International Family Law, Policy and Practice

Some Collected Papers from the Centre's July 2016 Conference Culture, Dispute Resolution and the Modernised Family

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Editor's Message

This issue is the first of the collected papers from the Centre's 2016 Conference on *Culture, Dispute Resolution and the Modernised Family*, which will be continued in the next two issues. We begin with four papers highlighting topics of key international interest: coincidentally three are from Australia which has often led the development of English law, however other global movers and shakers will get their turn in succeeding issues. Following the recent theme in our last two issues of updates in Family Justice in the Family Court of England and Wales it is fascinating to read here the account by the Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, of their Forty Years of Innovative Family Law in Australia, much of which has clearly been a model for our own modernisation. This was the subject of her keynote speech in the first plenary session of the conference.

Leading expert in international child protection Anne-Marie Hutchinson OBE QC, together with a colleague from their firm Dawson Cornwell in London, next provide a comprehensive account of a current problem which has attracted worldwide attention but for which so far no solution has been found despite widespread, but obviously ineffective, legislation which appears to be no match for ingrained culture in those communities in which the practice persists: Female Genital Mutilation. The power points from their conference session may be accessed through the Centre's website, but their more detailed paper published here also sets out the international response to this harmful practice which has now been taken up by the United Nations' Global Goal of eliminating FGM everywhere by 2030, perhaps more effectively through health and education channels than has been the case with any banning, prohibiting or criminalising legislation which has so far drawn only one (unsuccessful) prosecution in England. However this is a paper which makes for depressing reading, since this 'zero tolerance' is not really a new but renewed initiative with origins at least 10 years ago and which is clearly not yet obtaining a hearing in the cultures in which the practice flourishes.

Professor Patrick Parkinson of the University of Sydney, New South Wales, then shines new light on the international status of marriage. This is very much a new perspective, by a famous champion of the status of marriage, who is however now asking whether it can survive the relentless evolution practice of contemporary intimate partnering: in other words the 'functionality' point on which those in favour of legislative recognition for cohabitants in English Law have argued for changes to mirror those in other jurisdictions such as Australia and New Zealand.

Finally, we include a further paper from Australia with international significance: Sally Nicholes and Tim North SC's on an aspect of Parentage in the Australian Federation which addresses the key point of links to a child's biological culture and origins following adoption and indeed accurate registration of parentage following modern reproductive practices now available. The importance of this to the identity of a child is a constantly recurring theme in both law and social science, coincidentally the subject of a contemporary popular film already attracting many prize nominations, and a topic with which Australia has strong links in the past policy of adoption out of their cultures of indigenous Australian children which was thought at the time to be for their benefit, but later regarded as so wrong as to attract a government apology for the policy and its consequences.

The themes from this first collection of the conference papers certainly provides some excellent inspiration from the international Family Law community which never disappoints when gathering so productively in London at a Centre conference every three years, so as to share perspectives and insights from around the world, of which there are more in the next issue.

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40 Years of Innovative Family Law

The Hon Diana Bryant AO, Chief Justice of the Family Court of Australia*

1. Introduction

When the Family Court of Australia ('the Court' or 'the Family Court') opened its doors on 5 January 1976, it was the start of a proud and ground-breaking legacy in the history of the Australian legal system. It has now been 40 years since that exciting beginning, and still our family law is a highly dynamic and innovative practice area.

I had the special privilege of seeing that beginning. I entered legal practice in the area of family law when it was brand new, a completely even playing field — this is many a lawyer's dream, I imagine, but it is an opportunity that very rarely comes around. We were learning as we went — there was no jurisprudence, so we watched the law being made and each helped in some way to shape it.

Years later, I would have the opportunity again to be present at a beginning, in my role as the inaugural Chief Federal Magistrate of a brand new trial level federal court, then called the Federal Magistrates Court of Australia ('FMC'). Four years later, I was appointed Chief Justice of the Family Court, a role I have now held for more than a decade. Next year I will retire, and this has left me in a reflective mood. So I would like to take this opportunity to offer a brief look back at some of the major moments in Australian family law, from its inception in 1975 to the present day.

2. A (Very) Brief Introduction to the Australian Legal System

First, I must very briefly sketch the Australian legal system to give you a sense of how things fit together. Australia's governmental system is one of cooperative federalism as provided for in the *Australian Constitution*. Power is divided between the federal government (also known as the Commonwealth) and the governments of each of the country's six states and two territories. Section 51 of the *Constitution* sets out 39 heads of legislative power that are granted to the Commonwealth. The states retain residual powers — i.e. power in respect of all issues not specified in s 51. The states can also refer power to the federal government in circumstances where it would otherwise lack power under the *Constitution*. For example, referrals of power have been made in respect of corporation law and counter-terrorism.

Within this system, private family law matters are the constitutional responsibility of the Commonwealth, while public law disputes are the responsibility of the states and territories. The latter include applications for protective orders against family violence[2] as well as child protection proceedings.

3. 1975 to 1984

The *Family Law Act 1975* (Commonwealth) ('the Act' or 'the Family Law Act') and the Court it created were born of a time in Australian history characterised by significant social upheaval. Changes in Australian society had led to a widespread questioning of the continuing desirability of the fault-based divorce regime. The women's liberation movement had come to Australia, leading to demands for sexual equality reforms. Psychology had problematized old understandings of human relations, thus challenging the simplistic explanations of marital breakdown that were embedded in the old *Matrimonial Causes Act 1959* (Commonwealth). There were also growing concerns about the cost and indignity of having to prove a 'matrimonial offence'.[3] So, after several years of committees, reports, lobbying and revision,[4] the Family Law Act was passed by the Australian Parliament on 29 May 1975, receiving royal assent on 12 June of that

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* A paper delivered in the Plenary Session on Wednesday 6 July 2016 at the Conference *Culture, Dispute Resolution and the Modernised Family* of the International Centre for Family Law, Policy and Practice, in Association with King's College, London.

[1] The views in this paper are my own and do not represent the views of the Family Court of Australia or other judges. They also do not indicate how I would decide a case after having the benefit of argument. I would like to thank my Senior Legal Research Adviser, Candice Parr, for her assistance in researching and composing this paper.

[2] Note however that the *Family Law Act 1975* (Commonwealth) does provide jurisdiction to make injunctions for personal protection in both children's matters and property proceedings).

[3] Helen Rhoades and Shurlee Swain, 'A Bold Experiment? Reflections on the Early History of the Family Court' (2011) 22(1) *Australian Family Lawyer* 1, 1.

[4] See generally the Hon R S Watson AM, 'History of the Family Law Act and the Family Court of Australia' (2011) 1 *Family Law Review* 6.

year. The Act came into effect on 5 January 1976 — also the date when the Family Court of Australia, a brand new superior court of record created to administer the Act, opened its doors.

This 'helping court' as it was then envisaged was designed to emphasise 'conciliation over litigation, and innovation over tradition, with an in-house counselling service, a mandate to proceed "without undue formality" and specialist judges selected for their suitability to deal with family issues'.[5] Although the original Family Law Act did not refer expressly to conciliation, from the time the Court was established, one of the counselling service's functions was to assist with the resolution of disputes relating to children both before and after the commencement of litigation.[6] Similarly, in property disputes, registrars have long conducted conciliation conferences at an early stage after the institution of proceedings in an endeavour to resolve such disputes.

There were originally only five judges including the Court's first Chief Justice, the Hon Elizabeth Evatt AC. By the end of the first year 24 appointments had been made, presumably in an attempt to meet the overwhelming demand faced by the Court, which, in the words of the Hon Justice Austin Asche, had been 'besieged by vast numbers' of people who were unwilling or unable to pursue a divorce under the previous fault-based regime.[7] Extraordinarily, four of those 24 appointments were women. At the time, Dame Roma Mitchell in South Australia was the country's only other female superior court judge.

As someone who entered the practice of family law on the ground floor, so to speak, I can attest to the tremendous sense of optimism that pervaded the profession at that time and, from my own experience starting the FMC, I can certainly appreciate something of what those early judges must have felt.

The Family Law Act, as it then was, was a mere 55 pages long, introduced no-fault divorce into Australian law,[8] and contained fundamental principles that essentially remain in the Act today — that custody decisions were to promote the 'welfare of the child' (now 'best interests') and property allocations were to be 'just and equitable' — but what these things meant precisely was yet to be defined.[9] At the heart of family law's design were what we would now call goals of therapeutic justice, though that concept would not develop for almost two more decades.[10] The intention was 'to create in Australia a new kind of legal institution';[11] one that would seek to address not only clients' legal needs, but their psychological and familial needs as well.[12]

The Court was envisaged as a 'one stop shop' that would assist separating couples with a range of legal and non-legal dispute resolution options and therapeutic services.[13]

As my predecessor, the Hon Chief Justice Alistair Nicholson AO RFD said when the Family Court celebrated its 25th anniversary in 2001,

> 'The Family Law Act was one of the most innovative pieces of social legislation to be passed by the Federal Parliament in 100 years. The Act's establishment of a specialist Federal Family Court of Australia was equally innovative and daring, as was the emphasis on conciliated outcomes, with counsellors and registrars being employed by the Court to offer an alternative to litigation where appropriate. The efforts of the counselling service and the registrars pioneered alternative dispute resolution in Australia …'[14]

The in-house court counselling service counselling service has often been touted as the most significant of the Family Law Act's original innovations,[15] and was the first in the English speaking world.[16]

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[5] Rhoades and Swain, above, n 3, 1.
[6] See the Hon Elizabeth Evatt, 'Comment: Conciliation in Australian Law' (1986) 11 *Sydney Law Review* 1.
[7] Quoted in Rhoades and Swain, above, n 3, 3.
[8] The only requirement for divorce was then, and remains, 12 months of separation, which can be satisfied even if the parties continued to live under the same roof for that period of time: *Family Law Act 1975* (Cth) ss 48(1) and 49(2).
[9] Rhoades and Swain, above, n 3, 4.
[10] The Hon Diana Bryant AO and the Hon John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *JJA* 93, 93.
[11] Commonwealth of Australia, *Family Law in Australia: Report of Joint Select Committee on the Family Law Act* (AGPS, July 1980) at [7.7].
[12] Bryant and Faulks, above, n 10, 93.
[13] Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Australian Government Printer of Australia, 1975) 81, cited in Helen Rhoades, 'The "Helping Court": Exploring the Therapeutic Justice Origins of the Family Court of Australia' (2011) 2 *Family Law Review* 17, 20.
[14] Family Court of Australia, *Annual Report 2000–01* (2001) 1.
[15] See Rhoades and Swain, above n 3, 7, citing interview data.
[16] Commonwealth, Select Committee in Family Law — Certain Aspects of Its Operation and Interpretation, Family Law Act 1975*: Aspects of Its Operation and Interpretation*, Parl Paper No 326 (1992) [3.1] (*'1992 Report'*).

