been difficult to engage young people in the consultation, their views had been persuasive.

Between June 2007 and December 2008, another change in direction occurred. The Secretary of State announced in *Family Justice in View* that his ‘balanced view’ was that court rules should be changed to give media access.²³² Although the paper refers to the Ministry taking into account 200 letters received, there is no analysis of this correspondence, unlike the breakdown given of respondents to the actual consultation questions in earlier publications. Apart from these 200 letters of unknown provenance, the only reason given by the Secretary of State for his having to re-balance his view was the campaign by *The Times*, which consisted of parents’ complaints about social workers and medical expert witnesses. This sustained campaign included a week-long series of articles appearing in the paper in July 2008.

The Times was quick to attribute the Secretary of State’s decision to itself, a claim which he has not contested. On 16 December 2008, in a story portentously headlined: ‘Family courts: What changed in the long walk to freedom’, Camilla Cavendish wrote:

Talking ahead of his announcement in the House of Commons, Mr Straw credited *The Times* with bringing the issue to his attention “more graphically than it would otherwise have done”. He said: “You have to deal with shedloads of issues in jobs like this...if something isn't a particular issue at the time, you don't go searching around for it. I commend *The Times* for running such a professional campaign.”²³³

²²⁹ Ministry of Justice, *Confidence and Confidentiality: Openness in family courts – a new approach* (Cm 7131, 2007) 40

²³⁰ Ministry of Justice, *Confidence and Confidentiality: Openness in family courts – a new approach* (Cm 7031, 2007) 30

²³¹ *Clayton v Clayton* [2006] EWCA Cv 878, [2007] 1 FLR 11

²³² Ministry of Justice, *Family Justice in View* (Cm 7502, 2008)

²³³ A re-working of the article appeared the next day headlined as ‘How *The Times* helped to right a wrong’, 17 December 2008

This suggests that the Secretary of State was unaware of the issue until drawn to his attention by *The Times* in 2008, despite his department and its predecessor having been consulting on it for over two years.

Thus, policy on media access changed between 2006 and 2007, and back again in 2008. The inescapable conclusion is that public opinion was measured by policy-makers according to what appeared in the media rather than the sum of the evidence given to the Department over a period of four years. The consultation on ‘transparency’ was opaque.

In December 2008, in *Family Justice in View*, the Ministry proposed to:

1. Change the law so that the media will be able to attend, unless the court decides against this. (This was achieved by way of the rule change in April 2009.²³⁴)
2. Improve public information about how cases are decided
3. Pilot anonymised family proceedings court and county court judgments on-line.²³⁵
4. Give parties copies of the judgment at the end of the case
5. Make reporting restrictions consistent across all family courts
6. Protect children’s identity, unless lifted by the court. (This was a restatement of the present law).
7. Reverse the *Clayton* judgment
8. Enable more access to support and advice by easing restrictions on sharing case details
9. Consult on whether adoption hearings should also be open

On the first day the media were able to take advantage of the rule, a change of residence application by a celebrity was transferred to the High Court to establish what could be reported, the judge commenting: ‘none of us have proper guidelines.’²³⁶ A Practice Direction was issued by the President three weeks later.²³⁷

Press reaction to the announcement in December 2008 was initially favourable and it was not until late March 2009 that it became clear that the rule change introduced in April 2009 extended only to allowing journalists to attend. With the AJA 1960 and Children Act 1989 provisions still in place, reporting was still prohibited without express permission of the

²³⁴ Rule 10.28 Family Proceedings Rule 1991, now Family Procedure Rules 2010, part 27, as noted above.

²³⁵ A pilot was launched in Cardiff and Leeds in November 2009 with judgments being posted on the BAILII website <<http://www.bailii.org/ew/cases/EWCC/Fam/>> Last accessed 24 July 2011

²³⁶ F Gibb, ‘An age of secrecy ends as family courts opened to media scrutiny’ *The Times* 28 April 2009

²³⁷ Practice Direction 27B, Attendance of Media Representatives at Hearings in Family Proceedings, 29 April 2009.

judge.²³⁸ In theory, the media could send in journalists to be ‘the eyes and ears’ of the public, but in practice there were obstacles: they would need to know about the case in the first place, allow the time to wait for it to start and then sit through it, and then obtain leave of the judge to report on it, excluding any details that might identify the child.

The proposal to reverse *Clayton*,²³⁹ elicited a campaign spearheaded by Mr Clayton, and supported by *The Times*, that aggrieved parties needed to be able to identify themselves in order to gain media attention.²⁴⁰ On 27 April 2009, the Lord Chancellor made a written statement to Parliament that he was now minded not to reverse *Clayton*, having had ‘time to reflect and reconsider’.²⁴¹ He made no reference to the consistent message throughout the consultation process that was in favour of extending s 97 to post-proceedings. Again, it can be seen that the public consultation has been superseded by another agenda, as there is no evidence of genuine public discourse.

The following quotation is taken from a glossy ‘Young People’s Guide’, replete with photographs of cheerful teenagers, that was published with the 2007 Response by the DCA, which did indeed incorporate views from more than 200 young people.

‘Q: Will children’s views really make any difference?

A: You bet. When you read through this guide you will see just how keen Government have been to hear what children themselves have had to say.

REMEMBER: You are experts ... “Experts by experience”²⁴²

Only 30 per cent of young people who responded felt that the media should be allowed into family courts.²⁴³ In retrospect, it can only be concluded that their views were ignored. While the 2008 proposals were taken forward in the Children Schools and Families Bill in 2009, the Children’s Commissioner for England commissioned a study of young people’s views on media access, in the hope of influencing Parliament. Unsurprisingly, almost all the young people interviewed objected to the idea of reporters in the courtroom (as already permitted since April 2009) and even anonymised information being published. They indicated that children were unlikely to speak frankly to health professionals once told that this was a

²³⁸ A McFarlane, Keynote Speech to Resolution National Conference, London, 30 March 2009

²³⁹ [2006] EWCA Civ 878, [2007] 1 FLR 11

²⁴⁰ C Cavendish, ‘Wronged parents need the oxygen of publicity’ *The Times*, 20 March 2009

²⁴¹ Jack Straw, HC Hansard 27 April 2009 col 38WS

²⁴² Department for Constitutional Affairs, *Young People’s Guide to the Confidence and Confidentiality Response Paper* March 2007, third page

²⁴³ Department for Constitutional Affairs, *Confidence and confidentiality: Improving transparency and privacy in family courts* (Cm 2886,200) 58-77

possibility.²⁴⁴ (Although the report was not referred to in the debates when the Bill was passed in April 2010, it has been cited with approval by Ministers and MPs in the current Select Committee enquiry into family courts, suggesting a reluctance to implement this part of the subsequent Act.²⁴⁵)

The provisions in the Act were passed with minimal debate as part of the ‘wash-up’ of legislation in April 2010 just prior to the general election. Eighteen bills were passed in just two weeks; the absence of debate on this matter was deplored by many MPs, one describing it as ‘scandalous’ and ‘shabby’.²⁴⁶

OTHER JURISDICTIONS

Brophy and Roberts produced a briefing paper on openness and transparency in other countries’ family courts in May 2009 to inform the debate. They suggested that there was a myth that other countries’ courts were less ‘secret’, and pointed out that in comparable jurisdictions, the courts have very wide discretion in excluding attendance and there are strict rules against identifying parties.

As was discussed in the previous chapter, the Family Court of Australia has also been subject to criticism by the media. Currently, court proceedings are accessible to the public and to the media, but there is also a great deal of investment in public information. There are very strong restrictions on publishing any identifying details however, with the result that a journalist can only run a story ‘so dull as to lack all public impact’.²⁴⁷ Unfortunately, it is questionable whether this ‘open’ court has achieved more confidence than those in England and Wales.²⁴⁸

²⁴⁴ J Brophy, *The views of children and young people regarding media access to family courts* (Children’s Commissioner for England, London, 2010)

²⁴⁵ Evidence given by Tim Loughton MP to HC Justice Committee on 26 April 2011
< <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/11042601.htm>> Last accessed 24 July 2011

²⁴⁶ Henry Bellingham MP, HC Hansard 23 February 2010 col 227; 232

²⁴⁷ M Wright, ‘The Press, Children and Injunctions’ (1992) *Modern Law Review* 857
commenting on s 121 Family Law Act (Australia) 1975; see Chapter Five.

²⁴⁸ U Cheer, J Caldwell and J Tully, *The Family Court, Families and the Public Gaze* (New Zealand Families Commission, 2007) 11 and see further in Chapter Five.

A year after the law changed in New Zealand to allow media access to its Family Court, an evaluation of the impact found that there had been very little interest in attending or reporting cases. The media had access to hearings and documents, and the judiciary welcomed the new arrangements. The evaluation found that the judiciary were disappointed by the very low attendance at court and the limited nature of the reporting, which still drew more on anecdote than what could have been seen in court. Journalists had difficulty in finding newsworthy stories, partly because of a shortage of people and time to put in to the investigative task. Interestingly, some journalists felt uneasy about reporting on family cases. The researchers noted that the fathers' rights movement was still protesting about the court. The study indicates that the media, being driven by a commercial imperative are ill-equipped to fulfil an educative function.²⁴⁹

Brophy and Roberts conclude that resources need to be invested in user-friendly information, outreach work and educational programmes to enable a more genuine appreciation by the public of the family court system. They suggest that this alternative approach has been ignored for resource reasons.²⁵⁰ While one might hope they are wrong, this would be further indication that policy is being driven by instrumental imperatives instead of offering a rational discourse. The former President of the Family Division warned that confusion in the reform programme would add to the pressure on resources and judicial time.²⁵¹

CONCLUSIONS

The messages from other jurisdictions are that complaints about family courts do not go away when courts are 'opened up'. If children's identities are to continue to be protected, which has been reiterated at each stage the policy changed in England and Wales, it is inevitable that media interest will be limited. Journalists point out that stories need to be personalised and dramatised by names, and preferably photographs, to engage readers' interest.²⁵² Courts

²⁴⁹ U Cheer, J Caldwell and J Tully, *The Family Court, Families and the Public Gaze* (New Zealand Families Commission, 2007)

²⁵⁰ Brophy, J, and Roberts, C, *'Openness and transparency' in family courts: what the experience of other countries tells us about reform in England and Wales* (University of Oxford, 2009)

²⁵¹ A Hirsch, 'Media access to family courts will improve clarity, says judge' *The Guardian*, 27 April 2009

²⁵² P Wilby, 'Where's the care in social work coverage?' *The Guardian* 17 November 2008

have accepted that a risk of identification sometimes has to be taken if the story is to have any chance of engaging the public.²⁵³

Nevertheless, it must be right to simplify the law to make it consistent across all levels of court. Furthermore, there is an argument for transparency in court processes, to inform discourse in the public realm. Allowing journalists in to scrutinise decision making has some value in making the state and its agencies more accountable.²⁵⁴ For example, shortly after the rule change, one judge took advantage of it to publicise a resource shortage: Cafcass guardians.²⁵⁵ Narrowing the definition of the public interest in this way is unsatisfactory to the media, and possibly also to children who just do not think other people should be there, whatever the limitations.²⁵⁶

Fundamentally, the moral claim to privacy includes protection from unwanted intrusion and also being enabled to develop autonomy. Therefore a right of privacy should be accorded to young children as well as those old enough to be aware of intrusion. The law has developed to protect process as well as individual people. Current policy is not taking children's views and needs into account nor has it taken account of indirect effect on resources. Decision making in the public sphere must be accepted as legitimate, but transparency is the correct term for what is sought, rather than openness. Exposure of personal details is not required for the ideal speech situation in the public sphere. On the other hand, communication was distorted in the consultation on reform and fell short of the ideal speech situation.

The 2006 DCA consultation paper made several assertions about a loss of public confidence in family courts, but produced no evidence to substantiate this. Earlier research studies on court users' views did not feature complaints relating to publicising cases.²⁵⁷ The consultation process, as discussed here, was not undertaken free from distorted communication. A

²⁵³ *Re W (wardship) (publication of information)* [1992] 1 FLR 99; and see M Wright, 'The Press, Children and Injunctions' (1992) *Modern Law Review* 857

²⁵⁴ A similar role is suggested in Lord Neuberger's report on injunctions against publicity brought by celebrities: Report of the Committee on Super-injunctions (Master of the Rolls, 2011)

²⁵⁵ F Gibb, 'Cafcass Chief is called to account by judge' *The Times* 29 May 2009

²⁵⁶ J Brophy, *The views of children and young people regarding media access to family courts* (Children's Commissioner for England, London 2010)

²⁵⁷ J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: a review of research* (Family Justice Council, London 2010). Although when young people were presented with a narrative about journalists being present, they did not think that this would assist parties or the court: J Brophy, *The views of children and young people regarding media access to family courts* (Children's Commissioner for England, London 2010).

challenge to the legitimacy of the court system would be met more effectively, Habermas would say, by a genuine attempt to engage public debate. Nevertheless, the sustained media campaign seems to have lodged in the public consciousness to the extent that secrecy is now perceived as a major flaw in the system. To remedy this, it should be possible for institutions to be open in their communication processes, while the individuals concerned may retain their privacy, or keep their own secrets. What we should be seeking is institutional transparency, not wholesale exposure.

If we turn to the argument that the protective legislation was primarily used for the judicial process rather than the child, we find that the law has become no simpler,²⁵⁸ and there is potential for added cost and delay. The availability of expert witnesses may decline. The announcement by the Secretary of State in December 2008 was accompanied by comments to the media expressing his view that social workers and medical experts should not expect their identities to be protected, in the interest of professional accountability. The reluctance of medical expert witnesses to assist with court proceedings was acknowledged, but the implications were ignored.²⁵⁹ Some members of the judiciary now appear to be upholding this viewpoint. The President of the Family Division stated in May 2011 that the law allows medical expert witnesses to be named, provided this will not also identify the child, despite evidence brought by the Royal College of Paediatrics and Child Health of the negative impact this will have on the availability of expert witnesses.²⁶⁰

This chapter has shown how opportunities for genuine public discourse about the functions of family courts were discarded in a blur of shifting value statements that make it difficult to identify the underlying motives. Whatever the motives were, the disposal of the issue in a rushed legislative timeframe gives the impression that it were politically expedient. The result has neither appeased those who wanted the rules relaxed nor assisted families or the courts.

