

Evaluation of the 2006 family law reforms: Summary report

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Part 4: Implications of the findings for the key evaluation questions

This evaluation has shown that a significant proportion of families who actively engage with the family law system have complex needs and are affected by issues such as family violence, child abuse, mental health problems and substance misuse. Such families are the predominant clients both of post-separation services and the legal sector.

1. To what extent are the new and expanded relationship services meeting the needs of families?

(a) What help-seeking patterns are apparent among families seeking relationship support?

(b) How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?

There is evidence of fewer post-separation disputes being responded to primarily via the use of legal services and more being responded to primarily via the use of family relationship services. This suggests a cultural shift whereby a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms.

About half of the parents in non-separated families who had serious relationship problems used early intervention services to assist in resolving those problems. There was less use of these services to support relationships by couples who had not faced serious problems (about 10%). Client satisfaction with early intervention services was high, with a large majority of clients being willing to recommend the services to others.

Overall, clients of post-separation services also provided favourable ratings. Over 70% of FRC and FDR clients said that the service treated everyone fairly (i.e., practitioners did not take sides) and over half said that the services provided them with the help they needed.

This rate can be considered to be quite high, given the strong emotions, high levels of conflict and lack of easy solutions that these matters often entail.

Family relationship service professionals generally rated their capacity to assist clients as high. They also spoke of considerable challenges linked to the complexity of many of the cases they are dealing with and of waiting times linked largely to resourcing and recruitment issues, especially in some of the FRCs.

Consistent with an important aim of the reforms, family relationship service professionals generally placed considerable emphasis on referrals to appropriate services. At the same time, ensuring that families are able to access the right services at the right time represents one important area where there is a need for ongoing improvement. Pathways through the system need to be more clearly defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.

There is a need for more proactive engagement and coordination between family relationship service professionals and family lawyers and between family law system professionals and the courts. This need is especially important when dealing with complex cases.

2. To what extent does FDR assist parents to manage disputes over parenting arrangements?

The use of FDR post-reform was broadly meeting the objectives of requiring parents to attempt to resolve their disputes with the help of non-court dispute resolution processes and services.

About two-fifths of parents who used FDR reached agreement and did not proceed to court. Almost a third did not reach agreement and did not have a certificate issued. However, most of these parents reported going on to sort things out mainly via discussions between themselves. About a fifth were given certificates from a registered family dispute practitioner that permitted them to access the court system. Most of these parents mainly

used courts and lawyers and most had not resolved matters or had decisions made approximately a year after separation.

Family Relationship Centres have also become a first point of contact for a significant number of parents whose capacity to mediate is severely compromised by fear and abuse, and there is evidence that FDR is occurring in some of these cases. This may reflect an inadequate understanding of the exceptions to FDR (*SPR Act 2006* s60I(9)) by those making referrals. At the same time, the complexities of this process need to be acknowledged. There are decisions that need to be made on a case-by-case basis, including decisions about who is best placed to make a judgment concerning whether there are grounds for an exception and the extent to which professionals should respect the wishes of those who qualify as an "exception" but opt nonetheless for FDR.

Clearer inter-professional communication (between FDR professionals, lawyers and courts) will not provide prescriptive answers to such questions but would assist in developing strategies to ensure that there is a more effective process of sifting out matters that should proceed as quickly as possible into the court system. Progress on this front, however, also requires earlier access to courts and greater confidence on the part of lawyers and service professionals that clients will not get "lost in the family law system".

3. How are parents exercising parental responsibility, including complying with obligations of financial support?

In lay terms, parental responsibility has a number of dimensions, including care time, decision-making about issues affecting the child, and financial support for the child. Shared decision-making is most likely to occur where there is shared care time.

Shared decision-making was much less common among parents who reported a history of family violence or had ongoing safety concerns for their children. Nonetheless, the exercise of shared decision-making was reported by a substantial proportion of parents with a history of violence.

In contrast to the systematic variation in decision-making practices reported by parents with different care-time arrangements, legal orders concerning parental responsibility demonstrated a strong trend, pre-dating the reforms, for decision-making power to be allocated to both parents. There is evidence of some increase in shared responsibility outcomes for cases that went to court following the 2006 changes. Conversely, there were

only relatively small decreases in the proportion of cases in which the mother or the father had sole parental responsibility.

Generally, fathers' compliance with their child support liability did not vary according to care-time arrangements (the only exception is that fathers who never saw their child were less likely to comply with their child support obligations). Father payers with equal care time and fathers who never saw their child were more inclined to believe that child support payments were unfair, compared to father payers with other care-time arrangements. Child support compliance was higher where there was shared decision-making than where one parent had all of the decision-making responsibilities.

4. What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?

Although only a minority of children had shared care time, the proportion of children with these arrangements has increased. This is part of a longer term trend in Australia and internationally. Judicially determined orders for shared care time increased post-reform, as did shared care time in consent cases.