Particular note should also be made of the creation, via the Family Law Act, of two separate bodies with distinct functions, to facilitate the development of family law. Section 115 of the Act establishes a statutory authority called the Family Law Council, the functions of which are to advise and make recommendations to the Attorney-General in relation to the working of the Family Law Act and other legislation relating to family law; the working of legal aid in relation to family law; and any other matters relating to family law.[17] In 1980, the Institute of Family Studies (renamed the Australian Institute of Family Studies ('AIFS') in 1986) was created under s 114B of the Family Law Act. The Act sets out AIFS's role and functions, being to assist in identifying the factors affecting marital and family stability in Australia by conducting, encouraging and coordinating research; and to promote the protection of the family as the fundamental group unit in society.[18] Both of these organisations have made significant contributions to the development of the law and its complimentary services as well as underpinning many of the legislative changes that were later to occur.

A. *Early Controversy*

It must be acknowledged that the various innovations of the Family Law Act were not perceived positively by all members of the community, and the Act was in fact extremely controversial at the time of its passage. As Helen Rhoades and Shurlee Swain, both of whom have written extensively about the history of Australian family law, note:

> '[The Act's] detractors had claimed that no-fault divorce would threaten the institution of marriage by encouraging people to regard it as a temporary arrangement. Religious conservatives described it as a 'Casanova's charter' that would allow husbands in search of 'eternal youth' to discard their middle aged wives in favour of younger women, and predicted the wholesale disintegration of the family.'[19]

This controversy did not end when the Court opened and, instead, remained part of the early debates surrounding the Court.[20] Over time criticism mounted, with husbands alleging that wives were 'walking out' of their marriages 'by the hundred' and that the Court was biased in favour of women, with men being 'economically wrecked' by 'capricious' decisions of Family Court judges in property disputes.[21] This eventually led to the first of many parliamentary inquiries into family law in Australia, commencing in 1978 and tabling its report on 28 August 1980.[22]

As part of its inquiry, the Joint Standing Committee on Family Law received submissions expressing the aforementioned concerns about fault-free divorce and property decisions, but the submissions also 'revealed a growing resentment of the Court's approach in custody cases'.[23] Although subsequent research demonstrated that, at that time, fathers were granted custody in around a third of contested cases (meaning that fathers were much more likely to obtain custody through orders by a judge than in private negotiations), men's advocacy groups considered the continuing award of custody to mothers as evidence of gender bias by judges and claimed that husbands were being 'treated like criminals'.[24] This was the beginning of a thread that runs through the entire history of Australian family law, a push and pull between fathers and father's rights groups, and mothers and mother's rights groups.

Another source of complaint was the Court's informal design,[25] specifically intended to reduce acrimony and put people at ease. Among other things, the Bench was set close to the floor to allow judges to speak directly with litigants, and there was an explicit prohibition in the Act on robing, so judges sat in

[17] *Family Law Act 1975* (Cth) s 115(3).
[18] Australian Institute of Family Studies, *What We Do* (2016) <https://aifs.gov.au/about-us/what-we-do>. See also *Family Law Act 1975* (Commonwealth) s 114B(2) and (2A).
[19] Rhoades and Swain, above n 3, 8, citing Ken Enderby, 'The Family Law Act: Background to the Legislation' (1975–76) 1 *UNSWLJ* 10, 27; Rev Marcus Loane, 'Letter to the Editor', *Sydney Morning Herald*, 6 April 1974; Cardinal James Freeman and Rev Marcus Loane, 'Letter to the Editor', *Sydney Morning Herald*, 10 September 1974; Rev Alan Walker, 'Divorce for the Asking', *The Age*, 28 October 1974.
[20] See Rhoades and Swain, above, n 3, 8.
[21] B Todd, 'Letter to the Editor', *Sydney Morning Herald*, 5 July 1978; B Hooks, 'Ban Maintenance for Women: Call', *The Age*, 1 July 1978, quoted in Rhoades and Swain, above, n 3, 8.
[22] Commonwealth, Joint Standing Committee on Family Law, *The Family Law in Australia (Volumes 1 and 2)*, Parl Paper No 150 (1980).
[23] Rhoades and Swain, above, n 3, 8.
[24] Ibid 9, citing Frank M Horwill and A M Bordow, *The Outcome of Defended Cases in the Family Court of Australia: Research Report No 4* (1983) 30; Lone Fathers' Association of Victoria, Submission to the Joint Select Committee on the Family Law Act (Official Hansard Report, 1978) 1549; Morris Revelman, Defence Against Women's Maintenance and Alimony, Submission to the Joint Select Committee on the Family Law Act (Official Hansard Report, 1978) 611.
[25] Rhoades and Swain, above, n 3, 9.

ordinary suits.[26] Many legal practitioners complained that the Court's break with procedural tradition[27] had led lawyers in other jurisdictions to regard the Family Court as a 'Mickey Mouse' institution.[28] Some judges from the time have also recalled a feeling of 'isolation from the wider legal profession, and from other courts in the civil justice system'.[29]

The informality also had implications for litigants' feelings towards the Court; as the Hon Justice Stuart Fowler later recalled:

> 'The reality was that when judges sat without robes they were not regarded by many clients as being judges, and you had clients saying things like 'I'm not going to cop this. I'm waiting until the real judge comes along'.[30]

The Hon Justice Austin Asche similarly noted:

> '… there is a feeling of dignity and a feeling amongst the public too that a person who's sitting there without wig and gown … is not quite as important as the fellow sitting up there in wig and gown. Of course I notice a lot of judges are not wearing wigs these days, but there was also the feeling that if the chap was properly robed he did represent the country, he did represent the power of the state and they should obey it.'[31]

Many believe that the Court's informality contributed to the vulnerability of its judiciary, who received increasing numbers of letters and threats from disgruntled litigants.[32] This trend culminated in a horrifying series of attacks between 1980 and 1984: the Hon Justice David Opas was murdered at his home in 1980; the Hon Justice Richard Gee was injured when his home was bombed in March 1984; and four months later, the Hon Justice Watson's wife Pearl was killed in a letter-bomb attack on their family home. As Rhoades and Swain observe, '[i]t was inevitable that the internal life of the Court would change as a result of these events'.[33] I should report that in 2015 an arrest was finally made, and the suspect, now 68 years old, is awaiting trial for these and other crimes allegedly connected to his family law matter.

4. 1985 to 1994

So, as the Court commenced its second decade, it did so under the cloud of recent trauma, but was determined to strike a balance between 'being "friendly" and instilling a sense "of dignity and respect"'.[34] Despite some suggestion in the late 1980s that the 'helping court' experiment should be abandoned and that family law jurisdiction ought to be transferred to the Federal Court, the Family Court endured.[35]

In time, this saw the Court altered significantly. Courtrooms were changed to increase the distance between judges and litigants, wigs and robes were introduced in 1988[36] and a new and unique case management system was created, with formal guidelines for the referral of cases between the counselling and litigation parts of the Court.[37]

The late 1980s saw a number of other significant changes to Australian family law.

I have already mentioned that the Commonwealth has defined areas of legislative competence. These include marriage,[38] divorce and the parental rights and custody and guardianship of children of such marriages.[39] This means that matters relating to ex-nuptial children fell to be dealt with by state and territory law in family breakdown situations. Between 1986 and 1990, all states and territories except Western Australia[40] passed laws to refer their powers in respect of parenting arrangements for children of unmarried

[26] Ibid. See also Helen Rhoades, 'The "Helping Court": Exploring the Therapeutic Justice Origins of the Family Court of Australia' (2011) 2 *Family Law Review* 17, 19.
[27] Rhoades, 'The "Helping Court"', above, n 26, 25.
[28] Rhoades and Swain, above, n 3, 9.
[29] Rhoades, 'The "Helping Court"', above, n 26, 24.
[30] Quoted in Rhoades and Swain, above, n 3, 9.
[31] Quoted in ibid.
[32] Ibid. See also Rhoades, 'The "Helping Court"', above, n 26, 23–4.
[33] Rhoades and Swain, above, n 3, 10.
[34] The Hon Austin Asche cited in Rhoades, 'The "Helping Court"', above, n 26, 25.
[35] See Constitutional Commission, *Report of the Advisory Committee on the Australian Judicial System* (22 May 1987) 48. See also Current Topics, 'Proposed Integration of the Family Court with the Federal Court of Australia' (1987) 61 *ALJ* 209.
[36] Today, wigs are not worn in federal courts, though judges still wear court-specific robes.
[37] Rhoades and Swain, above n 3, 11.
[38] *Australian Constitution* s 51(xxi).
[39] Ibid s 51(xxii).
[40] Western Australia maintains its own Family Court, which deals with both federal and state issues arising from relationship breakdown.

partners to the Commonwealth. In 1995, the Family Law Act was amended to reflect those referrals.

The Court also worked hard at combatting continued misunderstanding and misinformation in public perceptions of family law. Several initiatives were developed to educate the public about the Court's services and its operations generally. The Court produced a Family Law Handbook as well as a brochure on litigation in the Family Court, and introduced a family law information line in Sydney, Melbourne and Brisbane.

In October 1986, after years of preparation, Australia finally ratified the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[41] and Regulations were made to implement the Convention in Australia.[42] This marks a key shift towards the international family law we know today, as the 1980s saw the beginning of a new wave of globalisation and a concomitant rise in the numbers of transnational couples and families.

With the passing of the *Courts and Tribunals Administration (Amendment) Act 1989* (Commonwealth), the Court (which had previously been administered by the Attorney-General's Department) became self-administering as of 1 January 1990.