²⁵⁸ RH George and C Roberts, *Media reporting of family court cases* (Family Policy Briefing 6, University of Oxford Department of Social Policy and Social Work, 2009)

²⁵⁹ C Cavendish, 'How The Times helped to end an injustice' *The Times* 17 December 2008

²⁶⁰ *X Y and Z v a local authority* (2011) EWHC 1157 (Fam)

CHAPTER SEVEN
DIVERSION FROM COURT
CONTENTS

ALTERNATIVE DISPUTE RESOLUTION	262
THE COURT AS LAST RESORT	263
ADVERSARIALISM	266
CONCILIATION AND MEDIATION IN PARENTING DISPUTES	269
<i>CONCILIATION AND MEDIATION: THEORY AND PRACTICE</i>	270
<i>EARLY HISTORY OF CONCILIATION</i>	272
<i>THE ESTABLISHMENT OF IN-COURT CONCILIATION</i>	276
<i>AFTER FINER: OUT-OF-COURT MEDIATION</i>	290
<i>CONVERGENCE OF COURT WELFARE SERVICES 2001-2011</i>	282
ALTERNATIVE DISPUTE RESOLUTION IN AUSTRALIA	283
<i>WELFARE SERVICES IN THE FAMILY COURT OF AUSTRALIA</i>	284
<i>FAMILY DISPUTE RESOLUTION AND FAMILY RELATIONSHIP CENTRES</i>	288
CONCILIATION/MEDIATION AND THE COURTS' PROTECTIVE FUNCTION	293
CONCLUSIONS	295

ALTERNATIVE DISPUTE RESOLUTION

In this chapter, the discussion returns to the subject of diversion from court, or ADR, raised in Chapters Four and Five. The Finer Committee's distaste for the physical indignity of parents being hauled up in 'courts of petty crime'¹ has since been reconfigured into a new ideology of 'courts' as an unwholesome mix of gender politics; secrecy; expensive lawyers; and scarcity of judicial resources. The conclusion is that we must avoid the use of a courtroom.

The argument that a court is not the right place to resolve a family dispute creates more than a simple 'law – not law' dichotomy. This chapter brings together the themes of diversion from court, how these developed and varied, and why they are attractive. The question to be answered is whether they are more likely to be accepted as more legitimate than the court.

The term 'alternative dispute resolution' (ADR) has been used in this thesis because it is commonly used to denote options other than an adjudicated outcome for the parties. Of course, there is usually more than one 'alternative' to a judicially-imposed solution, so the term is not strictly correct, but again the tendency to fall into the pattern of dualities has produced a broad categorisation of either court or ADR. For the most part, ADR in family law refers to mediation, with lawyer-led negotiation and court-directed conciliation both lying somewhere across the 'court – ADR' boundary.

In the postmodern era we have a sense that values and patterns of behaviour in family form are changing rapidly.² Yet instinctively we still felt that we should be capable of managing our intimate relationships. As discussed in the previous chapter, our privacy accords us the space to develop our autonomy and identity. It is therefore with reluctance that we turn to the formality of the law and accept the juridification of family life.³ The law will assist us only if it meets our expectations in the lifeworld, with processes that reflect the sensitivity and dignity we attribute to our private lives. When the law moves away from these expectations, it begins to lose legitimacy. There is therefore an attraction in seeking less formal process-driven solutions.

¹ Discussed in Chapter Four

² Discussed in Chapter Two

³ J Habermas, *The Theory of Communicative Action Volume Two: The Critique of Functionalist Reason* (Polity Press, Cambridge 1987) 356-373

Rather than ‘law – not law’, there are many threads in any blanket policy of diversion from court. The notion that court is the last resort is linked to, but is not the same as, the inappropriateness of the adversarial nature of proceedings. The court may ultimately be a system for enforcing the law,⁴ but that does not preclude an inquisitorial model. A family court could be either ‘a family organisation with some of the trappings of a court or a court with jurisdiction in family matters.’⁵ There is already a range of alternatives; it is arguable that few are truly independent of courts, while others are acted out in the court arena. Tensions between the different professional disciplines involved create another duality, primarily between law and social work. When these options are examined, questions arise as to whether the alternative is more likely to be grounded in the lifeworld, reached through rational communication and hold more legitimacy than what is currently available.

THE COURT AS LAST RESORT

With regard to parenting disputes, the Finer Report claimed that:

The court must not see the men, women and children with whom it is concerned as “clients”, and still less as “patients”...but the individual in the family courts must in the last resort remain the subject of rights, not the object of assistance.⁶

Despite this fundamental principle being announced for its idea of a new Family Court, commentators were sceptical about the rise of therapeutics associated with the promotion of conciliation and a Family Court, as discussed below. This argument now seems to have been completely lost; the ‘rationing motif’ has ensured that the court has indeed become the last resort of the deviant individual who cannot take responsibility for resolving his or her problems through alternative means. It is interesting to note the Finer Committee’s use of the phrase ‘the last resort’. Do we now believe that parenting disputes are conducted by individuals with rights that are enforceable in the courts, or do we believe that they involve only disturbed and vulnerable people with social or health issues that are better resolved in the social work or NHS arenas than the court? If the latter is now the consensus view, then alternative remedies have a chance of being better accepted. There seems to be a lack of acknowledgement of this development because once the existing filters of mediation and

⁴ As discussed in Chapter One

⁵ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 97

⁶ Department of Health and Social Security, *Report of the Committee on One-Parent Families, Volume 1* (Cmnd 5629, 1974) para 4.285 (hereafter ‘Finer Report’)

solicitors' negotiation are exhausted, there is no coherent alternative therapeutic service. Instead, the 'reasonable'⁷ parent is successfully diverted to other services, while the minority intransigent group still goes to court.

Perhaps the only explicit policy that labels the court user as dangerous is the gatekeeping role adopted by Cafcass since 2005, which now postpones any decision by a court until after initial safeguarding checks are undertaken.⁸

On the other hand, with regard to care proceedings, the rights of parents to defend the application by the local authority have been preserved in principle as well as in practice, through the availability of legal aid. The 'court as last resort' paradigm is different here, as any reluctance to use the court is initially on the part of the local authority.

A number of famous empirical studies have continued to find that social workers avoid applying to court. Prior to the Children Act 1989, Dingwall, Eekelaar and Murray identified a 'rule of optimism' that persuaded welfare agencies that it was natural for children to be better off with their parents, despite evidence of abuse or neglect, than removed to state care.⁹ After the Act was implemented, Hunt et al found that the emphasis in the Act on finding an alternative to compulsory measures had a strong impact on practice, particularly in the use of section 20 'voluntary' accommodation. Their research data supported a widespread perception that the 'no-order principle' had resulted in the deferment of court action.¹⁰ The court process was seen as negative and full of hurdles, but coercion was covertly used, with a paradox of 'enforced voluntarism and ambiguity of voluntary agreements.'¹¹

More recently, the combination of increased court fees payable by local authorities, reductions in availability of legal aid providers, and the introduction of the Public Law Outline, together with government policies aiming to reduce the number of children 'in care'

⁷ J Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *Modern Law Review* 467-485, discussed in Chapter One.

⁸ Family Procedure Rules 2010 Practice Direction 12B: The Revised Private Law Programme para 3.9

⁹ R Dingwall, J Eekelaar and T Murray, *The Protection of Children* (2nd edn, Avebury, Aldershot 1995), discussed in Chapter Four.

¹⁰ J Hunt, A Macleod and C Thomas, *The Last Resort: Child Protection, the Courts and the 1989 Children* (TSO, London 1999) 143

¹¹ J Hunt, A Macleod and C Thomas, *The Last Resort: Child Protection, the Courts and the 1989 Children* (TSO, London 1999) 387

have arguably reduced the rate at which local authorities issued care applications.¹² Applications are rarely made before a long history of local authorities attempting to work with the family.¹³ The Public Law Outline was intended to save court resources by obliging local authorities to follow a prescriptive series of pre-proceedings actions, but to date this has not successfully reduced delay. It may even be extending the time that families engage with child protection systems, with social workers coercing parents into ‘voluntary’ arrangements.¹⁴

Most children ‘looked after’ by the state, thus incurring considerable long-term public expenditure, are subject to s 20, not court proceedings. The motive is therefore not entirely economic. Avoiding court may well reflect a social work ethos of family support being preferred to compulsion. It may also stem from a reluctance to engage in a forensic examination of the local authority’s actions. If a child is to be removed by the state from his or her parents against their will, however, there would be little argument that this was not an issue for a court. As Archard explains, the exercise of the right to raise one’s own child is constrained by a duty to care for the child. The state must intervene if parenting fails, firstly because of a duty to safeguard its weakest citizens and also to preserve the continuity of the state.¹⁵ Transferring the right to raise one’s own child to the state is morally only defensible through a court process, underlying the principles of human rights and the Children Act, but we must be confident that decisions made whether to use the court or not can stand up to public scrutiny.

There is therefore a mix of economic and ideological motives in treating courts as the last resort, but removing family proceedings absolutely cannot be legitimate. If going to court is a negative experience, this should not prevent us asking why, rather than merely abandon the institution.¹⁶ When systems take on a life of their own and no longer serve the lifeworld, they

¹² P Welbourne ‘Safeguarding children on the edge of care: policy for keeping children safe after the *Review of the Child Care Proceedings System, Care Matters and the Carter Review of Legal Aid*’ 20 (3) *Child and Family Law Quarterly* 335-358 (Although the rate has increased since 2008 in the wake of the death of Peter Connelly.)

¹³ J Masson, J Pearce and K Bader, *Care Profiling Study* (Ministry of Justice, 2008)

¹⁴ B McKeigue and C Beckett, ‘Squeezing the toothpaste tube: will tackling court delay result in pre-court delay in its place?’ (2010) 40(1) *British Journal of Social Work* 154-169

¹⁵ D Archard, ‘Philosophical Perspectives on Childhood’ in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, Oxford 2001) 54

¹⁶ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 114-115

can be adapted through discourse in the public sphere. Such a discourse should challenge assumptions that the adversarial nature of the court prevents it meeting families' needs.¹⁷

ADVERSARIALISM

Shapiro describes the triad between the two disputants and the judge as unstable, because the 'loser' of the case gradually also loses his or her perception of the process as achieving resolution and begins to see it replaced by an imposition of constructs of behaviour. The acceptance of adjudication depends on parties accepting this triad as a 'common sense' solution but the likelihood of both parties continuing to accept this diminishes as one becomes aware that they might not 'win'. He argues that 'common-sense' consensual justifications for a third party role in dispute resolution are more suited to mediation than adjudication.¹⁸ On the other hand, the legitimacy of ADR is open to question if it is not perceived to reflect the legal system.¹⁹ Our sense of justice is formed in the lifeworld, so if we see this slipping away, the systems lose their credibility, but 'common sense' solutions in the lifeworld are sustained by an awareness of underpinning legal rights. Relying on the law does not always necessitate an adversarial forum.

For some commentators, a court judgment that measures past behaviour against a normative standard to find winners and losers is impossible to justify in terms of family relationships.²⁰ Acceptance of divorce as largely an administrative process reflects the development that an investigative role in divorce is no longer legitimate. This leaves us with the adversarial role relevant only in cases where the courts' protective function is called on. The current legal aid proposals reflect that development, because parties in parenting disputes will not be entitled to legal aid unless there is a history of violence.²¹

This does not mean that the courts are not adapting to a more inquisitorial way of working; adversarial practice need not be set in stone. Sir Nicholas Wall, the current President of the Family Division thinks that an adversarial approach is necessary only in a finding-of-fact

¹⁷ See for example Family Justice Review *Interim Report* (Ministry of Justice, 2011) paras 1.2; 4.136; 4.231; 5.27; 5.30-5.32.

¹⁸ R Cotterrell, *The Sociology of Law: An Introduction* (2nd edn. Butterworths, London 1992) 209-210

¹⁹ J Crowe and R Field (2008) 'The Problem of Legitimacy in Mediation' *Contemporary Issues in Law* 48-60

²⁰ M Freeman, *Understanding Family Law* (Sweet and Maxwell, London 2007) 117

²¹ Ministry of Justice, *Proposals for the reform of legal aid in England and Wales* (Cm 7967, 2010) Paras 4.64-4.68

hearing, and that the family court judge, supported by lawyers, is customarily more inquisitorial than the traditional judge.²² Family lawyers have long been specialists in negotiation rather than confrontation.²³ Codes of practice promote a ‘constructive, sensitive’ approach.²⁴ It is only when a finding is required in respect of domestic violence or child protection, that the court reverts to its forensic role. As the function of dispute resolution becomes more inquisitorial, only the protection function need be adversarial. The more ADR is promoted, the more likely the judge will be dealing only with cases where the protective function is invoked, at which point adversarialism and adjudication are unavoidable.