The majority of parents with shared care-time arrangements thought that the parenting arrangements were working well both for parents and the child. While, on average, parents with shared care time had better quality inter-parental relationships, violence and dysfunctional behaviours were present for some.

Generally, shared care time did not appear to have a negative impact on the wellbeing of children. Irrespective of care-time arrangements, mothers and fathers who expressed safety concerns described their child's wellbeing less favourably than those who did not hold such concerns. However, the reports of mothers suggest that the negative impact of safety concerns on children's wellbeing is exacerbated where they experience shared care-time arrangements.

5. What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?

Just over half the parents who separated after the 2006 changes to the family law system felt that time with grandparents had been taken into account when developing parenting arrangements, and just over half the grandparents confirmed this view. Parents who

separated prior to the 2006 changes to the family law system were less likely to recall having taken into account grandparents when developing parenting arrangements.

Nevertheless, the reports of both parents and grandparents suggest that relationships between children and their paternal grandparents often become more distant when the child lives mostly with the mother (reflecting the most common care-time arrangement). The parents in most families in these studies would have separated before the reforms were introduced. The level of impact of the reforms on the evolution of grandparent-grandchild relationships is an important area for future research.

There appeared to be a growing awareness among both family relationship service staff and family lawyers of the potential value and importance to children of taking into account grandparents when developing parenting arrangements. While grandparents were seen, in most cases, to have the potential to contribute much to the wellbeing of children, there was also an appreciation by family relationship service professionals of the complexity of many extended family situations. This was associated with a recognition that, in some cases, too great a focus on grandparents when developing parenting arrangements might be counter-productive.

The overall picture, however, is of grandparents being very important in the lives of many children and their families, with some evidence that the legislation has contributed to highlighting this. Clearly, grandparents can also be an important resource when families are struggling during separation and at other times. But as complexities increase, dispute resolution and decision-making in cases involving grandparents are likely to prove to be more difficult and time-consuming.

6. To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?

For a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drug misuse are relevant. The evaluation provides evidence that the family law system has some way to go in being able to respond effectively to these issues. However, there is also evidence of the 2006 changes having improved the way in which the system is identifying families where there are concerns about family violence and child abuse. In particular, systematic attempts to screen such families in the family relationship service sector and in some parts of the legal sector appear to have improved identification of such issues.

Families where violence had occurred, however, were no less likely to have shared care-time arrangements than those where violence had not occurred. Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns (16-20% of families with shared care time had safety concerns). Safety concerns were also evident in similar proportions of families with arrangements involving children spending most nights with the mothers and having daytime-only contact with the father. The pathways to these arrangements included decisions made without the use of services and decisions made with the assistance of family relationship services, lawyers and courts.

Mothers and fathers who reported safety concerns tended to provide less favourable evaluations of their child's wellbeing compared with other parents. This was apparent for parents with all care-time arrangements, including the most common arrangement where the child lives mainly with mother. But the poorer reported outcomes for children whose mothers expressed safety concerns were considerably more marked for those children who were in shared care-time arrangements.

There is also evidence that encouraging the use of non-legal solutions, and particularly the expectation that most parents will attempt FDR, has meant that FDR is occurring in some cases where there are very significant concerns about violence and safety.

A majority of lawyers and a large proportion of family relationship service professionals expressed the view that the system had some scope for improvement in achieving an effective response to family violence and child abuse. Some problems referred to were evident before the reforms, such as difficulties arising from a lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents. While the legislation sought to place more emphasis on the importance of identifying concerns about family violence and child abuse (e.g., *SPR Act 2006* s60B(1)(b), 60CC(2)(b)) other aspects of the legislation were seen to contribute to a reticence among some lawyers and their clients about raising such concerns. These include *SPR Act 2006* s117AB, which obligates courts to make a costs order against a party found to have "knowingly made a false allegation or statement" in proceedings and a requirement for courts to consider the extent to which a parent has facilitated the other parent's relationship with the child (s60CC(3)(c)).

The link between safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need to make changes to practice models in the family relationship services and legal sectors. In particular, these

sectors need to have a more explicit focus on effectively identifying families where concerns about child or parental safety need to inform decisions about care-time arrangements.

These findings point to a need for professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals. Protocols for working constructively and effectively with state-based systems and services (such as child protection systems) also need further work. At the same time, the progress that continues to be made on improved screening practices will go only part of the way to assisting victims of violence and abuse.

7. To what extent are children's need and interests being taken into account when parenting arrangements are being made?

This question is central to the objectives of the reforms and therefore a number of the evaluation questions are relevant to assessing the extent to which children's needs and interests are being taken into account. Particularly relevant is the question of the extent to which issues relating to family violence and child abuse are taken into account in making arrangements regarding parenting responsibility and care time.