A. *Independent Representation of Children*

I have already mentioned the fact that when the Family Law Act was passed, it contained a number of principles that were entirely new. An example of this was s 65 of the Act, which provided that the Court could, in appropriate cases, make an order for a child to be separately represented in the proceedings. Neither the Act nor its explanatory notes, have any guidance as to the nature of this representative, and without any jurisprudential guidance either, the first few years were a time of considerable uncertainty.[43] Although there was discussion of the role in a number of early cases,[44] it was three Full Court cases in the 1990s, *Bennett & Bennett* ('*Bennett*')[45], *Re K*[46] and *P & P*[47] that definitively addressed the nature and role of the separate representative and the circumstances in which the court should make an order under s 65. In *Bennett*, Nicholson CJ, Simpson and Finn JJ stated:

> 'We think that the role of the separate representative is broadly analogous to that of counsel assisting a Royal Commission in the sense that his or her duty is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the Court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child. Unless the separate representative does this it seems to us that there is little purpose in having a separate representative … we do not consider that the separate representative is bound to make submissions on the instructions of a child as to its wishes or otherwise. Nevertheless, the separate representative would be bound to inform the Court of such wishes. What is clear is that the separate representative should act in an independent and unfettered way in the best interests of the child.'[48]

In *Re K*, Nicholson CJ, Fogarty and Baker JJ set out a non-exhaustive list of criteria to assist judicial officers in knowing when a separate representative ought to be appointed, as follows:

- allegations of child abuse, whether physical, sexual or psychological;
- an apparently intractable conflict between the parents;
- a child who is apparently alienated from one or both parents;
- real issues of cultural or religious difference affecting the child;
- one or both parents, or another person having significant contact with the child, having sexual preferences which are likely to impinge upon the child's welfare;
- alleged anti-social conduct by one or both of the parents or another person having significant contact with the child to the extent that the child's welfare is seriously

[41] Opened for signature 25 October 1980, 1343 UNTS 97 (entered into force 1 December 1983).
[42] Family Law (Child Abduction Convention) Regulations 1986 (Commonwealth).
[43] The Hon Judith Ryan provided me with a paper on the history of children's representatives, which Her Honour presented during her time as the Manager of Family Law at the Legal Aid Commission of New South Wales. I have drawn upon that paper for this section and I thank Justice Ryan for this assistance.
[44] See *Todd & Todd (No 1)* (1976) FLC 90-001; *Demetriou* (1976) FLC 90-102; *Pailas* (1976) FLC 90-083; *Harris* (1977) FLC 90-276; *Lyons & Boseley* (1978) FLC 90-423; *E & E* (1979) FLC 90-645; *Waghorne & Dempster* (1979) FLC 90-700.
[45] (1991) FLC 92-191 ('*Bennett*').
[46] (1994) FLC 92-461.
[47] (1995) FLC 92-615.
[48] *Bennett* (1991) FLC 92-191 at 78-260.

impinged upon;

- issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child;
- neither parent seeming, on the evidence provided by each of them, to be a suitable custodian for the child;
- a child of mature years who is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
- a proposal by one of the parties that will entail the child being either permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child;
- a proposal for the separation of siblings;
- neither of the parties being legally represented; and
- applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.[49]

Shortly thereafter, Nicholson CJ, Fogarty and Finn JJ defined the role of the separate representative in *P & P*, stating that he or she should:

> Act in an unfettered way in the best interests of the child.
>
> Act impartially and make submissions in the best interests of the child.
>
> Inform a court of children's wishes.
>
> Arrange for the collation of expert evidence relevant to the welfare of the child.
>
> Test by cross examination, where appropriate, the other evidence.
>
> Minimise the trauma to the child.
>
> Facilitate an agreed resolution to the proceedings.
>
> Act upon the evidence rather than from a personal view or opinion of the case.[50]

Today, this role is called the 'independent children's lawyer', but aside from that, the principles expressed in *Bennett*, *Re K* and *P & P* remain relevant; indeed, many of them have now been codified in the Act.

B. *Renewed Criticism of the Court*

As the 1990s began, there was renewed criticism of family law, and of the Family Court in particular.[51] Dissatisfaction was no longer focused so much on divorce itself, but on what happens thereafter in terms of children and property.[52]

This eventually led to the announcement on 13 March 1991 of an inquiry into the operation and interpretation of the Family Law Act. A Joint Select Committee was established for this purpose, with the aim of undertaking 'a comprehensive and systematic review'.[53] The Committee's final report was tabled on 26 November 1992 and made a total of 120 recommendations, with only 19 of these suggesting amendments to the Act itself. The Committee considered the Act an 'effective vehicle for the administration of family law matters in Australia' and thought that the problems lay predominantly with the Court, which 'was not using the powers granted to it under the Act to the extent possible, nor was the Court making the best use of the flexibility of the Act'.[54] Most of the Committee's recommendations were accepted by the Government of the day, leading directly to very significant amendments to the Family Law Act through the *Family Law Reform Act 1995* (Commonwealth) ('the 1995 Act').

5. 1995 to 2004

A. *The 1995 Act*

Most significantly, the 1995 Act replaced Part VII of the Family Law Act — which deals with 'Children' — with a completely new Part, fundamentally altering the conceptual underpinning of how the Court was to address parenting matters. Drawing upon the *Children Act 1989* (UK),[55] the 1995 Act removed concepts that encouraged a mindset of parental ownership and control over children — specifically, 'custody' was replaced with 'residence', 'access' became 'contact' and

[49] *Re K* (1994) FLC 92-461 at 80,775 – 80,776.
[50] *P & P* (1995) FLC 92-615 at 82,157.
[51] *1992 Report*, above n 16, [1.2].
[52] Ibid [1.3].
[53] Ibid [1.1].
[54] Ibid [1.21].
[55] Explanatory Memorandum to the Family Law Reform Bill 1994 [3].

'guardianship' became 'parental responsibility'. Parental responsibility was vested in each parent regardless of marital status or living arrangements.[56] Parental responsibility meant, and continues to mean, 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[57]

The 1995 Act also inserted an objects clause into Part VII, providing that children should receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfilled their duties and met their responsibilities concerning the care, welfare and development of their children. This aspect of the reforms was intended to be consistent with *United Nations Convention on the Rights of the Child*,[58] which Australia had ratified in 1990, and in particular the principles that children have the right to know and be cared for by both of their parents (Article 7(1)) and that children have the right of contact, on a regular basis, with both of their parents (Article 9(3)).[59]

B. *The Magellan Project*

A further innovation of this period was the Magellan Project. In 1997, the Australian Law Reform Commission had published a report called *Seen and Heard: Priority for Children in the Legal Process*,[60] which had discussed Family Court cases involving allegations of child abuse. The report found that the processes adopted by the court were drawn out, costly and often inconclusive, which resulted in both parental and professional dissatisfaction (children's satisfaction was not measured *per se*).[61] Following that report, an internal review was conducted to examine the case management processes in place for cases involving allegations of child abuse. As a result, my predecessor, the Hon Chief Justice Alastair Nicholson AO RFD, appointed a committee based in Melbourne to develop a new way of managing such cases.

The child abuse jurisdiction had previously been managed by a series of agencies that often had overlapping tasks, and did not necessarily work together. To combat this issue, the committee was comprised of members from various organisations including the Victorian Department of Human Services, Victoria Legal Aid, the Family Law Section of the Law Council of Australia, Victoria Police, the Commonwealth Attorney-General's Department, the Family Violence and Family Court Research Program and the Family Court, including but not limited to the judiciary. In six months, the committee developed the Magellan Project, the first program of its kind, which was introduced at the Melbourne and Dandenong Registries between 1998 and 2000.

The Magellan Project drew on a set of principles derived from social science/multidisciplinary research. The key principles were:

- a child-focused approach, including the appointment of a legal representative for the child to be funded by a state/territory legal aid authority;
- a judge-led, tightly managed, fixed time program which included expedition of hearing dates;
- early intervention with full intervention resources made available at the outset;
- a multidisciplinary team that managed all families through the program;
- use of expert authority in investigations and assessments, using child protection teams (and, where they existed, joint police investigative and child protection teams) and court counsellors as professional investigators and assessors;
- the provision of clear information about the program processes and progress for families, including the circulation of expert reports to families;
- tight collaboration between the various services involved in the program using multiple coordination points during the program; and
- ongoing monitoring by the judge-led steering committee.[62]

In February 2001, an independent evaluation of the Magellan Project was completed and its results provided support for the continuation and extension of the program in its findings that Magellan cases were far more likely to resolve earlier in the process and with fewer court events than when similar cases fell outside the project.[63] The Project thus received the support of

[56] *Family Law Reform Act 1995* (Cth) s 61C.
[57] Ibid s 61B.
[58] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[59] Explanatory Memorandum to the Family Law Reform Bill 1994 [4].
[60] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84, 19 November 1997).
[61] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84, 19 November 1997) ch 16.
[62] Bryant and Faulks, above, n 10, 109–110.
[63] See T Brown et al, *Resolving Family Violence to Children — The Evaluation of Project Magellan, a Pilot Project for Managing Family Court Residence and Contact Disputes Where Allegations of Child Abuse Have Been Made* (Monash University, 2001).

the Commonwealth Attorney-General's Department, state and territory legal aid commissions and child protective services, and was rolled out nationally by mid-2004.[64] The program is now a thoroughly established aspect of case management practice in the Family Court and is applicable to cases involving serious allegations of physical or sexual abuse of a child. Because of the special vulnerability of the children involved, the Court aims to complete such cases within six months of the case being placed on the Magellan list.

C. *Outsourcing Dispute Resolution Services*

Following a recommendation in the Joint Select Committee's 1992 report that dispute resolution services be provided by community organisations rather than the Court, the 1995 Act made amendments that began the process of outsourcing these services to the community sector, the in-house inclusion of which had been one of the most revolutionary aspects of the original Family Law Act.[65] Somewhat ironically, during the 1990s, judges and Court staff were called upon to assist with the development of counselling services in several overseas jurisdictions, even as the Family Court's was contemporaneously being diminished.