It is more than ten years since s 8 proceedings were described as lacking ‘adversarialism red in tooth and claw.’²⁵ A number of research studies show that lawyers primarily work toward settlement and see the court more as a structure within which to achieve an agreement than a battlefield.²⁶ Self-representing litigants may be more rather than less inclined to press for trial than those who have lawyers. A consensual agreement is more likely to be achieved by involving lawyers in advising and negotiating, and confronting issues of violence and power imbalances than an approach that tries to ignore these issues and restrict access to legal services.²⁷ It now appears that the ‘less adversarial trial’ in Australia may in fact be taking longer and costing more than those with more traditional legal representation.²⁸ Although Bailey-Harris and Dewar had earlier commented that the Australian courts were more investigative than those in England and Wales, Hunter found similar conciliatory approaches in both jurisdictions, prior to the Australian reforms in 2006.²⁹ With regard to care cases, Pearce et al have also found that while lawyers respected their clients’ rights in the context of

²² Evidence given to HC Justice Committee by Sir Nicholas Wall, 1 March 2011 <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/11030101.htm>> Last accessed 24 July 2011

²³ G Davis and J Pearce, ‘A View from the Trenches – Practice and Procedure in Section 8 Applications’ (1999) 29 *Family Law* 457

²⁴ Resolution website <<http://www.resolution.org.uk/>> Last accessed 23 May 2011

²⁵ G Davis and J Pearce, ‘A View from the Trenches – Practice and Procedure in Section 8 Applications’ 29 (1999) *Family Law* 457

²⁶ For example, C Smart, V May, A Wade and C Furniss, *Residence and Contact Disputes in Court Vol 1*, (Department of Constitutional Affairs Research Series no. 6/03, 2003)

²⁷ R Hunter, ‘Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law’ (2003) 30(1) *Journal of Law and Society* 156-176

²⁸ Discussed in Chapter Five

²⁹ R Hunter, ‘Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law’ (2003) 30(1) *Journal of Law and Society* 156-176

the possibility of the state sanctioning removal of their child, lawyers were skilled in negotiating the least damaging outcomes.³⁰

The adversarial model was explicitly rejected in the Australian jurisdiction.³¹ However, as discussed in Chapter Five, the less adversarial trial depends on an enhanced role for the children's representatives in both screening for cases which will require a hearing on the facts and in working intensively with parties to minimise conflict. Investment in staff development and recruitment is therefore required, if judges' and lawyers' participation is to be reduced and reconfigured. So the court would still be active, within the wider family justice system, with legal and social work professionals balancing the aims of reducing conflict and protecting vulnerable parties. It is only safe to marginalise adversarialism if the facilities exist for thorough multi-disciplinary analysis that can effectively combine the dispute resolution and protective functions. During a previous era of anti-adjudication, pro-mediation, Davis warned: 'The legal processes should not be allowed to atrophy whilst we concentrate all our energies in developing extra-legal alternatives.'³²

In the criminal justice system, it appears that civil law jurisdictions are becoming more adversarial and common law jurisdictions less so, leading to what some commentators see as convergence. However, Jackson argues that conceptualising proceedings in a 'binary opposition' of adversarial and inquisitorial models is misleading. Instead, courts may be moving towards a new rights-based model of proof which he terms 'participatory'.³³

In contrast, the danger is that reducing adversarialism in family proceedings may be premised more on ADR saving money than it promoting families' rights or participation. Instrumental actions to adjust spending in the legal system may be dressed up as rational actions to help people adjust to post-separation parenting. In February 2011, the government introduced compulsory Mediation and Information Assessment Meetings with the headline: 'more couples to be spared court battles'. The announcement referred to figures that indicated that

³⁰ J Pearce, J Masson and K Bader, *Just Following Instructions? The representation of parents in care proceedings*, University of Bristol, 2011

³¹ M Harrison, 'Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings' (Family Court of Australia, Canberra 2007)

³² G Davis, 'The Halls of Justice and Justice in the Halls' in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal process* (Clarendon, Oxford 1988) 115

³³ JJ Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Toward Convergence, Divergence or Realignment?' (2005) 68 *Modern Law Review* 737-764

mediation costs about one-fifth of a court case, and takes about a quarter of the time.³⁴ In this way, the potential benefits of mediation to families in reducing conflict and expense, while speeding up resolution, are explicitly stated but the reduction in the court workload is only implicit.

The effect of this change in policy is that every parent, not just those legally-aided, will normally have to attend a meeting to learn about mediation and obtain a standard form to that effect, before being able to apply to court under Children Act 1989 s 8. The announcement, with no consultation, was made a month in advance of the Family Justice Review report, which was based on many months' investigation and consultation.³⁵ Separately, in the legal aid green paper, the government proposes to remove legal aid from almost all private law applications.³⁶ There is therefore a prospect of mediation services being overwhelmed by demand.

The tone of the Ministry of Justice announcement in February raises an obvious question: if mediation fits better with the lifeworld, and is more efficient, why is it underused? The history of conciliation and mediation features continuing questions about legitimacy and it is troubling that the evidence of previous attempts appears to be being ignored in the current drive for ADR.³⁷

CONCILIATION AND MEDIATION IN PARENTING DISPUTES

The terms 'conciliation' and 'mediation' are sometimes used interchangeably to describe a third party facilitating, rather than adjudicating, a settlement. The way they have been employed over the past 50 years does however give clues as to the inherent and continuing tensions between different concepts and styles of ADR. These developments are manifested in the duality of law and social work, and the duality of court-based and external conciliation.

³⁴ Ministry of Justice press release, 23 February 2011 <<http://www.justice.gov.uk/news/press-releases/moj/press-release-230211a.htm>> Last accessed 12 July 2011

³⁵ Which is also in favour of mediation: Family Justice Review *Interim Report* (Ministry of Justice, 2011) paras 5.125-5.126

³⁶ Ministry of Justice, 'Proposals for the reform of legal aid in England and Wales' (Cm 7967, 2010)

³⁷ G Davis, 'Reflections in the Aftermath of the Family Mediation Pilot' (2001) 13(4) *Child and family Law Quarterly* 371; R Dingwall 'Divorce mediation: should we change our mind?' (2010) 32(2) *Journal of Social Welfare and Family Law* 107-117

CONCILIATION AND MEDIATION: THEORY AND PRACTICE

In 1979, Mnookin and Kornhauser published their famous article: ‘Bargaining in the Shadow of the Law.’³⁸ Its libertarianism and low priority given to children’s welfare are now striking. They argued that ‘private ordering’ was preferable to court determination of family disputes, although there was a public interest in ensuring private arrangements had some procedural safeguards. Although they rejected the concept of a state-run process of investigation of each stage of a divorce, neither did they advocate a ‘night watchman state’ that would leave parties entirely unregulated. Separating couples in the US and England had the ‘formal power to make their own law’ regarding financial settlement, because of an assumption that adults bear their own responsibility for access to justice, with which a court would not interfere.³⁹ Although under *parens patriae*, courts cannot be bound by parents’ agreements about their children; research was cited to the effect that courts rarely set aside agreements.⁴⁰

Mnookin and Kornhauser gave four reasons for this minimal approach by courts (which they claimed perceived themselves as an agency for dispute resolution, not child protection): the state’s limited resources for investigation; if there was a risk of arrangements not being approved parents might be disinclined to present the true picture; that ‘welfare’ is indeterminate; and that the lack of post-order control by the court made it unrealistic to impose a solution against parents’ wishes.

If that was truly the courts’ self-perception, it has been substantially reversed in that the protective function is now accepted. For example, the Family Justice Council said about cases where there has been a history of violence:

The “no order” principle set out in the Children Act 1989 is imbued in those working in the Family Justice System. If parents have reached an agreement, it appears that some members of the judiciary are hesitant to intervene robustly, even if it is clear that it would be right to do so... In appropriate cases

³⁸ R Mnookin and L Kornhauser ‘Bargaining in the Shadow of the Law: The case of divorce’ (1979) 888 *Yale Law Journal* 950

³⁹ R Mnookin and L Kornhauser ‘Bargaining in the Shadow of the Law: The case of divorce’ (1979) 888 *Yale Law Journal* 950 at 954

⁴⁰ Namely, J Eekelaar and E Clive, *Custody after Divorce* (SSRC, Oxford 1977)

the judge will have to refuse to make an order despite parental agreement, if the statutory obligations [the welfare test] are to be fulfilled.⁴¹

This has recently been emphasised in Australia because despite the legislation promoting settlement, ‘violence changes everything’, to the extent that Dewar suggests that complete separation in legal process may be required between dispute resolution and protection.⁴²

Mnookin and Kornhauser described parents ‘bargaining in the shadow of the law’ with the court as the ultimate safeguard. They theorised that negotiation depended on each party having a ‘bargaining endowment’ to call on. Typically, the mother bargained from the position of having residence of the child while the father had the economic advantage. It was therefore more expedient for them to trade on their respective advantages than entrust a solution to court. (The underlying cultural assumption that contact and child support are linked may mean that bargaining accords with societal norms more closely than adjudication.) However, the transaction took account of a ‘legal endowment’ of benchmarks and guides provided by legal rules – hence in the shadow of the law. This imagery has stuck; Dewar describes the 2006 change in Australian legislation to promote equal parenting as creating new perceptions in the shadow of the law that have redistributed the ‘chips’ in favour of fathers.⁴³

Following Mnookin and Kornhauser, it can be argued that *all* parents make their post-separation arrangements in the context of the existence of the family court. This is because of the courts’ latent functions in influencing the behaviour of the wider community and implementing social policy. In contrast to fears of juridification, some opponents of the idea of a Family Court in England and Wales in the 1980s saw the colonisation of law by the behavioural sciences as ‘the triumph of the therapeutic’,⁴⁴ weakening the ability to resist the state’s ideal of family form.⁴⁵ An outline of the history of conciliation and mediation explains how this fear was founded.

⁴¹ Family Justice Council, *Report to the President of the Family Division on the approach to be adopted by the Court when asked to make a contact order by consent, where domestic violence has been an issue in the case.* (Family Justice Council, London 2006) para 4

⁴² J Dewar, ‘Can the centre hold?: Reflections on two decades of family law reform in Australia’ (2010) 24 *Australian Journal of Family Law* 139

⁴³ J Dewar, ‘Can the centre hold?: Reflections on two decades of family law reform in Australia’ (2010) 24 *Australian Journal of Family Law* 139

⁴⁴ M Freeman, Introduction to *Family Values and Family Justice* (Ashgate, Farnham 2010) xix

⁴⁵ Discussed in Chapter Four

EARLY HISTORY OF CONCILIATION

Conciliation has been traced back to 18th century upper class family and neighbours trying to shore up failing marriages, and then resorting to facilitate agreement to avoid scandal while striving for some degree of fairness.⁴⁶ Private separation often involved delicate negotiation, in contrast to the ‘patriarchal absolutism’ of the common law courts.⁴⁷ As we have seen, only a tiny minority of the population had access to a court, so few had the opportunity of an adjudicated verdict until the advent of legal aid in 1949. It would be unfair to describe the modern family judge as absolutist; indeed they tend to be portrayed as having little confidence in their own product.⁴⁸

Court conciliation was first undertaken in magistrates courts by JPs and their clerks, and then more systematically by probation officers.⁴⁹ The ethos of the probation service could either support or clash with the court’s view of its own functions. Vanstone attributes the history of the probation service’s work with offenders to an early evangelical humanitarian mission, the emergence of the study of individual psychology, and political and societal concerns about the maintenance of social order.⁵⁰ During the early 20th century this crusading ethos was supplemented by psychosocial theories on identifying potential young offenders. Probation officers became individual caseworkers – bringing together ‘the home, the school, the court and the clinic, the playground and the street’.⁵¹ The political imperative to maintain social order by reforming and repressing deviancy informed social work within the penal system; these same officers were undertaking matrimonial cases in the magistrates courts. Conciliation was relegated to the lower orders of society.

Probation officers’ tasks in marital causes were formalised by the Summary Proceedings (Domestic Proceedings) Act 1937.⁵² This was preceded by concern about the rising volume of matrimonial cases and the unsuccessful Summary Jurisdiction (Domestic Procedure) Bill

⁴⁶ L Stone, *Road to divorce: England 1530-1987* (OUP, Oxford 1990) 3

⁴⁷ L Stone, *Road to divorce: England 1530-1987* (OUP, Oxford 1990) 174; AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 16

⁴⁸ For example, in J Pearce, G Davis and J Barron, ‘Love in a Cold Climate = Section 8 Applications under the Children Act 1989’ (1999) 29 *Family Law* 22, and J Masson, ‘Judging the Children Act: Courts and the administration of family justice’ (2010) 5(2) *Journal of Children’s Services* 52-59

⁴⁹ As described in Chapters Three and Four

⁵⁰ M Vanstone, *Supervising Offenders in the Community: A History of Probation Theory and Practice* (Welfare and Society, Ashgate, Aldershot 2004)

⁵¹ N Rose, ‘Psychiatry as a political science: advanced liberalism and the administration of risk’ (1996) 9(2) *History of the Human Sciences* 1-23 at 11

⁵² AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 18

of 1934 which included Mullins' proposal for a special conciliation summons to bring the parties into court to try to resolve their differences. The court would have been put under a duty to investigate and advise the parties. Mullins was convinced that the courts needed to apply therapeutic measures but, as discussed earlier, his ideas were rejected.⁵³ It was however recognised that the probation service had no statutory footing in family cases, and in 1936 the Harris Committee was established to enquire into 'social services connected with the administration of justice in courts of summary jurisdiction, including ... the application of conciliation methods to matrimonial disputes'. The Committee reported that attempts at conciliation were widespread, although inconsistent. It rejected any blurring of the distinction between adjudication and social work. There was to be no statutory obligation on the court itself to provide conciliation; this was to be provided by the probation service.⁵⁴ Cretney comments: 'Mullins' dream of the magistrates court as the central point in a harmonised system of social work and legal provision was apparently dead beyond recall.'⁵⁵ He adds that the distinction between the functions of adjudication and welfare provision was upheld by the subsequent Denning and Finer Reports. (However Davis' research in the 1980s showed that many district judges were taking an active part in negotiating aspects of conciliation.⁵⁶)

The Harris Committee was deliberating in the context of a belief that juvenile crime was linked to an unhappy home background; this justified the probation service undertaking marriage conciliation work alongside its criminal remit in the JPs' courts.⁵⁷ Donzelot's tutelary discipline⁵⁸ appears to have been in full swing when family breakdown was linked to crime prevention, but not applied to the divorcing middle class. Divorce figures were also rising in the late 1930s; the Marriage Guidance Council was established in 1938. Then, of course, the war led to a steep increase in the rate of family breakdown.

Lord Merriman, then President of the PDA, outlined a scheme in 1946 to extend the conciliation facilities available in the magistrates courts to divorce. He proposed referral of

⁵³ Chapter Three

⁵⁴ Home Office, *Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction* (Cmd 5122, 1936)

⁵⁵ S Cretney, 'Marriage Saving and the Early Days of Conciliation : the Role of Claud Mullins' *Law, Law Reform and the Family* (Clarendon, Oxford 1998) 133

⁵⁶ G Davis and J Pearce, 'A View from the Trenches – Practice and Procedure in Section 8 Applications' (1999) 29 *Family Law* 457

⁵⁷ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 17-18

⁵⁸ J Donzelot, *The Policing of Families: Welfare versus the State* (Tr. R Hurley, Hutchinson, London 1980)

all undefended divorces to multi-disciplinary tribunals, a ‘Commission of Conciliation and Inquiry’, to investigate the possibilities of preventing marriage breakdown.⁵⁹ This approach was conservative in purpose but, similarly to the 1934 Bill, radical in its call for a combination of legal and social work expertise. It was examined by the Denning Committee, which recorded that the ecclesiastical courts saw early attempts at reconciliation in matrimonial causes as part of their pastoral role.⁶⁰ The Committee praised the marriage guidance and reconciliation work being undertaken by the probation service and church and welfare agencies, as supplemental to the obligation on the legal system to support marriage. There was even recognition that children are affected:

The reconciliation of estranged parties to marriage is of the utmost importance to the State as well as to the parties and their children. It is indeed so important that the State itself should do all it can to assist reconciliation.⁶¹

Thus the Denning Committee envisaged a wider role for conciliation services.