This is an area where the evaluation evidence points to some encouraging developments, but also highlights some difficulties. Many parents are using the relationship services available and there is evidence from both clients and relationship service professionals that this is resulting in arrangements that are more focused on the needs of children than in the past. Nonetheless, in a proportion of cases this is not occurring as well as it could.

There is evidence that many parents misconstrue equal shared parental responsibility as allowing for "equal" shared care time. In cases in which equal or shared care time would be inappropriate, this can make it more difficult for relationship services professionals, lawyers and courts to encourage parents to focus on the best interests of the child (discussed further below).

While the *SPR Act 2006* introduced Division 12A of Part VII - Principles for conducting child related proceedings - which was supported by new case management practices in the FCoWA and the FCoA, the court that handles most children's matters, the FMC, did not have change its case management approach.

8. How are the reforms introduced by the *SPR Act 2006* working in practice?

The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals. However, many parents do not understand the distinction between shared parental responsibility and shared care time, or the rebuttable (or non-applicable) presumption of shared parental responsibility. A common misunderstanding is that shared parental responsibility allows for "equal" shared care time, and that if there is shared parental responsibility then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and care time is expressed in the legislation. This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50-50 "custody". This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents' rights rather than children's needs, obscuring to some extent the primacy of the best interests principle (s60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

However, the changes have also encouraged more creativity in making arrangements, either by negotiation or litigation, that involve fathers in children's everyday routines, as well as special activities in arrangements made. Advice-giving practices consistent with the informal "80-20" rule have declined markedly since the reforms.

Total court filings in children's matters have declined, and a pre-reform trend for filings to increase in the FMC with a corresponding decrease in the FCoA has gathered pace.

Legal sector professionals had concerns arising from the parallel operation of the FMC and FCoA, including the application of inconsistent legal and procedural approaches and concerns about whether the right cases are being heard in the most appropriate forum. The FCoA, the FMC and the FCoWA have each adopted a different approach to the implementation of Division 12A of Part VII. The FMC processes have changed little (although this court is perceived to have an active case management approach pre-dating the reforms) and the FCoA and FCoWA have implemented models with some similarities, including limits on the filing of affidavits and roles for family consultants that are based on pre-trial family assessments and involvement throughout the proceedings where necessary. Excluding WA, the more child-focused process available in the FCoA is only

applied to a small proportion of children's matters, with the majority of such cases being dealt with under the FMC's more traditional adversarial procedures.

While family consultants and most judges believed the FCoA's model is an improvement, particularly in the area of child focus, lawyers' views were divided, with many expressing hesitancy in endorsing the changes. Concerns include a lack of resources in the FCoA leading to delays, more protracted and drawn-out processes, and inconsistencies in judicial approaches to case management. Similar concerns were evident to a lesser extent about the WA model. It appears that while these models have significant advantages, some fine-tuning is required. This is an area where this evaluation provides only a partial picture, as these issues were considered as part of a much larger set of evaluation questions.

The new substantive parenting provisions introduced into Part VII of the *FLA* by the *SPR Act 2006* tend to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice. Because of the complexity of key provisions, and the number of provisions that have to be considered or explained, judgment-writing and advice-giving have become more difficult and protracted. There is concern that legislation that should be comprehensible to its users - parents - has become more difficult to understand, even for some professionals.

9. Have the reforms had any unintended consequences - positive or negative?

The majority of parents in shared care-time arrangements reported that the reforms worked well for them and for their children. But up to a fifth of separating parents had safety concerns that were linked to parenting arrangements; and shared care time in cases where there are safety concerns correlates with poorer outcomes for children.

Similarly, the majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway. But many FDR clients had concerns about violence, abuse, safety, mental health or substance misuse. Some of these parents appeared to attempt FDR where the level of these concerns were such that they were unlikely to be able to represent their own needs or their children's needs adequately. It is also important to recognise that FDR can be appropriate in some circumstance in which violence has occurred.

Further unintended consequences are also evident. A majority of lawyers perceived that the reforms have favoured fathers over mothers and parents over children. There was concern among a range of family law system professionals that mothers are disadvantaged in a number of ways, including in relation to negotiations over property settlements. There is an indication that there may have been a reduction in the average property settlements allocated to mothers. Financial concerns, including child support liability and property settlement entitlements, were perceived by many lawyers and some family relationship professionals to influence the care-time arrangements some parents seek to negotiate. The extent to which these concerns are generally pertinent to separated parents is uncertain. The evaluation indicates a majority of parents are able to sort out their post-separation parenting arrangements quickly and expeditiously; however, there is also a proportion whose post-separation arrangements appear to be informed by a "bargaining" rather than "agreeing" dynamic. For these parents, it appears the reforms have contributed to a shift in the bargaining dynamics. This is an area where further research is required.