D. *The Federal Magistrates Court*

The Joint Select Committee's 1992 report had also raised the possibility of establishing a federal magistracy, a suggestion that the Family Court disagreed with. While the Court supported the idea of implementing a two-level judicial structure in family law, the important practical and financial difficulties arising from any decision that a separate generalist court should provide such a service raised serious concerns.[66] However, the Family Court and others who held similar views were overruled, and the FMC commenced operations in mid-2000.[67] As already mentioned, I was the inaugural Chief Federal Magistrate of that Court.

The FMC was established to handle less complex matters in the areas of family law and general federal law. The objective of the FMC was to provide a simple and more accessible alternative to litigation in the Family Court and the Federal Court of Australia, and to relieve the workload of those superior federal courts. The Act establishing the FMC enabled it to operate as informally as possible in the exercise of judicial power, use streamlined procedures and make use of a range of dispute resolution processes to resolve matters without judicial determination.

E. *The Children's Cases Program*

The early 2000s also saw increasing awareness of the potentially damaging effects of adversarial dispute resolution. For example, the 2001 report *Out of the Maze: Pathways to the Future for Families Experiencing Separation* by the Family Law Pathways Advisory Group observed that those who had participated in the consultation process, who often had very different views about the issues facing family law, nevertheless agreed 'that separation is a time of high emotion and that they favour a less adversarial system of resolution, with litigation either as a last resort or to manage violence'.[68]

The Family Court judiciary agreed that the adversarial system was not working satisfactorily, particularly in children's matters, where protracted litigation and the conflict that often comes along with it are undeniably contrary to the best interests of children. This led the Court to begin investigating ways in which children's disputes could be better managed. After drawing upon the experiences in various European systems, the Court commenced its Children's Cases Program in the Sydney and Parramatta registries of the Family Court in early 2004.

The aim of the Program was to provide a new way of conducting family law litigation to alleviate some of the problems associated with our adversarial legal system. If parties consented to participation in the Program, the proceedings were conducted in a less adversarial way. The ordinary rules of evidence did not apply and the judge controlled the way in which the hearing was to proceed. After discussions with the parties and their lawyers the judge determined what the real issues in dispute were, and directed what evidence was required as well as the manner in which it was to be given. The judge was able actively to encourage the parties to consider the possibility of settlement and could call upon the assistance of a Court counsellor to assist in that process.

After the pilot was implemented, the Program was

[64] Except in New South Wales.
[65] See generally Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012) 179.
[66] Family Court of Australia, *Annual Report 1998–99* (1999) 21.
[67] See generally <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>.
[68] Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Commonwealth of Australia, July 2001) 11.

independently evaluated by two separate experts, with substantially positive results.[69] As Professor Jennifer McIntosh wrote in her evaluation,

> '… it might be said that, through the eyes of the parents who participated in this study, the core impacts of the Children's Cases Pilot process centred around the creation of 'no further harm' to their co-parenting relationship, nor to their children's adjustment. Importantly, they report lower conflict and acrimony with their former partner post court. In many cases, it is a process that seems to have allowed a degree of recovery from the psychological hostility felt for their child's other parent.'[70]

F. *Further Parliamentary Inquiry*

Following the considerable changes to family law that had been implemented through the 1995 Act, research on its outcomes was conducted and found that the reforms' intended outcomes had largely failed to materialise.[71] Most relevantly, shared parenting had not become the new post-separation norm.[72] While the 1995 reforms did lead to a dramatic decline in the rate of orders denying contact,[73] residence cases still played out as contests concerning which parent should be given primary care of the children, and the players in the family law system continued to perceive residence as the 'winning' position.[74]

While the 1995 Act led to increased willingness on the part of lawyers and judges to make orders for symbolic shared residence, mothers were still most often the primary residence parents.[75] As can be expected, this angered those fathers who had expected 'shared parental responsibility' to automatically equate to having the children '50 per cent of the time'.[76] Consistent lobbying by father's groups ensued and, in 2003, then Prime Minister John Howard ordered a parliamentary inquiry into post-separation care arrangements.[77] Six months later, on 29 December 2003, the House of Representatives Standing Committee on Family and Community Affairs tabled its report, *Every Picture Tells a Story*.

The Standing Committee was asked to consider what factors ought to be taken into account in determining the time each parent should spend with their children after separation and, in particular, whether there should be a rebuttable presumption that children will spend equal time with each parent. The Standing Committee ultimately found that:

> '… the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care. However, the committee does not support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent. Rather, the committee agrees that, all things considered, each parent should have an equal say on where the child/children reside. Wherever possible, an equal amount of parenting time should be the standard objective, taking into account individual circumstances.'[78]

Thus the Committee recommended the creation of a 'clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making' (Recommendation 1) as well a 'clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse'

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[69] Jennifer E McIntosh, *The Children's Cases Pilot Project: Final Report to the Family Court of Australia* (Family Transitions, March 2006); Rosemary Hunter, *Evaluation of the Children's Cases Pilot Program: A Report to the Family Court of Australia* (Socio-Legal Research Centre, Griffith University, June 2006).

[70] Jennifer E McIntosh, *The Children's Cases Pilot Project: Final Report to the Family Court of Australia* (Family Transitions, March 2006) 39.

[71] See, eg, Helen Rhoades, Reg Graycar and Margaret Harrison, 'The *Family Law Reform Act 1995*: Can Changing Legislation Change Culture, Legal Practice and Community Expectations?' (Interim Report, The University of Sydney and Family Court of Australia, April 1999).

[72] Helen Rhoades, 'Posing as Reform: The Case of the Family Law Reform Act' (2000) 14 *Australian Journal of Family Law* 142, 143. See also Commonwealth, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, Parl Paper No 43 (2003) [2.15] ('*Every Picture Tells a Story*') (stating that statistics published by the Family Court of Australia demonstrated that from the time the 1995 reforms were introduced, the incidence of orders for substantially shared parenting had declined).

[73] Rhoades, 'Posing as Reform', above n 72, 143.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] See, eg, Phillip Hudson, 'PM Orders Inquiry on Joint Custody' (25 June 2003), *The Age* (online) <http://www.theage.com.au/articles/2003/06/24/1056449244109.html>.

[7] *Every Picture Tells a Story*, above n 72, [2.35].

(Recommendation 2).

On 29 July 2004, the federal Government published a framework statement for reform of the family law system in response to the *Every Picture Tells a Story* report. This ultimately led to the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('the 2006 Act'), which came into effect on 1 July 2006.

6. 2005 to 2016

A. *The 2006 Act*[79]

As is suggested by the title of the legislation, key to the 2006 reforms was the insertion of a rebuttable presumption that 'equal shared parental responsibility' is in a child's best interests.[80] The objects provision of Part VII of the Family Law Act was expanded to include the aims of ensuring 'that children have the benefit of both their parents having a meaningful involvement in their lives'[81] and protecting children from harm through exposure to abuse, violence or neglect.[82] This reflected the Parliament's dual intention to emphasise the importance of a child having a meaningful relationship with both of their parents (and both parents being involved in decision making in relation to their children) and the need to protect children from family violence and child abuse. These two aims were repeated in the substantive provisions, as the 'primary considerations'[83] to be taken into account when assessing a child's best interests. Thirteen 'additional considerations' were also to be taken into account in making such an assessment, with the last of these comprising a catch all provision ('any other fact or circumstance that the court thinks is relevant'[84]). The other twelve were:

- the views of the child and any factors that the court deems relevant to the weight that should be accorded to those views;[85]
- the nature of the child's relationships with each of the parents as well as other persons (such as grandparents);[86]
- the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (this was known as the 'friendly parent' provision);[87]
- the likely effect on the child of any changes to his or her circumstances, including separation from either of the parents or any other person with whom the child has been living;[88]
- the practical difficulty and expense of a child spending time and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations with both parents on a regular basis;[89]
- the capacity of each of the child's parents, as well as any other person (for example grandparents) to provide for the child's needs, including his or her emotional and intellectual needs;[90]
- the maturity, sex, lifestyle and background (including culture and traditions) of the child and either of the parents, as well as any other characteristics of the child that the court deems relevant;[91]
- if the child is an Aboriginal child or a Torres Strait Islander child, the child's right to enjoy his or her culture (including the right to enjoy that culture with other people who share that culture), as well as the likely impact that any parenting order would have on that right;[92]
- the attitude demonstrated by each of the parents towards the child and the responsibilities of parenthood;[93]

[79] This section and the subsequent one on the 2012 reforms draw substantially on a paper presented by my colleague Justice Bennett in 2015: The Hon Victoria Bennett, 'The Handling of Parental Responsibility Disputes by the Australian Family Court Following a Decade of Reform' (Lecture 1 of the 2015 Hochelaga Lectures, Hong Kong University, 24 June 2015).

[80] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 61DA(1).

[81] Ibid s 60B(1)(a).

[82] Ibid s 60B(1)(b).

[83] Ibid s 60CC(2).

[84] Ibid s 60CC(3)(m).

[85] Ibid s 60CC(3)(a).

[86] Ibid s 60CC(3)(b).

[87] Ibid s 60CC(3)(c).

[88] Ibid s 60CC(3)(d).

[89] Ibid s 60CC(3)(e).

[90] Ibid s 60CC(3)(f).

[91] Ibid s 60CC(3)(g).

[92] Ibid s 60CC(3)(h).

[93] Ibid s 60CC(3)(i).

• any family violence involving the child or a member of his or her family;[94]
• any family violence order that applies to the child or a member of the child's family if the order is final and the making of the order was contested;[95]
• whether it would be preferable to make the order that would be the least likely to lead to the institution of further proceedings in relation to the child.[96]

In addition to the abovementioned 'friendly parent' provision contained in s 60CC(3)(c), s 60CC(4) required the court to:

> … consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
> (a) has taken, or failed to take, the opportunity:
> (i) to participate in making decisions about major long-term issues in relation to the child; and
> (ii) to spend time with the child; and
> (iii) to communicate with the child; and
> (b) has facilitated, or failed to facilitate, the other parent:
> (i) participating in making decisions about major long-term issues in relation to the child; and
> (ii) spending time with the child; and
> (iii) communicating with the child; and
> (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

Section 60CC(4A) also required the court to have particular regard to 'events that have happened, and circumstances that have existed' since the parents separated.

A section[97] was also inserted into the Act obliging courts to order that one party pay some or all costs of another party (or parties) to proceedings in the event that the court was satisfied that the first-mentioned party knowingly made a false allegation or statement in the course of the proceedings.