However, the Committee rejected the Merriman scheme because it could be initiated only once proceedings had begun and would still be too closely identified with the adjudication process. This would not achieve the same sort of success as confidential consultation with an independent professional. A new publicly-funded Marriage Welfare Service, separate from the judicial process, was recommended. This would ‘evolve gradually from the existing services and societies just as the probation system evolved from the Court Missionaries’.⁶² Those existing services included probation, the Forces welfare sections, and voluntary organisations.⁶³ This evolved service was to have a broad role encompassing preparation for marriage; marriage guidance; and reconciliation. However, a new function would have been added which hints at a future role: these welfare officers would also advise on post-separation arrangements and report on the welfare of children.⁶⁴

Although no new service began, a probation officer was appointed to the PDA on an experimental basis in 1950,⁶⁵ and in 1956 the Morton Commission recommended expanding this to appoint a court welfare officer in each divorce town, although in principle the

⁵⁹ S Cretney, *Family Law in the Twentieth Century* (OUP, Oxford 2003) 302

⁶⁰ Lord Chancellor *Final Report of the Committee on Procedure in Matrimonial Causes* (Cmd 7024, 1947) (Hereafter ‘Denning Report 1947’) para 12

⁶¹ Denning Report (1947) para 28 (i)

⁶² Denning Report (1947) para 28 (iii)

⁶³ Denning Report (1947) para 28 (ii)

⁶⁴ Denning Report (1947) para 34 (i)

⁶⁵ See Chapter Four.

Commission maintained that parents must take continuing responsibility for their children's arrangements.⁶⁶ The Matrimonial Proceedings (Children) Act 1958 introduced the requirement that the divorce judge be satisfied with arrangements to be made for the children of the family and made provision for powers to make orders regarding the care and supervision of children. This is the first time the legislation refers to a 'welfare officer' and stipulates that this shall be a probation officer.⁶⁷

A major advance in the scope of conciliation was achieved when the Matrimonial Causes Act 1963 reduced collusion with adultery to a discretionary rather than an absolute bar to obtaining a divorce. This enabled the court to allow agreements about children without the risk of an appearance of collusion between the parties.⁶⁸ When the county courts assumed jurisdiction for divorce under the Matrimonial Causes Act 1967 more officers had to be appointed; between 1961 and 1971 the number of welfare reports for all courts quadrupled. This service in the county court was however provided only at the request of the judge, not available to the parties on request.⁶⁹ By 1981 Wilkinson estimates that one in five divorce cases involving children were assisted by welfare reports, but agreed with Elston et al's findings of variation.⁷⁰ Indeed, in 1979 a practising welfare officer recorded her experience that judges and magistrates decide 'on a whim' whether to try to resolve the matter themselves or refer it for a report.⁷¹

The term 'conciliation' in family courts was originally synonymous with reconciliation, but by 1974 the Finer Committee was able to clarify it was:

...assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.⁷²

⁶⁶ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 21-2

⁶⁷ M Wilkinson, *Children and Divorce* (The Practice of Social Work, Basil Blackwell, Oxford 1981) 3

⁶⁸ Finer Report Volume 1 para 4.37

⁶⁹ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 22

⁷⁰ M Wilkinson, *Children and Divorce* (The Practice of Social Work, Basil Blackwell, Oxford 1981) 5; E Elston, J Fuller and M Murch, 'Judicial Hearings of Un defended Divorce Petitions' 38 (6) *Modern Law Review* 609

⁷¹ H Bretherton, 'Court Welfare Work: Practice and Theory' (1979) 26 (3) *Probation Journal* 74

⁷² Finer Report Volume 1 para 4.288

Cretney described this definition as ‘the key concept it has become in reform proposals ever since.’⁷³ However, the term ‘conciliation’ is less used now, possibly since it became associated with short-termism, lack of risk assessment and marginalising children’s views in ‘in-court conciliation’.⁷⁴

Although Finer’s recommendations were not followed, in-court conciliation became more widespread, alongside new out-of court services during the 1980s, as the desirability of ADR became articulated in terms of reaching better solutions and costing less money. In 1983, the inter-departmental committee which produced the Robinson report was directed ‘primarily’ to analyse cost benefits, but emphasised the desirability of solutions being reached wherever possible by agreement rather than being imposed by judicial decision.⁷⁵

THE ESTABLISHMENT OF IN-COURT CONCILIATION

In the early 1970s, divorce welfare reports were ordered in only extreme cases, usually where some other enquiry was being made. The very ordering of a report singled out the family in a negative way.⁷⁶ The judge could call for a report if he was not satisfied with the arrangements for children,⁷⁷ but this was very rare; there was considerable disparity between judges as to whether they made use of the service, and in some courts there was virtually no service provided. There was evidence that some investigations were carried out in an intimidating and oppressive way.⁷⁸ Parents were more willing to go to a doctor, lawyer or health visitor for help than an individual in a social work role. Being advised by a probation officer or social worker was ‘acceptance of a submissively dependent role, a consequent loss of self-respect or a decline in social status.’⁷⁹

Murch described a shift from reconciliation to conciliation as ‘marriage saving’ to ‘child saving’, although James and Hay maintained that reconciliation had also featured a ‘child

⁷³ S Cretney, *Family Law in the Twentieth Century* (OUP, 2003) 306

⁷⁴ L Trinder and J Kellett, *The longer-term outcomes of in-court conciliation* (Ministry of Justice, Research series 15/07, 2007)

⁷⁵ Lord Chancellor’s Department Interdepartmental Committee on Conciliation, *Report* (HMSO, 1983)

⁷⁶ E Elston, J Fuller and M Murch, ‘Judicial Hearings of undefended Divorce Petitions’ 38 (6) *Modern Law Review* 609 at 637

⁷⁷ Matrimonial Causes Rules 1973 r. 95

⁷⁸ M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 110-117

⁷⁹ M Murch, *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 149

saving' aspect in its aim of delinquency prevention.⁸⁰ By 1988 however, Eekelaar and Dingwall wrote 'the dominant influence is neither marriage-saving nor child-saving but cost-saving. Again and again one is confronted by the struggle of civil servants, judges, and court administrators to cope with the pressure of a continuing rise in the demand for divorce.'⁸¹ They observed that 'the language of accountancy becomes the only language of policy argument', excluding objectives of equality and justice.⁸² James and Hay summarise policy developments during the 1980s to demonstrate that this was consistently targeted to save resources rather than support practice.⁸³ It is difficult to disassociate this history of promoting conciliation on economic grounds from claims that ADR better meets families' needs than adjudication.

In 1985, the Booth Committee reported on procedure within terms of reference of achieving simplification as well as saving costs.⁸⁴ It proposed a reduction in the number of court welfare reports by diversion into conciliation, which should become a standard step in divorce.⁸⁵ The rationale was the same as often repeated in the succeeding 25 years: parties should be given every opportunity and facility to come to an agreement before resorting to contested proceedings; conciliation encourages parents to take responsibility for their ongoing arrangements for children; and early access to conciliation may prevent positions from becoming entrenched. The Booth report added that counselling for 'deep seated and complex emotional problems' should also be available - elsewhere. The Committee seemed wary of officers' time being lost to the court if they became too caught up in long-term therapeutic processes.⁸⁶

The change from idealistic concepts of rehabilitation to a more punitive approach in the probation service weakened the perceived link between upbringing and delinquency which

⁸⁰ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 25

⁸¹ J Eekelaar and R Dingwall, *The Development of Conciliation in England* in R Dingwall and J Eekelaar (eds.) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 17

⁸² J Eekelaar and R Dingwall, *The Development of Conciliation in England* in R Dingwall and J Eekelaar (eds.) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 21

⁸³ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 27-28; see also J Eekelaar and R Dingwall, *The Development of Conciliation in England* in R Dingwall and J Eekelaar (eds.), *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) 18-21

⁸⁴ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1985) para 1.1

⁸⁵ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1985) paras 5.7; 3.11

⁸⁶ M Wilkinson, *Children and Divorce* (Basil Blackwell, Oxford 1981)

had justified its family court remit.⁸⁷ A tension developed between the Home Office, which held responsibility for probation, and officers who wanted more attention paid to the scope of family court work. This central disinterest in the probation service's family court welfare function let it spread across the country with a shift from report-writing to conciliation, apparently with no statutory basis.⁸⁸ Eventually, the ethos of working toward agreement pervaded casework, whether brief meetings at court or as part of a more extended report-writing process. Services followed a referral from a court and, unlike external mediation services, meetings were not privileged, nor entirely voluntary. Some practitioners coerced couples into a series of joint meetings, determined to apply their skills to arrive at an agreement. Schemes varied in the extent of judicial control exercised.⁸⁹ Despite the introduction of national standards in 1994,⁹⁰ varieties of in-court conciliation developed inconsistently across the probation service until the late 1990s, highlighted by an early inspection of Cafcass, which categorised the many different models into nine generic 'schemes'.⁹¹

Mainstream family court welfare tasks were reflected in Wilkinson's social work practice guide published in 1981. He saw the roles of reporter and conciliator as 'interwoven, interdependent and indistinguishable'.⁹² Officers relied on professional perspectives of parental capacity to change. On the other hand, Bretherton referred to the officer as 'spokesman for the child' and Murch saw the role as including children's advocacy.⁹³ James and Hay however relate that during the 1980s it was generally accepted by officers that their duty was counselling adults rather than listening to children.⁹⁴ Indeed, some articles appearing in the *Probation Journal* were categorical that children's views should be ignored.⁹⁵

⁸⁷ AL James, '“Civil” Work in the Probation Service' in R Dingwall and J Eekelaar (eds.) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988)

⁸⁸ G Davis, 'Mediation in Divorce: a theoretical perspective' in (1983) *Journal of Social Welfare Law* 131-140

⁸⁹ C Piper, 'Barriers to Seeing and Hearing Children in Private Law Proceedings' (1999) *Family Law* 394

⁹⁰ Home Office, *National Standards for Probation Service Family Court Welfare Work* (1994)

⁹¹ Magistrates Courts Services Inspectorate, *Seeking Agreement: A thematic review of schemes involving CAFcass at an early stage of private law proceedings* (MCSI, 2003)

⁹² M Wilkinson, *Children and Divorce* (The Practice of Social Work, Basil Blackwell, Oxford 1981) 7- 8

⁹³ H Bretherton, 'Court welfare work: practice and theory' (1979) 26 *Probation Journal* 3; M Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London 1980) 161-164.

⁹⁴ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 62-3

⁹⁵ For example, J Howard and G Shepherd, 'Conciliation - New Beginnings?' (1982) 29 *Probation Journal* 87

A ‘struggle for “ownership” of conciliation and the definition thereof’ ensued.⁹⁶ Practice between probation areas was inconsistent; in Birmingham, for example, one family court welfare office simply produced court reports, while the other used long-term therapy, much to the annoyance of local lawyers. Eventually, cases that reached the Court of Appeal were subject to swingeing judicial criticism about the preoccupation with conciliation and lack of investigation. A reversal of policy was demanded.⁹⁷ It seems that writing reports may have been more efficient than conciliation, where the latter consisted of long-term social work, presumably because this did not succeed in removing the cases from the legal system. James and Hay concluded that by the time they were writing in the early 1990s, the turmoil had been resolved, with social work principles of child-saving, problem resolution and adjustment to change informing the officers’ primary function to provide information for the courts.⁹⁸ This was an optimistic view; the tensions continue, and it remains to be seen whether the latest attempt at diversion will de-clutter court listings.

AFTER FINER: OUT-OF-COURT MEDIATION

Out-of-court mediation developed in the 1980s in parallel to in-court conciliation; adding another layer by making a claim as a less system-driven alternative. The first family mediation service was established in Bristol in 1978, a response to the shelving of the Finer recommendations.⁹⁹ Family mediation has been defined as a process in which an impartial third party assists a couple at any stage of separation or divorce to consider their options and communicate better to reach joint decisions on arrangements for children, finance or property. This was distinguished from conciliation because it is not part of the mediator’s role to recommend a solution to the couple or to the court, nor to report to the court. The presumed result is that control remains in the hands of the parties.¹⁰⁰ Thus, another duality is identified, suggesting that in-court conciliation was an alternative to an adjudicated decision but less respectful of parents’ competence. Conciliation was provided more directly by the state, through the probation service, whereas mediation was seen as more progressive, being

⁹⁶ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 72

⁹⁷ *Scott v Scott* [1986] 2 FLR 320

⁹⁸ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 74-6

⁹⁹ M Murch, 'The Germ and the Gem of an Idea' in J Westcott (ed) *Family Mediation Past, Present and Future* (Family Law, Bristol 2005)

¹⁰⁰ L Parkinson, *Family Mediation* (Sweet & Maxwell, London 1997) 5-8

indirectly funded through the voluntary sector. It is unlikely that the stigma of being investigated by a probation officer was ever entirely overcome, however specialised the family court services became.¹⁰¹

It may be true that the in-court services were potentially more controllable by government. In 1983, the Robinson Committee's recommended that government funding should be confined to in-court schemes because they were more cost-effective than out-of-court schemes.¹⁰² Cretney wrote that the inadequacy of this claim was soon exposed, and that the only long-term effect of Robinson was the linguistic distinction.¹⁰³ As discussed below, this is questionable.

Even out-of-court mediation was not universally accepted as genuinely enabling parties to take responsibility for coming to agreement. The idealised 'Family Court' and mediation were referred to as 'two current sacred cows' by Freeman in his introduction to a book of essays, *State, Law and the Family*, published in 1984.¹⁰⁴ This book included a contribution by Bottomley, who concluded that articulating domestic disputes through 'a jurisprudence of rights, obligations, due process and recognition of conflict of interests' might be more honest and beneficial to vulnerable individuals than diversion to mediation.¹⁰⁵ Similarly to Davis,¹⁰⁶ she advocated improvement of the legal system from within.

Whether the mediator intervenes less powerfully than the conciliator has been questioned. Roberts thought that, in any scenario, the mediator 'transforms' the bilateral negotiation between the parties by clarifying issues and offering advice on the probable behaviour of other agencies, and therefore becomes partly in control of the outcome.¹⁰⁷ Much has been written about mediators not being in a position to redress power imbalance between couples; in their critique Diduck and Kaganas conclude that mediation is premised on negotiations

¹⁰¹ Discussed in Chapter Four

¹⁰² A similar recommendation was made in Australia in 1996, discussed below.

¹⁰³ S Cretney, 'Conciliation, reconciliation and mediation' in J Westcott (ed) *Family Mediation Past, Present and Future* (Family Law, Bristol 2005) 18

¹⁰⁴ MD Freeman, Introduction to M Freeman (ed) *Family, State and the Law* (Ashgate, Aldershot 1999) 2

¹⁰⁵ A Bottomley 'Resolving family disputes: a critical view' in M Freeman (ed), *State, Law and the Family* (Tavistock, London 1984)310

¹⁰⁶ G Davis 'The Halls of Justice and Justice in the Halls' in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford, 1988)

¹⁰⁷ S Roberts, 'Mediation in Family Disputes' (1983) 46(5) *Modern Law Review* 537-557

‘unclouded by hostility’.¹⁰⁸ It is therefore entirely unsuited to high conflict relationships. The idea of replacing a legal process with a therapeutic one was seen as seriously eroding the civil liberties of women in general.¹⁰⁹

Mediation came into prominence when the Family Law Act 1996 placed it at the centre of its divorce law reforms. Services had grown haphazardly and lack of regular funding prevented planning. It seemed that with statutory recognition, family mediation would move into the mainstream. The introduction of mediation as the norm in divorce law recognised that divorce had changed from a public matter requiring legal intervention to one subject to private ordering, privatisation and de-legalisation.

Bottomley had vividly expressed the suspicion that there was something insidious about mediation ten years earlier:

What we are experiencing at the moment is a pincer movement. On the one hand family law is being squeezed out of the formal legal system on arguments of cost and on the other hand it is being enticed out with promises of more fruitful pastures elsewhere. ... We need to recognise that the process of de-legalisation is not one of de-regularisation but is a shift from one form of social discipline to another. While the articulate middle classes will continue to buy the services of professional groups, other will become more and more the subjects of welfarism. Those who are the most vulnerable will be caught between the unequal power relations of private ordering and a familial ideology rendered benign by welfarism in informal dispute resolution.¹¹⁰

These fears were revived in anticipation of the implementation of the mediation provisions in the 1996 Act.¹¹¹ Although the mediation provisions of the Act did not come into force, Diduck and Kaganas maintained their view that mediation continued to enforce an ideology of the family as a means of social control.¹¹² They saw the focus on children as reinforcing the identification of women with motherhood, and the presumption of contact perpetuating the power of fathers. An imbalance of power between the parties precludes the weaker one being able to participate in the decision-making process because of fear, cultural reasons or guilt.¹¹³ To speak of family privacy and family autonomy in the context of ADR is to assume that the family is capable of making decisions as a unit, despite the interests and desires of

¹⁰⁸ A Diduck and F Kaganas, *Family Law, Gender and the State* (2nd edn Hart, Oxford 2006) 440

¹⁰⁹ K O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicholson, London 1985)

¹¹⁰ A Bottomley, 'Resolving family disputes: a critical view' in M Freeman (ed) *State, Law, and the Family* (Tavistock, 1984) 300

¹¹¹ A Diduck and F Kaganas, *Family Law, Gender and the State* (1st edn, Hart, Oxford 1999) 343

¹¹² A Diduck and F Kaganas, *Family Law, Gender and the State* (2nd edn. Hart, Oxford 2006) 431

¹¹³ A Diduck and F Kaganas, *Family Law, Gender and the State* (2nd edn, Hart, Oxford 2006) 431-433

different family members being different, and possibly irreconcilable.¹¹⁴ Advocates of mediation in the 1990s saw it as reinforcing family against state control by upholding the freedom of individuals to make their own decisions.¹¹⁵ However, an ideology of non-intervention in family life can reinforce oppression.¹¹⁶

The Family Law Act 1996 divorce reform was abandoned, as has been well-documented. The reasons given range from the government's disappointment that immediate cost savings were not apparent, through to more fundamental flaws in the legislation which reflected perpetual factional struggles in family policy.¹¹⁷ If the latter interpretation is correct, this is an example of a gap between formulation and implementation of social policy. The proposals were piloted and evaluated, so there was considerably more scope for public discourse in the late 1990s about the courts' functions than is apparent throughout most of their history. The reforms may indeed have proved unworkable and abandoning them the right course of action; the disappointment amongst lawyers was largely because of the retention of fault, rather than the loss of the ideal of mediation.¹¹⁸ In the long term, it is remarkable that the wealth of research evidence about information meetings and mediation was overlooked in the interim report from the Family Justice Review.¹¹⁹

CONVERGENCE OF COURT WELFARE SERVICES 2001-2010

In 2001, the welfare reporting and conciliation services of the probation service were combined with the services supplied by guardian *ad litem* panels and the Official Solicitor in representing children's interests in the family courts, to form the non-governmental public body, Cafcass.¹²⁰ It was envisaged that these services had enough in common to provide a cohesive organisation that could serve the courts, children and families in both public and

¹¹⁴ A Diduck and F Kaganas, *Family Law, Gender and the State* (2nd edn, Hart, Oxford 2006) 450

¹¹⁵ L Parkinson, *Family Mediation* (Sweet & Maxwell, London 1997)

¹¹⁶ FE Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835-864

¹¹⁷ Discussed in Chapter Four

¹¹⁸ M Thorpe (ed), *No Fault or Flaw: The Future of the Family Law Act, 1996* (Family Law, 2000)

¹¹⁹ R Dingwall, 'Divorce mediation: Should we change our mind?' (2010) 32(2) *Journal of Social Welfare and Family Law* 107-117

¹²⁰ Discussed in Chapter Four (Cafcass Cymru has been a separate agency in Wales since 2005.)

private law proceedings.¹²¹ Indeed, an initial policy was the convergence of staff to develop skills to undertake casework across the previous boundaries. Within five years, it became apparent that the demands on the courts of contact and residence applications¹²² were so high that resources were prioritised to investigate child protection issues arising in those cases. Thus Cafcass has now acquired a significant proportion of the courts' functions. The sceptics in the 1980s might be appalled at this development, especially if Cafcass also starts to replicate the social policy functions of the court. On the other hand, perhaps it does fit better with the lifeworld for social work practice to be applied to routine conflict resolution than the law, leaving judges to adjudicate only in the narrow band of cases where findings of fact regarding violence and abuse are required. This might be anathema to the Finer Committee which proposed a welfare service integrated in a family court which treated people as objects of rights not treatment, but the language of the Family Justice Review suggests just such a prospect, with Cafcass 'subsumed' into a new Family Justice Service.¹²³

In 2007, Cafcass informed its officers that a new practice model, the Private Law Pathway, had been agreed with the judiciary, under which officers would interview the parties and investigate welfare issues before any court hearing, presenting a recommendation to the court on the appropriate 'pathway' at the first hearing. It was stated that continuing casework would be required in only a small number of cases. However it appeared that the model had not been agreed by the judiciary, as was made clear in a speech from the President, reclaiming the courts' control.¹²⁴ The present position is that the only action taken by Cafcass prior to the first hearing are risk assessment checks with the police and relevant authorities.¹²⁵

ALTERNATIVE DISPUTE RESOLUTION IN AUSTRALIA

Another proposal from the Family Justice Review is the 'information hub' based partly on the panel's observations of ADR in Australia.¹²⁶

¹²¹ Department of Health, Home Office, Lord Chancellor's Department and Welsh Office, *Support Services in Family Proceedings – Future Organisation of Court Welfare Services: Consultation paper* (Department of Health, LASSL(98)11, 1998)

¹²² Children Act 1989 s 8

¹²³ Family Justice Review, *Interim Report* (Ministry of Justice, 2011) paras 3.104-5

¹²⁴ M Potter, 'Report on the Private Law Programme', Speech at the President's Conference, London, 13 May 2008

¹²⁵ Practice Direction: The Revised Private Law Programme (1 April 2010) para 3.9

¹²⁶ Family Justice Review, *Interim Report* (Ministry of Justice 2011) para 5.114

Divorce law had been unified across Australia in 1959, but contained 14 grounds for divorce, and procedures were excessively legalistic. This was the context of the creation of the federal Family Court under the Family Law Act (FLA) 1975.¹²⁷ Harrison states that the Court was established in recognition of a range of extra-legal resources required by parties, with an emphasis on litigation as the last resort.¹²⁸ Government policy was explicit that it was to be a 'helping court.' As already described, this lack of formality was a contributory factor to the Court's lack of legitimacy.¹²⁹ One relatively successful aspect was the integral welfare service.

WELFARE SERVICES IN THE FAMILY COURT OF AUSTRALIA

The FLA included provision for family counsellors (termed family consultants since 2006) to assist with psychological and social work expertise. They are qualified in social work or psychology, and the reports they prepare for the court are described as 'behavioural science assessment'.¹³⁰ The original Court's structure included a chief justice; judges; registrars, and a director of counselling and welfare.¹³¹ Star identifies the driving force behind the new legislation as politicians who had practised as lawyers in labour relations and arbitration, who held strong beliefs in natural justice and equal rights to representation.¹³² However these ideals were not widespread amongst the legal profession.

In her 2007 overview, Harrison distinguishes the FCtA from courts in other common law jurisdictions by its emphasis on settlement before litigation, facilitated by the family consultants. She states that other courts assume that disputes will be resolved by 'trial and judgment'.¹³³ This may have been the case when the FCtA was established in 1976 but, as has been discussed here, hardly accurate for many years in the courts in England and Wales.

¹²⁷ As discussed in Chapter Five

¹²⁸ M Harrison, 'Australia's Family Law Act: the First Twenty-Five Years' (2002) 16(2) *International Journal of Law Policy and the Family* 1 at 2

¹²⁹ Chapter Five

¹³⁰ Family Court of Australia Glossary of Terms

<http://www.familycourt.gov.au/wps/wcm/resources/file/eb4ffa0eeb99fdc/part_9.pdf> Last accessed 24 July 2011

¹³¹ L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 92

¹³² L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 61. (The Australian Court of Arbitration and Conciliation, with jurisdiction in employment disputes, was established in parallel to the High Court in 1904.)

¹³³ M Harrison, *Finding a better way? A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, Canberra 2007) 16

Harrison's report, subtitled a 'bold departure', glosses over this, and implies that the non-legal services have always been a successfully integrated function of the FCtA. The use of a family consultant as a 'single expert' from the very early days of the Court has been described elsewhere as an outstanding contribution to reducing the complexity and cost of proceedings.¹³⁴ The family consultant does indeed now appear to be highly regarded,¹³⁵ but this was not always the case.

Under the 1975 Act, the original in-court counsellors conducted both voluntary and mandatory meetings with parents in children matters, as well as writing reports for the court and providing information to parties about the courts' services. For example, group information sessions were provided by Court staff, including counsellors.¹³⁶ The original legislation provided for court counsellors to be available to parties who either requested, or were ordered to attend, a conference to discuss the child's welfare, and to attempt to reach a solution.¹³⁷ These discussions were privileged. The first counsellors came from a varied background including health, and created a new service that focused on clients' needs, and how these could be met either by court services or other agencies, without institutionalising families within the court process, but in crisis intervention could be quite directive.¹³⁸ Early court publicity materials however encouraged parties to see counsellors as being approachable and sympathetic, being able to offer a mix of marriage guidance and conciliation functions.¹³⁹ At first, services could also be requested before any application had been made to court, known as 'voluntary conciliation counselling'.

Alternatively, the counsellors could be requested to provide reports to assist the court in its decision making. However, it was clear that these reports were for assistance only, and there was no expectation that the court would necessarily follow their recommendations, unless

¹³⁴ Hon P Rose, 'The road to less adversarial trials and beyond' (2007) 21 *Australian Journal of Family Law* 232

¹³⁵ R, Hunter 'Close Encounters of a Judicial Kind: Hearing children's "voices" in family proceedings' (2007) 29 *Child and Family Law Quarterly* 203; D Fry, 'The role of the family consultant in the less adversarial trial' (2007) 21 *Australian Journal of Family Law* 113

¹³⁶ D Truex, 'An Australian Perspective' in National Council for Family Proceedings, *Finer – 25 Years On? How close are we to establishing a Family Court* (NCFP, Bristol 1999)

¹³⁷ Family Law Act 1975 s 62(1)

¹³⁸ Hon Justice Watson 'The Structure of the Family Court of Australia and Court Counselling – the Parramatta Experience' (1980) 18(1) *Conciliation Courts Review* 53

¹³⁹ J Wade, 'The Family Court of Australia and Informality of Court Procedure' (1978) 27 *International and Comparative Law Quarterly* 820-848 at 837 at 837

these accorded with other evidence.¹⁴⁰ Although counsellors could be cross examined, it was not even clear whether parties had a right to see the report.¹⁴¹ Court welfare reports in the English courts may therefore have been more influential on outcomes.

Despite the ideology behind the FLA, there was an initial lack of consensus about the extent to which the ‘helping court’ encouraged alternative resolution. Judges felt that the counsellors’ priority was to assist them in adjudication, rather than resolve issues independently. The envisaged relationship between legal and welfare professionals took many years to coalesce; Star identifies ideological tensions between the two branches, exacerbated by arguments over resources.¹⁴² In some of the registries, counsellors were more successful in expanding their conciliation role than others, but this had the perverse effect of adding to delay and cost.¹⁴³

The confusion about the role of the counsellors reflected the early conceptual uncertainty as to the level of formality of the FCtA.¹⁴⁴ The first Chief Justice expected the judges and counsellors to work together on a mutual development of their shared powers.¹⁴⁵ In retrospect, in our era of excessive managerialism in public services, this could be seen as a lack of leadership, but Star clearly admires the Chief Justice and accepts this as part of the idealistic ethos of the FLA. In 1983, the Chief Justice issued a practice direction requiring parties to attend a ‘counselling session’ before starting litigation, but the different registries applied this inconsistently in the face of hostility from the legal profession.¹⁴⁶ The conflict between their respective adversarial and conciliatory training, described by one judge as ‘brimstone and treacle’, is reminiscent of the conflicts between judges and probation officers in the English courts in the same period, discussed above.