In terms of application, the presumption in favour of equal shared parental responsibility was also connected to considerations in relation to time arrangements.[98] Where the presumption is applied and orders for shared parental responsibility are made, the court must consider making orders for children to spend equal or substantial and significant time with each parent,[99] taking into account the best interests of the child[100] and the reasonable practicability of such arrangements.[101]

The presumption can be rebutted by satisfying the court that it is not in the child's best interests for the parents to have equal shared parental responsibility[102] and the presumption does not apply where there are reasonable grounds to believe that one of the parents, or a person in that parent's household, has engaged in child abuse or family violence.[103]

The 2006 Act also provided legislative support for a less adversarial approach to child-related proceedings, through a new Division 12A, meaning that the approach taken by the Children's Cases Program could be applied to all proceedings initiated after 1 July 2006, not just those where the parents consented. These provisions have generally been well received; when Australian Institute of Family Studies undertook a comprehensive evaluation of the 2006 reforms, 58–60% of respondents strongly or mostly agreed that Division 12A was a desirable change to the family law system.[104]

The 2006 Act also again amended the Part VII terminology. For example, the 'right to contact'[105] became the concept of 'meaningful involvement'[106] and rather than one parent being the 'residence' parent and the other having 'contact', the former became the 'person with whom a child is to live'[107] and the latter became the 'time a child is to spend with another person'.[108]

I have mentioned how ground-breaking the original

[94] Ibid s 60CC(3)(j).
[95] Ibid s 60CC(3)(k).
[96] Ibid s 60CC(3)(l).
[97] Ibid s 117AB.
[98] Ibid s 65DAA (see Appendix).
[99] Ibid.
[100] Ibid s 65DAA(1)(a) and (2)(a).
[101] Ibid s 65DAA(5).
[102] Ibid s 61DA(4).
[103] Ibid s 60DA(2).
[104] Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, Australian Government, December 2009) 322.
[105] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 61DA(1) s 60B(2)(b).
[106] Ibid s 60B(1)(a).
[107] Ibid s 64B(2)(a).
[108] Ibid s 64B(2)(b).

Family Court model was, in respect of its inclusion of in-house Counsellors. The 2006 Act was the final end of this aspect of the Court's original innovation. Court based family consultants, previously known as Family Court counsellors or mediators, were given a new role,[109] and all family consultant interventions became reportable. The conciliation, counselling, mediation and family dispute resolution functions previously performed within the Court were moved to 65 Government-funded Family Relationship Centres with a mandate to conciliate parental disputes.

The 2006 Act also inserted into the Family Law Act a requirement, with limited exceptions,[110] for parties to attend at, and obtain a certificate from, a registered family dispute resolution practitioner before an application under Part VII of the Act could be filed.

After the 2006 Act was implemented, considerable Government-funded research was undertaken to assess its effectiveness and ascertain whether the legislation had had any unexpected consequences.[111] The research indicated that the Family Law Act was not adequately protecting children and other family members from family violence and child abuse.[112] As a result, further reform to the Act was contemplated and, ultimately, culminated in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Commonwealth) ('the 2011 Act'), the substantive provisions of which commenced on 7 June 2012.

B. *The 2012 Act*

The purpose of the 2012 Act was again to amend Part VII of the Act, this time with the aim of enabling the courts and the family law system generally to respond more effectively to parenting cases involving violence or allegations of violence. The most important changes instituted by the family violence reforms were as follows:

- When considering what is in a child's best interests, the Act now gives greater weight to protecting children from harm than it does to maintaining meaningful relationships.
- In addition to the changes to the definition of family violence explained below, the definition of 'abuse' was also altered.
- The Act now requires family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to encourage their clients to prioritise the safety of the children.
- Reporting requirements for family violence and abuse have been improved to ensure that the courts have better access to evidence in this regard.
- It is now easier for state and territory child protection authorities to participate in family law proceedings.

Since 2006, the primary considerations contained in s 60CC(2) of the Act have been:

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The 2011 Act inserted a new subsection, namely s 60CC(2A), which states: 'In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).' Thus, the family violence reforms altered the balance between the two 'best interests' primary considerations, giving priority to the safety of children over the benefit to children of having a meaningful relationship with both parents.[113]

Furthermore, the s 60CC(3) additional considerations were amended through the 2011 reforms. The aforementioned 'friendly parent provision' was removed (as was its supplement, s 60CC(4)(b), quoted above) as it had reportedly discouraged disclosures of family violence and child abuse, because parents were afraid of being found to be an 'unfriendly parent'.[114] Thus', its repeal was intended to enable all relevant information to be put before the courts for consideration when making parenting orders. Nonetheless, removal of the 'friendly parent' provision does not prevent the court from considering a range of matters relevant to the care, welfare and development of the child and this may

[109] Ibid Pt III.

[110] *Family Law Act 1975* (Commonwealth) s 60I(9).

[111] Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms', above , n 104; Richard Chisholm, 'Family Courts Violence Review' (Report, 27 November 2009); Family Law Council, 'Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues' (Report, December 2009).

[112] See Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

[113] See Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [29].

[114] Ibid [31].

include one parent's attitude towards the other.[115] The remaining parts of s 60CC(4) were consolidated into the additional considerations.

Section 117AB of the Family Law Act, the provision requiring the court to make a mandatory costs order against a party to the proceedings where the court was satisfied that the first party knowingly made a false allegation or statement in the proceedings, was also repealed by the family violence reforms. Again, the reason behind the repeal was a finding that

> '… section 117AB has operated as a disincentive to disclosing family violence. Vulnerable parents may choose to not raise legitimate safety concerns for themselves and their children due to fear they will be subject to a costs order if they cannot substantiate the claims.'[116]

A new definition of 'family violence' was also inserted into the Act,[117] repealing what had been an objective requirement that a victim's fear or apprehension be reasonably held and instituting in its place a subjective definition which defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful'.[118] A non-exhaustive list of examples of behaviour that might constitute family violence is included in the definition, as follows:

> a. an assault; or
> b. a sexual assault or other sexually abusive behaviour; or
> c. stalking; or
> d. repeated derogatory taunts; or
> e. intentionally damaging or destroying property; or
> f. intentionally causing death or injury to an animal; or
> g. unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
> h. unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
> i. preventing the family member from making or keeping connections with his or her family, friends or culture; or
> j. unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

The rationale for including this list in the legislation was to recognise 'the wider range of behaviour experienced by victims of family violence'.[119]

Section 4AB(3) stipulates that a child is 'exposed' to family violence if that child 'sees or hears family violence or otherwise experiences the effects of family violence.' Section 4AB(4) then sets out a non-exhaustive list of examples of situations that may constitute a child being exposed to family violence, as follows:

> a. overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
> b. seeing or hearing an assault of a member of the child's family by another member of the child's family; or
> c. comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
> d. cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
> e. being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Here, the reason for including the examples was to 'clarify that there does not have to be intent for the child to hear, witness or otherwise be exposed to family violence'.[120]

The Australian Institute of Family Studies conducted a comprehensive evaluation of the 2011 reforms, publishing its results in October 2015.[121] Some key findings from the evaluation include:

- A new section in the Family Law Act requiring advisors to inform parents that

[115] Ibid [32].
[116] Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [79].
[117] *Family Law Act 1975* (Cth) s 4AB.
[118] *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 4AB(1).
[119] Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [17].
[120] Ibid [18].
[121] See <https://aifs.gov.au/projects/evaluation-2012-family-violence-amendments>.

protection of children is to be prioritised over a meaningful relationship with each parent had allowed family dispute resolution, mediation and discussion pathways to become more effective mechanisms for negotiating parenting arrangements.[122]

• Whilst there was evidence of increased use of non-legal mechanisms for the resolution of parenting disputes,[123] those that used the courts presented with the most complex issues:

> 'Most separated parents make limited use of family law system services. Those who do [use family law services] are also those affected by complex issues, such as family violence, substance misuse, mental ill health, problematic social media use, and pornography use … and safety concerns … In 2014, nearly four in ten court users had four or more of these issues, compared with three in ten who used lawyers and two in ten who used [family dispute resolution]/mediation.'[124]

• The Australian Institute of Family Studies found that across the family law system there has been a heightened emphasis on identifying concerns about family violence and safety concerns, particularly among lawyers and the courts. However, the evidence also indicated that 'refinements in practice in this area are required and the development of effective screening approaches has some way to go'.[125]

• The research also showed small but statistically significant increases in the proportion of parents disclosing family violence and/or safety concerns to professionals since the 2011 reforms.[126] Further, there was an increase in allegations of family violence and child abuse in court proceedings, with the proportion of matters involving family violence, child abuse or both family violence and child abuse rising to 41% of the total sample of court users.

• Unfortunately, the research demonstrated that an 'unintended consequence' of the 2011 Act had been an increase of the time matters took to be resolved, both in and outside court.[127]

It should be noted, however, as indeed the Australian Institute of Family Studies acknowledged, their research was conducted very close to the 2011 reforms having taken place, so 'it is likely that greater effects of the reforms will unfold over time'.[128]

The issue of family violence has been one of growing concern to Australians over the last several years, particularly following the announcement of Rosie Batty as Australian of the Year in 2015. Ms Batty's son was tragically murdered by his father at a public cricket ground in February 2014, and she has subsequently become a prominent family violence campaigner. As a result of Ms Batty's work, awareness and concern about family violence is at an all-time high in the Australian community. This has led to a number of inquiries into family violence and its effects in recent years — the Senate Finance and Public Administration References Committee conducted an inquiry into domestic violence in Australia in 2014;[129] the South Australian Social Development Committee conducted an Inquiry into Domestic and Family Violence in 2015–16;[130] and, over a similar time-frame, Victoria appointed a Royal Commission into Family Violence.[131]

A particular issue that these inquiries have all highlighted is the difficulty in the interaction between the federal family law system and the state and territory protective orders regimes as well as the tensions between these two jurisdictions. People have

[122] Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015).
[123] Ibid 29.
[124] Ibid 10 and 20.
[125] Ibid 44.
[126] Ibid.
[127] Ibid 21.
[128] Ibid.
[129] Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (Commonwealth of Australia, 20 August 2015).
[130] Social Development Committee of the Parliament of South Australia, *Report into Domestic and Family Violence* (39th Report, 2nd Session, 53rd Parliament, 12 April 2016).
[131] Royal Commission into Family Violence, *Report and Recommendations* (2016) <http://www.rcfv.com.au/Report-Recommendations>.

struggled to appreciate the differences between private family law and public protective orders. For example, the issue of cross-examination of a party by an allegedly abusive ex-partner who is self-represented has raised considerable concern.