In 1995 the FLA was amended to oblige the court and practitioners to consider ‘primary dispute resolution’.¹⁴⁷ ‘Primary’ dispute resolution was re-branded as such to counter the

¹⁴⁰ *PW and AJ Hall* (1979) 5 Fam LR 609 (FC) cited by R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 141

¹⁴¹ R Ingleby, *Family Law and Society* (Butterworths, Sydney 1993) 142

¹⁴² L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 99-100

¹⁴³ L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 110-111

¹⁴⁴ Chapter Five

¹⁴⁵ L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 02-3

¹⁴⁶ L Star, *Counsel of Perfection: The Family Court of Australia* (OUP, Melbourne 1996) 107-108

¹⁴⁷ FLA 1975 s 14E, since amended.

impression that ‘alternative’ dispute resolution was secondary in importance to litigation.¹⁴⁸ Primary dispute resolution comprised: financial conciliation conducted by a registrar; counselling in children’s matters by the family counsellors; conciliation conferences conducted jointly by the registrar and a counsellor; and early mediation. (This has since been further re-branded by the 2006 Act as ‘family dispute resolution’.¹⁴⁹)

The 1995 amendments extended the scope to offer primary dispute resolution to external agencies but most conciliation counselling was still conducted by the court counsellors, integrating early, voluntary and court-directed meetings. The average time spent by a couple in these meetings was a couple of hours.¹⁵⁰ In 1996 the Attorney General caused a flurry with proposals to devolve all conciliation to community-based services, co-ordinated by a new government agency. The plan was to centralise ‘all non-judicial family law services’ within the executive arm of government. He stated that:

...the first resort for people with family problems should not be the court ...placing the bulk of those non-judicial services in the community sector is one way we can encourage people not to put themselves and their children through the adversarial process.¹⁵¹

Writing in 1997, Finlay et al were enthusiastic about this plan for less oppressive regulation of ‘the private sphere of family relationships’. They believed that a new agency would remove the inappropriate paternalism of the court from family disputes and reduce feelings of helplessness, as well as reducing the financial burden, at a national level, of a labour-intensive structure.¹⁵² On the other hand, Harrison responded that a new bureaucracy would be unwieldy and less effective.¹⁵³ She countered that the FCtA had successfully integrated judicial and social services within its functions.¹⁵⁴ About two-thirds of parties attended voluntary early meetings; just under half were ordered to attend a conciliation session, and

¹⁴⁸ M Harrison, ‘Resolution of Disputes in Family Law: should courts be confined to litigation?’ (1997) 46 *Family Matters* 43-45

¹⁴⁹ See Chapter Five

¹⁵⁰ M Harrison, ‘Resolution of Disputes in Family Law: should courts be confined to litigation?’ (1997) 46 *Family Matters* 43-45

¹⁵¹ Hon Daryl Williams MP QC, Address 15 October 1996 quoted in HA Finlay, RJ Bailey-Harris and MFA Otlowksi, *Family Law in Australia* (5th edn. Butterworths, Sydney 1997) 40

¹⁵² HA Finlay, RJ Bailey-Harris and MFA Otlowksi, *Family Law in Australia* (5th edn. Butterworths, Sydney 1997) 40

¹⁵³ HA Finlay, RJ Bailey-Harris and MFA Otlowksi, *Family Law in Australia* (5th edn. Butterworths, Sydney 1997) 45.

¹⁵⁴ M Harrison ‘Resolution of Disputes in Family Law: should courts be confined to litigation?’ (1997) 46 *Family Matters* 43-45

only a small number were referred for assessment.¹⁵⁵ Only if conciliation was exhausted without settlement did the case proceed to a report, which was used in evidence. She argued that the provision of both early voluntary sessions and court-ordered sessions at a later stage were effectively undertaken by the in-house service. Leaving adjudication as the FCtA's sole function would elevate litigation over primary dispute resolution.¹⁵⁶

The counsellors were not removed from the FCtA but funding was reduced over the years until facilities for mediation prior to application were provided only by community services and lawyers. In 2004 Nicholson wrote that community services were patchy, and less highly regarded by solicitors than the in-court service,¹⁵⁷ but some of these formed the basis of new Family Relationship Centres.

Family consultants (as they now are) remain an essential element in both the resolution and adjudication stages of court proceedings, especially in the less adversarial trial.¹⁵⁸

FAMILY DISPUTE RESOLUTION AND FAMILY RELATIONSHIP CENTRES

As noted in Chapter Five, the parliamentary enquiry that preceded the 2006 legislative amendments sought to take action in response to the 'Pathways report',¹⁵⁹ which had found that separating parents were not always directed toward the most helpful remedies for their particular situation. The report proposed a gate-keeping service to enable families to follow the 'pathway' that most fitted their needs: either self-help, supported or litigation. The litigation pathway was appropriate only where there were issues of child abuse, domestic violence, child abduction, or all other methods had failed to reach a settlement.¹⁶⁰

¹⁵⁵ M Harrison 'Resolution of Disputes in Family Law: should courts be confined to litigation?' (1997) 46 *Family Matters* 43-45

¹⁵⁶ M Harrison, 'Resolution of Disputes in Family Law: should courts be confined to litigation?' (1997) 46 *Family Matters* 43-45

¹⁵⁷ Hon A Nicholson, 'Sixteen Years of Family Law' (2004) 18 *Australian Journal of Family Law* 131

¹⁵⁸ Discussed in Chapter Five

¹⁵⁹ House of Representatives Standing Committee on Family and Community Affairs: *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation* (Parliament of the Commonwealth of Australia, Canberra 2003) xvii

¹⁶⁰ Family Law Pathways Advisory Group, *Out of the Maze: pathways to the future for families experiencing separation* (Commonwealth of Australia, 2001)

At that time, only five percent of applications the Court received were actually adjudicated.¹⁶¹ The aim of the 2006 Act was to promote ‘family dispute resolution’ (FDR) even more strongly. FDR is now compulsory before an application can be issued to the court, with a few exceptions. Registered FDR providers include lawyers and mediators, but the government’s commitment to the new scheme is embodied in Family Relationship Centres (FRCs), which are contracted out to voluntary organisations and centrally funded to provide a range of free and subsidised services, supplemented by telephone advice lines and internet resources. They have a wide role in family support, marriage guidance, and relationship skills as well as dealing with post-separation parenting. Although they give advice about law and court processes, they were intended as a social work, not a legal service, grounded in relationship-building, not enforcement of rights. However, the information currently given to parties attending a Centre includes a suggestion that they may wish to bring their own lawyer.¹⁶²

The FRCs were intended to produce:

...a long-term cultural change in the pathways people take to resolve disputes about parenting arrangements after separation...The philosophy is that post-separation parenting should not be seen in the first place as a legal issue.¹⁶³

Parkinson describes an anti-lawyer motivation in Parliament, which wanted to increase free access to a wider range of advice, for which lawyers were not necessarily the best qualified to assist. He saw FRCs as having five functions: information referral to strengthen relationships; education and advice for separating parents; assistance in resolving contact disputes; assisting grandparents; and advice on child support.¹⁶⁴ However, Rhoades identifies a strong anti-professional thread emanating mainly from the fathers’ rights movement; a distrust of all ‘experts’.¹⁶⁵

Access to web-based Family Relationship Services, including information about FRCs is very easy.¹⁶⁶ Family Dispute Resolution (FDR) is specified as a compulsory step for anyone wanting to apply for or vary a parenting order. A certificate must be obtained from a

¹⁶¹ Family Court of Australia *Annual Report 2005-6* (2006) 43

¹⁶² Family Dispute Resolution Brochure <<http://www.familyrelationships.gov.au>> Last accessed 1 May 2011

¹⁶³ P Parkinson, ‘Keeping in contact: the role of family relationship centres in Australia’ (2006) 18(2) *Child and Family Law Quarterly* 157

¹⁶⁴ P Parkinson, ‘Keeping in contact: the role of family relationship centres in Australia’ (2006) 18(2) *Child and Family Law Quarterly* 157

¹⁶⁵ H Rhoades, ‘Yearning for Law: Fathers’ Groups and Law Reform in Australia’ in R Collier and S Sheldon (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006) 132-134

¹⁶⁶ <<http://www.familyrelationships.gov.au/Pages/default.aspx>> Last accessed 19 July 2011

registered provider that FDR has been attempted. The exceptions relate to consent orders, urgency or risks of violence or abuse.¹⁶⁷ If the certificate states that no genuine effort was made, the parent can be referred back or have costs awarded against them.

Joint dispute resolution meetings with FRC advisers are free of charge, up to three hours. The purpose is to negotiate post-separation parenting and agree a parenting plan, if possible. A means-tested scale of fees applies if sessions continue beyond the three hours. Problems encountered with existing contact orders or agreements can also be taken to the FRCs, possibly avoiding further court applications.

There is not such a structural division between family courts and child support in Australia as in the UK. For example, guides for parents are jointly published by the Family Court and the Child Support Agency.¹⁶⁸ The FRCs have formal links with local child support agencies to provide workshops, advice and information. Although the child support scheme has been unpopular since its inception, and has been subject to considerable reform, it is relatively more successful than systems in Britain and the USA.¹⁶⁹ It had already developed methods of advising and supporting non-resident parents.¹⁷⁰ This indicates a more holistic approach to family disputes. On the other hand, the FRCs do not assist in disputes over family property.

It was anticipated that FRCs would remove much of the courts' workload, firstly because they would resolve the easier type of case which had previously been subject to a case assessment conference or court-ordered conciliation, and secondly because there should be a reduction in the number of cases that become highly conflicted. It was hoped that FRCs would help forge better lasting solutions by being able to listen to and respond to each party's narrative of events.¹⁷¹ This would however depend on a number of factors: whether three hours in a FRC is as effective as negotiations 'at the court door', and whether a significant proportion of parents and grandparents would consult a FRC at a stage before positions become entrenched. However, some mediators were wary of the prospect of compulsory

¹⁶⁷ Family Law Act 1975 s 60I (9) (b)

¹⁶⁸ Hon A Nicholson, 'Sixteen Years of Family Law' (2004) 18 *Australian Journal of Family Law* 131

¹⁶⁹ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 165-181

¹⁷⁰ N Wikeley, *Child Support: Law and Policy* (Hart, Oxford 2006) 508

¹⁷¹ L Moloney and B Smyth, 'Family Relationship Centres in Australia: Reflections based on research and practice' (2004) 69 *Family Matters* 64-70

mediation.¹⁷² The premise was that FRCs would have little or no role to play in the types of cases which prevail at final hearing stage: those involving a history of violence and abuse. These are exempted from FDR and FRCs are obliged to operate complex screening risk assessment procedures. Doubts were expressed as to how adequate and consistent these would be.¹⁷³ The 2009 evaluation has now highlighted this as a major concern.¹⁷⁴

FRCs were integral to an explicit policy drive to reach agreement without litigation.¹⁷⁵ The government favoured 'parenting plans' over consent orders.¹⁷⁶ Ten years ago, Bailey-Harris wrote that despite the promotion of agreement in the 1995 Act, Australian courts still subjected post-separation parenting to a greater degree of scrutiny than the Children Act 1989 s 1(5) 'no order principle' applied by courts in England. She believed that s1(5) had led to fewer consent orders being made, whereas the FLA as amended in 1995 still envisaged judicial oversight of both consent orders and parenting plans.¹⁷⁷ Parenting plans had not become as popular as consent orders for a number of reasons,¹⁷⁸ but Rhoades described the system as 'built on a consent order culture' by 2002. Researchers found that consent orders were rife in cases where there had been an imbalance of power and incidents of violence.¹⁷⁹ It seems that the judicial oversight observed by Bailey-Harris had little to offer the courts' protective function.

Although Parkinson advocated the FRCs as a positive alternative to court, he thought there were associated benefits for their local communities and hoped they would avoid being overwhelmed as 'divorce centres', which would exclude their wider functions of family support.¹⁸⁰ Conversely, Eekelaar has commented that the FRCs' involvement in family

¹⁷² V Wolff *A Snapshot of Family Mediation in Australia* <<http://articlecru.com/Article/A-Snapshot-of-Family-Mediation-in-Australia/43162>> Last accessed 18 April 2008

¹⁷³ B Smyth, L Moloney, R Weston, N Richardson, L Qu and M Gray, 'Allegations of family violence and child abuse in children's proceedings: A pre-reform empirical snapshot' (2007) 21 *Australian Journal of Family Law* 252

¹⁷⁴ Discussed below.

¹⁷⁵ H Rhoades 'Yearning for Law: Fathers' Groups and Law Reform in Australia' in R Collier and S Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, Oxford 2006) 146

¹⁷⁶ B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, Melbourne 2008) 342

¹⁷⁷ R Bailey Harris and J Dewar, 'Variations on a Theme – Child Law Reform in Australia' (1997) 9(2) *Child and Family Law Quarterly* 149

¹⁷⁸ B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, Melbourne 2008) 342-343

¹⁷⁹ H Rhoades 'The "No Contact" Mother: Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law Policy and the Family* 71; M Kaye, J Stubbs and J Tolmie, *Domestic Violence and Child Contact Arrangements* (2008) University of Sydney Legal Research Series 08/18

¹⁸⁰ P Parkinson, 'Keeping in contact: the role of family relationship centres in Australia' (2006) 18(2) *Child and Family Law Quarterly* 157

disputes imposes the will of the wider community on parties, while depriving individuals of legal protection.¹⁸¹ It is understandable that some may fear an ideological, homogenised model being enforced by FRCs, especially as they were introduced by a conservative government, much as the move to mediation in England in the early 1990s took place under a conservative administration. The 2009 evaluation suggests that FRCs are providing flexible need-focussed services to meet the needs of diverse family forms.¹⁸²

Hunter pointed out that restricting litigation to cases involving family violence, or intractable disputes, does not achieve a resolution in the child's best interests if there are other concerns about parenting capacity, for example because of substance abuse or disability. She suggested that this type of case should proceed by way of expert evidence to the court, not by out-of-court negotiations restricted by legal aid rules about the prospects of success. She contrasted the benefits of early investigation in Magellan cases.¹⁸³ However, as discussed in Chapter Five, Magellan only applies to cases of serious physical and sexual abuse, not to neglect or emotional abuse. It is presumably up to the FRC or family consultant to attempt to get the parent engaged with local support services.

The evaluation was largely positive about FRCs, now used by about two thirds of parties, amounting to a cultural shift toward FDR away from legal services.¹⁸⁴ Although many parties still used lawyers there was an overlap, with co-operation between professionals in the two services.¹⁸⁵ Lawyers had concerns about the less adversarial trials, including increased cost and delay; inconsistent judicial practice and clients being disadvantaged by directly addressing the judge.¹⁸⁶ Overall, the evaluation concludes that the use of FDR was broadly meeting the objective of achieving resolution outside court, but with reservations about the number of cases that were proceeding through FDR despite risks of violence and concerns about children's safety.

¹⁸¹ J Eekelaar 'Law, Family and Community' in G Douglas and N Lowe (eds) *The Continuing Evolution of Family Law* (Family Law, Bristol 2009) 177 - 178

¹⁸² R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, [Evaluation of the 2006 Family Law Reforms](#) (AIFS, Melbourne, 2009)

¹⁸³ R Hunter, 'Adversarial Mythologies: Policy Assumptions and Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156-176 at 166

¹⁸⁴ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, [Evaluation of the 2006 Family Law Reforms](#) (AIFS, Melbourne, 2009) Report Summary Para 3.2.2

¹⁸⁵ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, [Evaluation of the 2006 Family Law Reforms](#) (AIFS, Melbourne, 2009) Report Summary para 3.4

¹⁸⁶ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, [Evaluation of the 2006 Family Law Reforms](#) (AIFS, Melbourne, 2009) Report Summary Para 3.13

Attempts to de-legalise family disputes in Australia can claim a remarkable degree of legitimacy because of the rigorous ongoing research and evaluation programme, involving longitudinal studies of many thousands of families.¹⁸⁷ Although English politicians praise the Australian FDR model and the Family Justice Review now recommends an on-line ‘hub’,¹⁸⁸ this is unlikely to be viable without the intensive financial commitment made in Australia. The 2006 reforms may have begun with the ‘frozen chook’ discourse, but developments now appear to be based on solid research evidence. As a result, a new bill before Parliament attempts to address some of the unintended consequences of the 2006 amendments, widening definitions of abuse and incorporating the UNCRC into federal law.¹⁸⁹

CONCILIATION/MEDIATION AND THE COURTS’ PROTECTIVE FUNCTION

Mediation is promoted as a personal solution to an individual problem selected to by-pass legal rules. If mediation is enshrined in legislation, as it is now in Australia, it can no longer depend for its legitimacy on being consensual and voluntary. Like the law, it is sanctioned by coercion, and is therefore subject to the same theories of legitimacy as law.¹⁹⁰ Hazel Genn has said, controversially, that mediators have no interest in justice or fairness.¹⁹¹ However, it is probably difficult to discern radical differences in approach between family lawyers’ and mediators’ current practice. The Australian experience shows us that out-of-court mediation can work, given a sufficient infrastructure, but it also emphasises the ongoing role of the court in undertaking the protection function. Engaging parents in court-directed negotiation by Cafcass bears little relation to mediation as envisaged in the 1980s, but more with social work intervention.

In the early 1980s, Roberts wrote that conciliation/mediation was a ‘simple and attractive idea’ but warned against vagueness. His lengthy analysis of the different models differentiated between an enabling negotiating process and a directive advisory style of mediation, with only the latter having any prospect of addressing the safety of children. It was wrong to pretend that this was joint decision-making based on the parties’ own values

¹⁸⁷ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (AIFS, Melbourne, 2009)

¹⁸⁸ Family Justice Review, *Interim Report* (Ministry of Justice 2011) para 5.114

¹⁸⁹ Family Law Legislation Amendment (Family Violence and other measures) Bill 2011, <<http://www.austlii.edu.au/au/legis/cth/bill/flavaomb2011623/>> Last accessed 19 July 2011

¹⁹⁰ J Crowe and R Field, ‘The Problem of Legitimacy in Mediation’ (2008) *Contemporary Issues in Law* 48-60

¹⁹¹ C Irvine, ‘Mediation and Social Norms: A response to Dame Hazel Genn’ (2009) *Family Law* 351

and preferences.¹⁹² Davis argued that there was a conflict between conciliation and welfare investigation, with a risk that preoccupation with a child's welfare undermines parents' authority, becoming authoritarian with imposition of value judgments.¹⁹³ The increasing enthusiasm with which family court welfare officers were pursuing conciliation in the 1980s meant that they were focusing their work on the parents' disagreement instead of providing information to the court, conflict resolution instead of investigation.¹⁹⁴ This type of practice strayed far from Mnookin and Kornhauser's assumption of parental competence, and the Finer Committee's demand for parties to be treated as rights-holders, not patients. It seemed that the 'over-zealous' religious officer of the 1930s had been succeeded by the equally determined quasi-psychotherapist.

Writing in retrospect in 2004, Davis identified three issues that had been debated for the past 25 years: whether mediation is separate from legal processes; whether mediation is controlled by the parties; whether the mediator can seek to impose his or her expertise in the promotion of the child's welfare. He concluded that there were unlikely to be 'right and wrong answers' but warned against mis-description of processes. He singled out his residual concern, that the language of conciliation was still applied to fit 'forms of intervention which rested on abstruse theoretical constructs which were never explained to the parents involved'.¹⁹⁵ In other words, officers were covertly imposing their own beliefs on families who had entered the court arena to resolve a dispute through the law, not to engage in therapy. The likelihood of Cafcass officers indulging their pet theories is now less, in view of their high caseloads and directive to assess immediate risk rather than capacity to change.¹⁹⁶

The evaluation of FDR in Australia found that although it was sometimes followed in cases where there were significant concerns about violence and safety, this did not necessarily mean that those parents would want to take a court-based pathway. The report recommended

¹⁹² S Roberts, 'Mediation in Family Disputes' (1983) 46 (5) *Modern Law Review* 537

¹⁹³ G Davis, 'Conciliation: A Dilemma for the Divorce Court Welfare Service (1982) 29 *Probation Journal* 123-128

¹⁹⁴ AL James and W Hay, *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, Hemel Hempstead 1993) 65-68

¹⁹⁵ G Davis, 'A Research Perspective' in J Westcott (ed) *Family Mediation Past, Present and Future* (Family Law, Bristol 2005) 61 (An additional concern Davis did not mention is the lack of a mechanism for the child's views to be heard.)

¹⁹⁶ HC Justice Committee, evidence given by Harry Fletcher, Napo, 1 March 2011
<<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/11030101.htm>>

careful monitoring of screening and intake processes.¹⁹⁷ This suggests a future problem for the English courts: if a Cafcass officer encounters risk, matters can be referred to a judge but a mediator's input will presumably be limited to certifying a dispute as unsuitable for mediation.

CONCLUSIONS

The current Family Procedure Rules 2010 interpret 'alternative dispute resolution' as meaning 'methods of resolving a dispute, including mediation, other than through the normal court process'. There is a duty on the court, in all types of family proceedings, to consider at every stage whether ADR is appropriate.¹⁹⁸ In private law proceedings, 'conciliation' takes place at the First Hearing Dispute Resolution Appointment which includes a period for discussion with a Cafcass officer. The distinction between mediation and conciliation is thereby preserved, with the latter as part of the 'normal court process'. Following the attempt in 2008 by Cafcass to assume a role in decision making before matters had been listed before a judge, procedures now clearly locate conciliation within judicial oversight.

As Davis commented, the lack of judicial confidence in the law's ability to deal with child disputes, together with the rationing motif, leads to a principal object of restricting, rather than supplying, a service – that of judicial determination.¹⁹⁹ It may therefore appear odd that judges objected to Cafcass undertaking much more responsibility, but it appears they were anxious about the primary objective of deflecting parties being to reduce the workload of report writing.²⁰⁰

However, Davis was correct that, progressively rationing resources means that adjudication is 'stigmatised as the last refuge of the obsessive and the intransigent.'²⁰¹ In parallel,

¹⁹⁷ R Kaspiew, M Gray, R Weston, L Moloney, L Qu and the Family Law Evaluation Team, [*Evaluation of the 2006 Family Law Reforms*](#) (AIFS, Melbourne, 2009)

¹⁹⁸ Family Procedure Rules 2010, Rule 3.2

¹⁹⁹ G Davis, 'A Research Perspective' in J Westcott (ed) *Family Mediation Past, Present and Future* (Family Law, Bristol 2004) 63

²⁰⁰ Sir Mark Potter, 'Report on the Private Law Programme', Speech at the President's Conference, London, 13 May 2008

²⁰¹ G Davis 'The Halls of Justice and Justice in the Halls' in R Dingwall and J Eekelaar (eds) *Divorce Mediation and the Legal process* (Clarendon, Oxford 1988)

Bottomley's 'jurisprudence of rights, obligations and due process' is a luxury available only to the wealthy.²⁰²

This chapter has shown that there are several additional dualities to the 'court – not court' duality of ADR. These are: adversarialism and negotiation; law and social work; forensic and therapeutic; court directed conciliation and voluntary mediation. Overall, the predominant shift is that the court's protective function has overtaken that of dispute processing. If dispute resolution no longer belongs in the court system, this will have to be justified in open exchange of evidence and ideas (including full disclosure and understanding of economic factors) if it is to have a chance of being more successful than current systems.

²⁰² A Bottomley, 'Resolving family disputes: a critical view' in M Freeman (ed) *State, Law, and the Family* (Tavistock, 1984)

CHAPTER EIGHT
CONCLUSIONS
CONTENTS

THE FUNCTIONS OF FAMILY COURTS – A HISTORY OF DUALITIES	298
DUAL COURT STRUCTURES	301
FUNCTIONS OF DISPUTE PROCESSING AND PROTECTION	303
LAW AND WELFARE	304
SECRECY AND OPENNESS	305
ADJUDICATION AND ADR	306
DISPUTE PROCESSING AND PROTECTION; PRIVACY AND ADR: CONCLUSION	307

THE FUNCTIONS OF FAMILY COURTS – A HISTORY OF DUALITIES

It is not claimed here that family courts in England and Wales have lost legitimacy to the point where they are dysfunctional, because clearly they do still function. Rather, I have tried to identify what lies behind the excessive criticism that family courts attract, to see whether their functions are worth preserving or could be more successfully undertaken elsewhere. In Chapter One, these functions were defined as dispute processing and protection, with latent functions of interacting with social policy. The family justice system has been subject to a number of new initiatives during the period this thesis was written (2004-2011). The Family Justice Review has provided a fair overview, but there seems little prospect of more stability in the near future. Change will have a greater chance of success if it is grounded in a recognition that our society has invested in a construct of childhood that needs support and protection. The anxieties generated by perceptions of failure to protect children and their parents are too great to risk the replacement of family courts with anything less than a system that is carefully and inclusively designed, and will consequently earn public support.

Studying the history of the courts reveals that their administration of family law has been put under strain by a series of split systems which have borne little relation to the expectations and values of the society of the time. This series of dualities owes more to the embedding of practice to serve political and/or economic interests than to an emancipatory model of agreeing in a public space how best to preserve our private values. In this concluding chapter, I set out the dualities that have been identified and how far these have been addressed by public discourse.

A significant theme running through much of the literature is the existence of a boundary between public and private in family law. Chapter Two examined how social theory on the public and private spheres could be applied to a study of family courts by distinguishing the public and private realms from the role of the state in relation to family life. This set out how social theory can be applied to the historical context of the courts and to the current problems of secrecy and the drive for ADR. In particular, aspects of Habermas' theories were discussed. These include the extent to which tensions between capitalism and the welfare state in the late 20th century can be explained by his idea of the colonisation of the lifeworld. This is relevant to conflicts between social welfare and legal solutions and the question of whether the court system follows social norms, or vice versa. Habermas argues that institutions are accepted as legitimate if they work on consensus arrived at through rational

discourse and undistorted communication. This level of discourse is not always found in the way social policy is formulated and applied. The concept of the ideal speech situation is highly relevant to publicity in courts and the transparency of policy formulation in claiming transparency in the courts. Furthermore, if there is a deeper crisis of legitimacy in the court system, the question is whether alternative dispute resolution is more or less legitimate than the court process.

The historical development of the family courts was summarised in two separate periods in Chapters Three and Four, divided by the advent of the welfare state and social administration in the 1940s. Chapter Three provides the background to court systems into which social policy had to fit. The legacy from systems in the ecclesiastical courts and the role of JPs contributed to a fragmented court system based on religion and class, which imposed social order in the guise of morality. The interdependence of the patriarchal nature of private family life and retaining control of families in the public sphere was played out in the courts, where women and children's interests were relegated. For most of the population, the only protection to be found was within the JPs' criminal jurisdiction.

In contrast, the well-being of children became a priority during the 20th century, and over the decades the legal focus has shifted from marriage to parenthood, and the socialisation of children. Again, this socialisation may be motivated by the aim to develop economically self-sufficient and obedient members of society, but the UK now has explicit family policies, rather than relying on social order being enforced through the patriarchal family form.

The upbringing of children is now central in policy applied by the courts when parents are in dispute with each other and/or with the state. This explicit family policy evolved only recently. Chapter Four outlined the post-war history of the courts, the connection with social policy and the increasing calls for a specialised family court or for the use of alternative means to address family breakdown. The impact of legal aid as integral to the welfare state is highly significant. Social policy brought family life into the public realm, and the nature of the relationship between citizen and state created new expectations of the courts. By the 1970s, the burdens of the legacy of the original court systems were recognised in a call for a family court. In England and Wales, the Children Act 1989 unified many aspects of the courts' functions, especially in contrast to the structural separation in Australia, although Australia did establish a Family Court in 1976. Attempts to establish mediation as a plausible

alternative to family courts in England and Wales failed to win legitimacy, not even to satisfy cost-saving objectives.