C. *Practical Operations*

Stepping away from law reform and towards practical operations — from 2006, the FMC grew substantially, as did the allocation of federal magistrates to undertake family law work. This enabled the Family Court to concentrate its resources on the more complex work of the Court and reduce the pool of cases awaiting hearing. In 2013, the FMC was renamed the Federal Circuit Court of Australia ('FCC'), with the intention of this change being 'to more accurately reflect the role of the FCC and its accessibility for all court users'.[132] The inclusion of 'circuit' in the name was to highlight the prominence of the FCC's circuit work in regional areas and 'federal' reflects the broad jurisdiction in both family law and general federal law. Federal magistrates were also renamed 'judges' as part of the change.

The FCC has jurisdiction broadly concurrent to that of the Family Court, with the exception of adoption and applications for nullity or validity of marriage, which are exclusive to the Family Court. The Chief Judge and I have published a Protocol for the division of work between the courts, to enable legal professionals and litigants to direct their matters to the appropriate court.[133] Today, the majority (about 85%) of all family law matters are heard in the FCC.

The Family Court has appellate jurisdiction, and the Appeal Division, which is comprised of 10 judges including myself, hears appeals from the FCC as well as first instance decisions of the Family Court.

Another important initiative that I instigated in 2006 was the publication of all of the Court's judgments on the internet, aimed at rendering decisions more transparent and combatting false perceptions in the community about the manner in which the Act is applied in practice. Decisions are initially published to both the Family Court's website and Austlii (the Australasian Legal Information Institute), and they remain on the latter permanently. Section 121 of the Family Law Act prohibits publication of any information identifying parties to family law proceedings and, consistent with this section, all decisions are anonymised and allocated a pseudonym prior to publication.

7. Conclusion

Various aspects of the Family Law Act have been examined and reviewed dozens more times than I have mentioned here, by parliamentary inquiries, the Family Law Council, the Australian Institute of Family Studies, the Australian Law Reform Commission and others. As the Hon Justice William Johnston has aptly observed:

> 'All through our history, because we are unpopular and because people have voiced that unpopularity to their politicians and to the media and to anybody who will give them an audience, that has had the natural consequence of governments wanting to review us. And a lot of people think there must be something wrong. Because they get so many complaints about the place they think we are doing something wrong. So we are the most examined organisation that I can think of.' [134]

This has meant in turn that the Act has been very frequently amended; indeed, it has been amended more than 80 times. Long gone is the 55 page document it originally comprised. Today it is 790 pages long, and its opacity has long been lamented by litigants, the profession and indeed the judiciary.[135] More than 10 years ago, the 2003 *Every Picture Tells a Story* report observed that the principles on which the family law system operates were, even then, not well understood[136] due to the system's 'complexities … its disconnectedness, its costs and delays'.[137] More than *20* years ago, the 1992 parliamentary inquiry noted that the Act had become 'unwieldly' due to frequent

[132] Federal Circuit Court of Australia, *Federal Magistrates Court of Australia Re-Named the Federal Circuit Court of Australia Brochure* (9 April 2013) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/fcc-namechange>.

[133] Family Court of Australia, *Protocol for the Division of Work between the Family Court of Australia and the Federal Circuit Court* (12 April 2013) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>.

[134] Quoted in Swain, above, n 65, 159.

[135] See Bennett, above, n 79, 21–4 and the references contained therein.

[136] Family Law Pathways Advisory Group, 'Out of the Maze: Pathways to the Future for Families Experiencing Separation' (Report, Commonwealth of Australia, July 2001) [2.9].

[137] *Every Picture Tells a Story*, above, n 72, [2.9].

amendment, and recommended that it be renumbered as a matter of urgency.[138] As the Hon Justice Victoria Bennett has written:

> 'A small but emblematic example is the fact that Part VII of the Act starts at s 60A. Part VIII concerns 'PROPERTY' and starts at s 71. To non-family lawyers, those numbers may suggest that there are about 11 sections which deal with children. Not so. Having taken the time to count them, I can tell you that Part VII includes 238 sections and 637 subsections, organised in 14 Divisions and 44 Subdivisions.'[139]

And while this complexity is a well-known problem, and the almost constant review of the Act has been a source of annoyance for many,[140] these challenges seem to reflect the complexity of what we are dealing with when we make and apply family law. When you think about the changes society has seen in the last 40 years, it hardly seems surprising that social legislation like the Family Law Act would be trying to keep pace with the times.

This leads me to my final point: having now had this opportunity to reflect upon what I think have been the particular highlights of the system, there are three particular things that have stood the test of time. The first is the inclusion of family consultants in the Court's design — both the community and the judiciary have benefited enormously from having experts employed by the Court to provide independent social science assessments in particular matters. The second and third are the Family Law Council[141] and the Australian Institute of Family Studies,[142] both of which have been indispensable in evaluating law reform and suggesting improvements for the future.

Those who work within the milieu of family law have a keen understanding of its special paradox: it is a perpetually unpopular and undervalued area of law and yet it is absolutely essential, dealing with fundamental human relationships and their breakdown. Working in this area is a burden and a privilege. I am very grateful to have served it — and to continue serving it, until my very last day at the Family Court.

[138] *1992 Report*, above, n 16, [1.22].
[139] Bennett, above, n 79, 23.
[140] See Swain, above, n 65, ch 8.
[141] For a list of the many reports completed by the Family Law Council since 1992, see Attorney-General's Department, *Family Law Council Published Reports* (Australian Government) <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>.
[142] For the Australian Institute of Family Studies's list of publications, see Australian Institute of Family Studies, *Publications* (2016) <https://aifs.gov.au/publications>.

Who is a parent in the Australian federation and do its laws concerning parentage and families in our modern world give rise to conflicting outcomes or fail to pay appropriate regard to each child's right to know his or her identity?

Sally Nicholes and Timothy North SC*

Abstract

Australia is a Federation in which the central (Commonwealth) legislature has specified powers. When the Commonwealth has not exercised its powers or has no power the legislatures of the six States and two Territories are free to pass laws. A multitude of Commonwealth State and Territory legislative provisions impose obligations or confer rights by reference to a person's status as a parent or as a child of a particular parent or parents. One inevitable consequence of this is that a person can find himself or herself to be recognised as a parent of a particular child in one legislative context but not in another. As various legislatures pass or alter laws to accommodate or regulate new and varied family formations inconsistent outcomes are being achieved and the capacity of children to maintain a connection with their biological origins and associated cultural inheritances is being obliterated. Are our legislatures repeating the errors of the past or will they prove to be sufficiently agile to accommodate alternate family formation without sacrificing a child's right to know his or her identity?

Introduction

On 13 February 2008, the then Prime Minister of Australia, Kevin Rudd, presented an apology to indigenous Australians as a motion to be voted on by the House of Representatives. That apology said in part:

> We apologize especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

This is not the place to provide a detailed account of the forced removal of "mixed race" children from their families which was carried out on a large scale throughout Australia from the late 19th Century and for much of the 20th Century under powers conferred by Acts such as the *Aboriginal Protection Act 1869 (Vic)* and the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld)*. That it was commenced and maintained in the belief that the forced removal of children from their families and communities was in the interest of those removed seems apparent and that it had long term and seriously damaging consequences for those children is well established and documented in detail by the "Bringing Them Home Report".[1]

Some five years later on 21 March 2013 yet another Australian Prime Minister, Julia Gillard, stood on the floor of the Parliament to move a motion by way of apology known as the National Apology for Forced Adoption. That apology contained the following:

> To each of you who were adopted or removed, who were led to believe your mother had rejected you and who were denied the opportunity to grow up with your family and community of origin and to connect with your culture, we say sorry.
>
> We apologise to the sons and daughters who grew up not knowing how much you were wanted and loved.
>
> We acknowledge that many of you still experience a constant struggle with identity, uncertainty and loss, and feel a persistent tension between loyalty in one family and yearning for another.

Those apologies carry with them a recognition that in a primary and fundamental sense not only are a child's parents his or her progenitors but by being that they confer upon that child a heritage, a kinship group, an identity and community, culture and history to which each such child belongs through his or her parents. Those apologies acknowledge that a severance of the link to this kinship culture and identity often generates a deep and fundamental feeling of loss and isolation which can, and often does, cause long term emotional and psychological

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[1] Report of the national enquiry into the separation of Aboriginal and Torres Strait Islander children from their families by the Australian Human Rights Commission April 1997, see in particular Chapter 11.

damage to the person removed and isolated. We are lawyers, not sociologists or psychologists or the like. We do not pretend to have expertise sufficient to enable us to assert the existence of each consequence from our own knowledge but we proceed on acceptance that it is so.

The United Nations Convention on the Rights of the Child (CRC) by Articles 7.1 and 8.1 proceeds on a similar premise. Article 7.1 provides:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 8.1 provides:

> States parties undertake to respect a right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

In Australia, our law without some further specific intervention recognises the biological progenitors of a child, his or her parents, as being those who have the right[2] or responsibility[3] to raise and nurture that child through his or her minority. Because this aspect of "parenting" can and often has been and often will in the future be performed by adults other than the biological progenitors, (it should be observed that in many instances such people are better able and more motivated to care for and nurture the child than the biological progenitors), those other adults either by legal process or convention can and frequently will be identified as the "parents" of the children under their care. Indeed, many who seek the opportunity to fulfil that role with respect to children for whom they are not the biological progenitors do so in the hope and expectation that they will be recognised as that child's parents. Their concern to be so recognised and their efforts to achieve and maintain that recognition lies behind much of the legislation we examine in this paper. That it is frequently achieved at the expense of the child's capacity readily to know and establish or maintain any link with his or her origins is a cause for concern.

For many years the legal process of adoption has been one process whereby a person other than a biological progenitor of a child can assume the status as the parent of the child. The advent of artificial conception procedures has led to the establishment of other processes where such legal recognition can be obtained and now with the processes of surrogacy yet other legal structures are being established for persons other than biological progenitors to assume the status as a parent.