Chapter Five shows how the Australian court structure is fragmented by an artificial separation of public and private law. The specialised court failed to achieve legitimacy, which led to new policies prioritising extra-legal processes. In its earlier history, its reputation was also damaged by allegations of secrecy. The Australian system, despite the establishment of a Family Court, therefore exhibits similar problems to those alleged to apply to courts in England and Wales, and illustrates how difficult it is to maintain the division between public and private law when children's interests are brought to court.

In the past few years, 'secrecy' has been blamed for a lack of confidence in family courts by a wide range of critics, including government Ministers. Chapter Six is a case study on publicity in the family courts. The perceptions of secrecy and the call for openness in family court proceedings were examined, in the context of theories of privacy and the public sphere. These include: privacy as a moral value and as a right; comparing secrecy, privacy, transparency and openness; and concluding that transparency of process can be achieved without opening up private matters to damaging publicity. The question of whether we need an open court to achieve legitimacy has been posed on a flawed basis, denying genuine consultation on legal reform. While there may have been some value in an increased awareness of accountability by professionals, the domination of this discourse by vested interests makes it difficult to assess whether the courts would be more acceptable an institution if restrictions on publication of personal information were further relaxed.

Chapter Seven drew together the themes of alternative processes to courts and the social welfare-legal conflict dating from the 1930s and more recently in Australia. The drive to deflect both private individuals and public bodies from using court processes has strengthened. This can be seen in terms of forcing private solutions on parties whose concerns might be in the public interest because they involve vulnerable children, and poses a contradiction for 'open justice'.

It might be concluded that family courts, by the nature of the problems they are trying to resolve, are inevitably going to be a focus of discontent. Rather than simply dismissing the issues in this way, narrowing them to the allegation of secrecy and the belief that the use of

an alternative process will lead to better outcomes for children and families, allows courts to be observed as trying to function in a context of policy confusion. The causes of the legitimacy crisis go deeper, to our continuing inability to agree on the public and private functions of the courts, but if time was given to meaningful consultation we might at least improve the chances of a workable solution. The problems of family courts are commonly expressed as arising from their being the site of a conflict between the public realm of state intervention and the private realm of private family arrangements. However the modern relationship between state and citizen depends on the boundary between public and private being crossed in the lifeworld to agree how the economy and the state will meet our expectations. The values held by individuals and society will not be upheld if the justice system is dominated by forces of market and power. A legitimate system can function when policies are agreed rationally in the public sphere.

The dualities are not mutually exclusive, nor are they necessarily mired in conflict, but their contradictions need to be carefully explored if systems can improve, rather than isolated aspects being seized on to support claims driven by money and power.

DUAL COURT STRUCTURES

The earliest records of the ecclesiastical courts through to the eventual introduction of divorce in the mid 19th century show that the ‘family’ function of these courts was to uphold marriage as an institution that regulated behaviour and secured property and succession rights. The transfer of this jurisdiction from the church to the civil courts did little to improve the position of women or children. The parallel JPs’ jurisdiction enforced intra-family obligations in order to protect the parish from having to maintain family dependents, who were unable to work for a living. Each system was allied to an economic imperative in upholding social order. Children became the objects of court decisions only if they were due to inherit wealth or were likely to become a burden on the state.

Restricted access to divorce was preserved in the Matrimonial Causes Act 1857, which was attached to an administrative rearrangement rather than a reconceptualisation of the courts as a means of allowing people to escape unhappy relationships. The split jurisdiction that originated in the function of the ecclesiastical courts to adjudicate the status of marriage and the JPs’ function to oversee law and order was of course condemned in the Finer Report published in 1974, on the grounds of class discrimination as well as its legacy of ineffective

support for families. That Committee was in no doubt that the system was obsolete and unfit for purpose, although there are mixed views on why its recommendations were not implemented. Whether this was because they looked too expensive or would disturb departmental powers, the fact remains that the plans did not gain sufficient political support, and may indeed have been too radical in increasing women's economic independence to have gained popular support either. The impression is given that scope for development was quickly contained by messages or assumptions that the Finer vision was unaffordable. In contrast, the removal of the child support function from the courts by the Child Support Act 1991 followed considerable publicity and comment. Unfortunately the legislation was rushed and took little account of this, with the resulting system being unsatisfactory to almost all concerned.

The Finer Committee's view of the 'police courts' being inappropriate for dispensing family justice was shared by many through to the 1980s, but addressed to some extent by the combined jurisdiction under the Children Act 1989. It seems that this level of court was seen as appropriate for care proceedings, being closer to the community it served than professional judges. On the other hand, contact and residence applications were assumed to be attached to divorce in the county courts. The justice system as a whole is economically dependent on the supply of lay magistrates, but their continued use in family cases will always risk the preservation of a two-tier system predicated on class and status, rather than the complexity of the law being applied or the seriousness of the outcomes.

Although divorce was once proclaimed to be a matter of such public interest that proceedings were conducted as full-blown trials, the shift toward the largely administrative system we now have was achieved through incremental procedural changes, not through parliament. Legal aid was introduced in 1949 because of the demands of divorce and is the factor that has dominated changes in the family courts ever since. Few of these developments have been informed by a public debate about the extent to which society agrees on supporting families whose relationships are breaking down.

The Children Act 1989 was drafted on the premise that public law proceedings would continue to occupy the magistrates while there would be more flexibility in private law. The last few years have seen a pragmatic acceptance of the idea of a combined family court, as

further developed in the Family Justice Review. However, its scope is seriously limited by the inadequacy of the infrastructure.

Accidents of history are perhaps even more problematic in Australia, where the constitutional separation of powers has imposed an artificial barrier between private law/dispute resolution in the federal courts and public law/protection in the state courts.

FUNCTIONS OF DISPUTE PROCESSING AND PROTECTION

Despite the most strenuous efforts being made, for ideological or economic reasons, to stop people taking their dispute to court, substantive legislative reform would be required, here and in Australia, to remove disputes about children from family courts altogether. The 2003 enquiry in Australia probably went as far as possible, in considering a tribunal for family cases. Taking the idea to its ultimate conclusion, child protection could become a matter for the criminal law only, with children being removed by the state only if it can be proved beyond reasonable doubt that their parents have abused them. Similarly, one parent would 'win' sole parenting control only if the other was proved guilty. Domestic violence could complete its emigration into the criminal law. There would be no need for a civil court to become involved in any disputes apart from property, and we would have a pure forensic system. This extreme change in the law would be logical if courts are the wrong place for resolving family disputes, and care proceedings turn on experts' reports in any event.

It would of course be possible only if we reverted entirely to the *laissez faire* paradigm. Children and vulnerable adults would not be adequately protected. In 2004, Cretney was still posing a 'profound question: what is the legitimate role of the courts, which by definition embody the coercive judicial power of the state in what was traditionally regarded as the private realm of family life?'¹ The answer surely must be that while disputes might be processed (and even resolved) outside a court process, judicial authority functions as the power accepted by society to protect individual members of families.

In today's courts, disputes are processed through a series of filters, some before an application is even made, such as the Public Law Outline in care proceedings; difficulty in accessing legal aid; the settlement culture that is now intrinsic in solicitors' practice. Once in

¹ S Cretney, 'Conciliation, Reconciliation and Mediation: The Historical Context', in J Westcott (ed) *Family Mediation: Past Present and Future* (Jordans, Bristol 2004)

the court, private law cases are diverted by Cafcass, and there is an overarching duty in all cases at all stages to consider ADR; solicitors will be negotiating throughout. Parties fall away through attrition and while these processes are observable as functions, the extent to which they are dispute *resolution* is doubtful, even when a line is drawn under the case in the court record.

Now that there is no investigation function for the court in divorce itself, and child support has been transferred to an administrative agency, disputes in private law centre on controlling aspects of parenting, usually articulated as a claim on the amount of time the child will spend with a parent or with whom they will live. With pressure and encouragement at every stage, most parents are persuaded that a failure to agree is a failure of parenting. Only a small proportion ever reach the formality of an adjudicated hearing, and even then a judge or magistrate will be seeking a workable compromise rather than applying law to the facts.

The formality of dispute processing has receded over the years in England and Wales, although increased for a period in Australia, in response to criticism of the court dealing out less than proper justice. In the 1970s, the Finer Committee insisted that parties were rights-holders and that matters would be decided by a judge; in the 1980s mediation/conciliation were seen as threatening due process. Perhaps in a few years' time we will look back to see the notion of a judge or magistrate imposing the law on a contact dispute as absurd.

There has been a cultural shift in Australia away from courts into ADR, and such a shift is greatly to be wished by the UK government. Whether it is achievable without the intensive economic investment made in Australia remains to be seen. The Australian experience highlights that the protective function has to remain with the court.

Clearly the protective function is to the fore in public law applications, although negotiation and brokering agreement are involved in reaching an order, which may well involve the state withdrawing and the child being brought up by another family member. Although parties' rights to family life are safeguarded by legal representation, again the approach is more about problem-solving than adversarial. Such an approach utilises non-legal professional disciplines.

LAW AND WELFARE

The term ‘behavioural science’ covers social work and psychology but is not a familiar one in the UK.² Broadly, it represents the input by non-legal professionals in the family justice system, including the social workers, probation officers, court welfare officers, guardians, family consultants and expert witnesses who assist the court in arriving at a decision. As has been seen, their functions are not always confined to investigation and reporting, but they also work with the family toward solutions. The history of court welfare in both England and Australia has shown that that judicial and behavioural science approaches can sometimes clash rather than coalesce. Public perceptions of other professionals are sometimes lower than of lawyers. During the 1980s, in particular, there was much criticism of the therapeutic colonising the law. Taking into account the courts’ latent functions of applying policy and regulating behaviour, is there still a danger of covert manipulation by those holding arcane theories? Resources are now monitored to the extent that the most the parties are likely to be offered is ‘brief therapy’, rather than indefatigable attempts to mend relationships.

Nevertheless, we have arrived at a situation where it is justified to resort to court to protect children but dispute resolution which does not involve risk of harm is not a matter for judges. However the law and welfare paradigms continue to be interdependent. The evaluation in Australia has confirmed that it is not safe to make assumptions about which cases are safe and which not. Judges rely on assessments of parenting capacity and the impact on the child before they are able to make decisions about the state assuming parental responsibility.

This leads to the point about privacy in the court: if family courts are applying behavioural science rather than the law, are they subject to the same principles of open justice as other courts?

SECRECY AND OPENNESS

Firstly, it cannot be ignored that the prospect of court proceedings being publicised may well deter some applicants. However, that would be a simplistic analysis of the political

² C Wright Mills explains that this term replaced ‘social sciences’ in the US during the Cold War period as the latter sounded too much like ‘socialism’: CW Mills, *The Sociological Imagination* (Penguin, Harmondsworth 1970) 25-26

motivation to 'open up' the courts. Secondly, if there is a significant move to private ordering, presumably mediators will be bound by a duty of confidentiality but parties will not be subject to any sanctions if they complain to the press, revealing details about their children.

It is commonly assumed that the campaign for 'open' family courts is dominated by the media for commercial reasons. Looking beyond such an assumption, the courts as state agencies will achieve greater legitimacy the more transparent their decision-making processes. The increased frequency of published judgments, the Bailii pilot, and the higher courts' willingness to publish names of expert witnesses probably have an educative function and may improve accountability. This is at the cost of sacrificing the rights of children to privacy, which is not adequately protected by anonymisation. At a utilitarian level, it is also an unnecessary diversion of resources and will reduce the quality of evidence available to the court. The duality between personal privacy and publicity is more complex than between secrecy and openness, and it is disappointing that the rhetoric of 'transparency' was not followed when the law was recently changed.

ADJUDICATION AND ADR

The feeling that families' needs and wishes are not recognised by the court system leads to a belief that ADR is necessarily better at matching these, but then there is a problem with ADR being taken over also by economic and power forces. Processes used to avoid court take different forms, but all of these raise questions about whether they are based on values or on instrumental rationality. Social work or community-based conflict resolution might mean more juridification of family law, rather than less.

Arguments that the state should not intervene in private family life, and that private individuals should not be obliged to contribute through the cost of public services to help other people resolve their disputes, run through the justifications for promoting ADR. However, ADR is not truly less public. Mediators, Cafcass officers and the FRCs in Australia are being delegated some the courts' functions. These are now integral as a compulsory stage in dispute resolution, but one mediator is assumed to cost the state less than two lawyers and a judge. ADR may employ non-legal language but it no longer truly an alternative to the

‘coercive power’ of the law. ADR and adjudication are connected in the same way as dispute resolution and protection.

This is not a new issue. Maidment wrote in 1984 that ‘the encouragement of private ordering and the many virtues claimed for it nevertheless raise difficult philosophical issues for the professed concern of the law to protect the welfare of the child, which is embodied in the s 41 declaration procedure.’³

While outcomes for children remain central to family policy, adjudication in both public and private law cases will still be required if there is a factual dispute about risk of harm. The public interest is engaged in trying to ascertain the truth.

DISPUTE PROCESSING AND PROTECTION; PRIVACY AND ADR: CONCLUSION

As Dingwall and Eekelaar pointed out in 1988, the practical objection to delegalisation was that ‘disputes are displaced from the courts but society must find a way of resolving them.’⁴ The courts’ protective function has been found to be universal, exemplified in the recent Australian report about the unintended consequences of legislation in marginalising family violence.⁵

In the ideal speech situation we would contribute to a public discourse, open to all, free of restrictions and untruths. Of course this is a theoretical construct, but the further we fall short of that ideal, the less chance there is of policy being accepted as legitimate. Only when proposals to make courts more accountable through publicity are honestly examined for what they offer, can we arrive at consensus about children’s privacy and transparency of process. Only when the extent of the economic imperative in the drive to ADR is recognised, can we arrive at a consensus about where the courts’ current functions should be exercised.

³ S Maidment, *Child Custody and Divorce* (Crook Helm, London 1984) 77

⁴ R Dingwall and J Eekelaar, ‘A Wider Vision’ in R Dingwall and J Eekelaar (eds), *Divorce mediation and the Legal Process* (Clarendon Press, Oxford, 1988) 174- 176

⁵ R Chisholm, *Family Courts Violence Review* (Attorney General of Australia, 2009)

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