Just as the proverb "it is a wise child who knows his own father"[4] ceases to have its potency by reason of the advances in genetics and DNA testing, corresponding advances in reproductive technology and biological science, accompanied by legislative attempts to accommodate those advances may well have reinvigorated it, even if with an altered nuance.

There are many laws which confer responsibilities, rights and duties on a person by reference to that person being a parent of a particular child or the child of the particular parent. Where the status of "parent" has been manipulated by legislative accommodation for a variety of modes of family formation it is not always easy to identify who is the parent and individuals may find it difficult if not impossible, to trace their biological origins or even know that all need not be as it seems.

Where there are as many as nine different legislatures, that could and sometimes do make differing provisions, the "parental landscape" can be challenging to navigate.

Fate or misadventure can cause a person to lose contact with his or her biological origins or "roots". When that occurs it is occasion for regret and the loss suffered by the individual can readily be acknowledged by all. The apologies cited above demonstrate that severance of individuals from their roots by reason of deliberate Government policy or practice is occasion for national remorse and regret.

It is our contention that there are clear indications that there are children who are today being denied access to, or impeded from obtaining access to their origins and their heritage by existing but apparently benign and well intentioned legislative regimes enabling alternate modes of family formation. What is more, the circumstance of Australia being a federation adds a further layer of complexity to those impediments and makes it all the more difficult to achieve changes that might overcome this unfortunate by-product of what otherwise may be regarded as a beneficial and necessary legislative support for various modes of family formation.

When we first envisaged this paper we had intended to include detailed discussion of intercountry or transnational adoption and surrogacy. In the Australian context that can only be considered against the backdrop of the domestic laws and arrangements and our survey of the domestic scene has necessitated that we leave transnational arrangements for family formation for another occasion. In doing so, we observe that the risk of children being irretrievably denied access to knowledge

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[2] S.51(2xxii) Constitution

[3] S.61C *Family Law Act 1975 (Cth)* (FLA)

[4] From Act 2, Scene 2, *The Merchant of Venice* William Shakespeare; from Homer *The Odyssey* translated by Samuel Butler

or experience of their "roots" is exponentially greater where the arrangements involve transnational dealings than when the activity occurs entirely within the boundary of the nation. We also note that the search for babies overseas by Australians is often driven in part by the likelihood that the child's capacity to establish or maintain a link with his or her biological origins will be more difficult.[5] In many cases the adopting or commissioning parent sees the severance of the link as an advantageous aspect of the process.

Furthermore, the risk of the child, and indeed the surrogate mother, being commodified is exacerbated in such circumstances.[6]

Federal Complexities

Australia became an independent nation on 1 January 1901 when the British Parliament passed the *Commonwealth of Australia Constitution Act*. The Constitution established the Commonwealth of Australia by establishing its Parliament, Executive Government and Judicature and defining the powers of each. It also preserved the constitutions of each of the States and preserved the powers of each of the Parliaments of the colonies that became States unless those powers were exclusively vested in the Parliament of the Commonwealth. The laws of a State touching on matters within the powers of the Parliament of the Commonwealth continued to be in force until provision was made on that subject matter by the Parliament of the Commonwealth. Importantly, when a law of a State is determined to be inconsistent with the law of the Commonwealth, the law of the Commonwealth will prevail and the law of the State is invalid to the extent of the inconsistency.[7]

In addition, the Constitution provides for the Commonwealth Parliament to make laws with respect to Territories, being those areas of land within the control of the Parliament of the Commonwealth not forming part of any one of the states.[8]

Hence, Australia is a federation with the powers divided between the Commonwealth Parliament and the Parliaments of the six State and two Territorial Legislatures. Under the Constitution, specific areas of legislative power are conferred on the Commonwealth including, for instance, taxation defence, foreign affairs, marriage, and divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants.[9]

Each of the States have retained legislative power in all other areas not expressly conferred on the Commonwealth Parliament, principally those enumerated in s.51 of the Constitution, which includes s.51(xxxvii) enabling any State or the States to refer matters to the Parliament of the Commonwealth and thereby expand the powers of the Commonwealth Parliament.

There are six States and rwo Territories and hence all nine Parliaments may make laws touching upon the identity and rights and obligations of parents.

Our intent is to survey some of these laws in order to demonstrate the complexities in our jurisdiction but before doing so it is necessary to briefly explain that the Commonwealth Parliament's power with respect to making laws touching upon parents and their children including custody (residence), access, maintenance and the like, was originally confined to children of a marriage or children of parties who had been married but who had undergone divorce.[10]

In 1986 and 1990 the States (other than Western Australia) referred sufficient legislative power to the Commonwealth Parliament pursuant to s.51(xxxvii) of the Constitution such that the Commonwealth Parliament has the power to make laws with respect to the maintenance of children and the payment of expenses in relation to children or child bearing expenses and parental responsibility for children irrespective of the marital status of the parents of the child. However, matters such as adoption, child welfare and the registration of births remain within the legislative competence of the States. Surrogacy is an area within the legislative competence of the several States and not the Commonwealth unless by an exercise of its external affairs power under s.51 of the Constitution the Commonwealth were in the future to legislate in that sphere by virtue of treaty obligations under say, the CRC. Thus far, it has not ventured to do so.

Registration of Births and the Accuracy of Registers

The States and Territories have established separate legislative and regulatory regimes for the maintenance of birth registers which impose obligations on particular persons to register each birth occurring within that State or Territory. In each case the parents of the child are obliged to register the birth and the legislation or regulation makes provision for the recording of the details of the parentage on the register. A typical example is s.14 of *Births, Deaths and Marriages Act 1997 (ACT)*:

[5] See Quartly, Swain and Cuthbert *The Market in Babies* (2013) Monash University Publishing in particular at Chapters 5 and 6.
[6] See Sally Nicholes "The Australian Position on Surrogacy" Law Asia Conference 9 June 2016 Hong Kong.
[7] See the Constitution s.109.
[8] See s.122 of the Constitution.
[9] Constitution s.51.
[10] See s.51(xxi) and s.51(xxii) Constitution.

On registration of a child's birth, the registrar-general must not include information about the identity of a child's parent in the register unless-

a) the information is contained in a document lodged under section 5 in relation to the child; or

b) the parents of the child apply for the inclusion of the information; or

c) a parent of the child applies for the inclusion of the information and the registrar-general is satisfied that the other parent is dead or cannot join in the application because the other parent cannot be found or for any other reason; or

d) a parent of the child applies for the inclusion of the information and the registrar-general is satisfied that the other parent does not dispute the correctness of the information; or

e) the registrar-general is entitled under an Act or a law of a State, the Commonwealth or another Territory to make a presumption about the identity of a parent of the child; or

f) the inclusion of the information is authorised by regulation.

In no case is "parent" defined but in most States and Territories the ordinary meaning of the word is altered and altered for all purposes by provisions within other legislation typically styled as the *Status of Children Act*. For instance, the New South Wales *Status of Children Act 1996* contains a number of presumptions relating to parentage or paternity all of which are consistent with the ordinary meaning of "parent".[11] With a delightful circularity registration on the birth register as a parent gives rise to a presumption that one is a parent.[12] There is a presumption arising from an acknowledgement of paternity.[13] There is also a presumption arising from a Court finding and power to seek a declaration of parentage from the Supreme Court with associated power to require testing procedures to be undertaken and the results received in evidence.[14] All of these abovementioned presumptions are essentially consistent with the ordinary meaning of the word "parent".

However, the presumptions arising in New South Wales as a result of the use of fertilization procedures have different consequences. S.14 of that Act provides:

14 - Presumptions of parentage arising out of use of fertilisation procedures

(1) When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and

(b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

(1A) When a woman who is the defacto partner of another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and

(b) the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

Note : "Defacto partner" is defined in section 21C of the Interpretation Act 1987.

(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

(3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy. This subsection does not affect the presumption arising under subsection (1A)(a).

(4) Any presumption arising under subsections (1)-(3) is irrebuttable.

(5) In any proceedings in which the operation of subsection (1) is relevant, a husband's consent to the carrying out of the

[11] See s.9 and s.10.
[12] See s.11.
[13] See s.13.
[14] See s.22, s.26 and s.27.

fertilisation procedure is presumed.

(5A) In any proceedings in which the operation of subsection (1A) is relevant, the consent of a woman to the carrying out of a fertilisation procedure that results in the pregnancy of her defacto partner is presumed.

(6) In this section:

(a) a reference to a married woman includes a reference to a woman who is the defacto partner of a man, and

(b) a reference (however expressed) to the husband or wife of a person:

(i) is, in a case where the person is the defacto partner of a person of the opposite sex, a reference to that other person, and

(ii) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

Where any of the presumptions under s.14 are applicable the birth can be registered in New South Wales identifying persons other than biological progenitors as parents and in reliance upon the presumptions.[15] Neither of these New South Wales Acts requires the recording of the fact of conception by use of a fertilization procedure or the identity of the donor or any such material in a register nor do either of those Acts establish a mechanism whereby a child may come to know of his or her mode of conception and hence that those persons named as his or her parents on the birth register are other than his or her biological progenitors.

The consequence is that the birth register apparently identifying the parents, without qualification that the word's meaning has been altered from its ordinary meaning, offers no clue to anyone including the child that the persons there identified are or may be other than the child's biological progenitors. Where the parents are not the progenitors it in effect amounts to a legislatively sanctioned and engineered masquerade. Without a familiarity with both Acts and without any other reason to know or suspect, why would anyone consulting his or her own birth certificate not simply assume that the persons there identified as his or her parents are his or her biological progenitors? There is good reason to assume that this misleading consequence is indeed an intended outcome and one which is sought by many of those who participate in assisted reproductive procedures using donor gametes.

In New South Wales a person who comes to know or suspect that he or she was born after a conception occasioned by assisted reproductive technology and with donated genetic material can seek to consult a separate register maintained under the Assisted Reproduction Technology Act 2007 (NSW) provided he or she first knows that such a register is maintained and he or she knows or suspects that he or she may have good reason to seek out information there contained.

Under that Act a person who provides Assisted Reproductive Technology (ART) services must be registered and must maintain records concerning the donor of a gamete being:

a) the full name of the gamete provider;

b) the residential address of the gamete provider;

c) the date of birth of the gamete provider;

d) the place of birth of the gamete provider;

e) the ethnicity and physical characteristics of the gamete provider;

f) the relevant medical history of the gamete provider;

g) the sex and year of birth of each offspring of the gamete provider;

h) the name of each ART provider who has previously obtained a donated gamete from a gamete provider and the date on which the gamete was obtained.[16]

Where a birth results as a consequence of a treatment using a donated gamete then the ART provider must furnish that information contained in subparagraphs (a) to (g) above together with certain other information to be Secretary of the Department charged with the maintaining of a register under the Act.[17]

However, where an ART procedure is carried out other than for reward or in the course of business then in the event that a birth results, those involved in such a procedure may, but are not required to, furnish information about that procedure to the Secretary.[18]

The Secretary is obliged to furnish such information disclosing the identity of a donor as is maintained on the register to an adult who was born as a result of an ART treatment using a donated gamete and who applies for it in the approved form.

The existence of such a register and the capacity for an adult born as a result of a gamete donation to enquire of its contents is something that that person must first know to about. Such a person will be one who was not

[15] See s.16(1)(f) *Birth Deaths and Marriages Registration Act 1996 (NSW)*
[16] See s.30(1)
[17] See s.33.
[18] See s.33A.

deterred from further enquiry by reason of the apparently contrary information contained on his or her birth certificate and will need to have been prompted by information from some other source before making the enquiry. The history of closed adoption in Australia and the resistance by many adopting parents to legislative reform of that practice points to it being unrealistic for us as a community to assume that the registered parents can always be relied upon to frankly reveal the necessary information to their children.[19]

Every State is different. For instance, in South Australia, Part 2A of the *Family Relationships Act 1975* contains provisions that deem the woman giving birth to be the mother of the child irrespective of whether the birth results from the fertilization of an ovum taken from another woman. Similarly, her domestic partner is deemed to be the father or co-parent, as the case may be, irrespective of the source of the sperm. In all cases, by virtue of s.10C(4) the donor of sperm is taken not to be the father of any child. However, if the operation of s.10C(4) does not reflect the wishes of both the provider of the sperm and the mother then on the application of the donor a Court may make an order to the effect that the donor is for all purposes the father.[20]
The birth register in South Australia could well identify persons other than biological progenitors as parents without giving any indication that that is the case.

The *Assisted Reproductive Treatment Act 1988 (SA)* might provide an avenue for a child to obtain information about his or her biological progenitor or progenitors but need not do so. It enables but does not compel the relevant Minister to maintain a register recording identifying details of donors where the material donated has been used in treatment resulting in a birth.[21] There is a power to make regulations enabling inspection of that register. The existing regulations under that Act contain no such regulation enabling inspection of any register, if indeed one has been established.

The situation in Western Australia is different again. There, by provisions under the *Artificial Conception Act 1985* donors of genetic material are deemed not to be parents of children born as a result of that genetic material having been used in an artificial fertilization procedure and the woman giving birth is deemed in all cases to be the mother. Similarly, if she is married or in a defacto relationship, including a same sex relationship, then her husband, or defacto partner, is deemed for all purposes to be the father or a parent of the child as the case may be. When read together with the relevant legislation with respect to the maintenance of the birth register, again, the consequence is that the register may at the time of first entry record persons other than the biological progenitors as parents.

In Western Australia the *Human Reproductive Technology Act 1991* requires a Public Officer known as the "CEO", being an office established under the *Health Legislation Administration Act* to maintain a register containing identifying information with respect to participants in human reproductive technology treatments.[22]

Not surprisingly, children who might be born as a result of such a treatment are not participants and because they are not, are not entitled under the Act to seek identifying information with respect to any such participant.[23]

Furthermore, whilst a participant may obtain identifying information on the payment of the prescribed fee, they may only obtain such information if it relates to them.[24]

The capacity of a child born as a result of an artificial conception procedure to obtain information about the identity of his or her donor is even more limited in Queensland. In that State, as in others, the birth register, by reason of a combined operation of s.10 of the *Births, Deaths and Marriages Act 2003* and subdivision 2 of Part III of the *Statute of Children Act 1978*, may include details of persons as parents even though those persons are not the biological progenitors without there being any indication on that register they are other than the biological progenitors. Furthermore, by virtue of provisions contained within Division 2 Part III of the *Status of Children Act* the donor of genetic material will be presumed for all purposes not to be a parent.

At least so far as we can ascertain Queensland makes no provision for the maintenance of a register of donors that is capable of being searched by a child (even if adult) much less one that is capable of being searched for identifying information.

Our research has indicated that in all remaining jurisdictions with the exception of Victoria, that is the Australian Capital Territory, the Northern Territory and Tasmania, while by reference to corresponding legislative provisions one can establish that the entries as to parents in the birth register need not be identifying of biological progenitors there is no means by which a child can obtain access from any public register to information that may identify, for that child, the biological progenitors of that

[21] See s.15.
[22] See s.45 *Human Reproductive Technology Act 1991*.
[23] See s.46.
[24] See s.46(2).

child. Furthermore, so far as we can ascertain, those jurisdictions contain no requirement associated with licensing or registration of a provider of reproductive technological services to maintain records with respect to donors.

It would seem that Victoria provides some limited glimmer of hope for a person born as a result of a "donor treatment procedure" as the *Assisted Reproductive Treatment Act 2014 (Vic)* establishes a process whereby the Registrar of Births, Deaths and Marriages maintains a separate register of details of persons involved in the birth of a child by use of donated genetic material.[25] A person born as a result of such a procedure may apply to the Registrar for information identifying a donor who provided genetic material used in treatment giving rise to that child's birth.[26]

What is more, that child, provided he or she applies in the appropriate form, is entitled to the information as of right, if an adult, and if still a child may obtain the information with the consent of his or her parent or guardian or in the absence of such consent, if a counsellor has provided counselling to the person and advised the Registrar in writing that the person is sufficiently mature to understand the consequences of the disclosure and that the register is separate from the Birth register which will show no indication that one or other parent named is not a progenitor.

It need be noted however, that if the person was conceived using gametes donated between 1 July 1988 and 31 December 1997 then the donor has first to give consent to that disclosure, and that this register is separate from the birth register which will show no indication that one or other parent named in it is not a progenitor.

It may be observed that if it be the case that the registration of the birth and the maintenance of such registers is carried out as partial fulfilment of obligations assumed by reason of Australia being a signatory to the CRC and in particular Articles 7.1 and 8.1[27] then it is an imperfect fulfilment of such obligations.

Indeed, the maintenance of these registers as registers of "birth" which signify by their content the identity of "parents" is in a real sense actively misleading and discouraging of the endeavour and efforts a child may undertake to seek to establish a connection with his or her biological progenitors. The capacity to identify persons other than biological progenitors as parents in birth registers facilitates the concealment of the true biological origins of the person whose birth is registered and most particularly from that person.

Adoption

Adoption is the most established and familiar form of alternate family formation that attracts legislative support and sanction. It is essentially a matter within the legislative power of the States. Western Australia was the first State to pass adoption legislation in 1896, that is before federation. By the 1920's all the eastern States had introduced such legislation.

Adoption legislation was introduced in response to a number of then existing practices. Prior to its introduction informal arrangements were in place often mediated by midwives or through newspaper advertisements for the placement of children typically of single women and such arrangements often included the payment of the premium in favour of the adopting parent by the relinquishing parent. Orphanages and government hostels were by the late 19th and early 20th centuries coming under increasing strain and foster parents who were receiving a fee for the care of children, subject to regular government inspection, were showing an increasing willingness to "adopt" and forego the payment in exchange for security of possession of the child and cessation of regular inspection of welfare authorities.

The regimes established had variants one from another but relevantly they had common features.

> There is little place for birth parents in the post-legislation markets. The aim of legal adoption was to erase the child's origins. The role of the mother was restricted to delivering the child and then relinquishing it, grateful to be relieved of the stigma attached to single motherhood ... Birth fathers were scarcely acknowledged at all. Parents who tried to make themselves visible were increasingly presented as threatening. Fears of blackmail or kidnap were used to justify the strengthening of secrecy provisions in the laws. Parents were denied any knowledge of their child's new family, and any attempt to disrupt an adoption was made a criminal offence. While there was an understanding that a mother who could provide for her child might be anxious to reclaim it, there was universal agreement that relinquishment had to be permanent.[28]

The alteration of the birth register was seen as a key aspect of the adoption regimes introduced. It facilitated

[25] See Part 6.
[26] See s.58 *Assisted Reproductive Treatment Act*.
[27] Referred to above.
[28] See Quartly et al at pp54, 55.

the maintenance of secrecy with respect of the adoption process and the security of the ongoing possession of the child by the adoptive parent. It was a feature of the legislative regimes that found favour with adoptive parents as it facilitated the fulfilment of their desire to establish their own unique whole and inviolate family.

Nevertheless there were in the 1950's a number of celebrated cases where relinquishing mothers sought to reclaim their children through the Courts. There was mixed success but the willingness of the Courts to consider these claims by reference to the capacity of the respective parties to nurture the child and certain Justices expressing the view that "blood is thicker than water" caused disquiet amongst adoptive parents who had believed themselves to be unassailable in their possession of children whom no-one had wanted. Those claims, and in particular the successful ones, led to calls for legal reform from adoptive parents supported by social workers and other professionals arguing that "the welfare of children ... was best served by early and secure relinquishment", and "a natural mother" who sought to stand in the way of her child's future should be denied the right to withhold her consent, as should other "irresponsible parents" who were depriving their children of "the benefits of good homes and a fair chance in life".[29]

In 1960 the then Attorney General for the Commonwealth, Garfield Barwick, sought to encourage the establishment of uniform adoption laws and his office drew up a Model Bill which specified, inter alia, that parents who had signed adoption orders had only 30 days in which to change their minds, after which the order could not be revoked. State laws which were passed in the following period reflected many of the model provisions and included strengthened provisions with respect to the secrecy surrounding the adoption process.

Hence, the era of closed and forced adoption, for which our Prime Minister would apologise in 2013, emerged on the urging of professionals practising in the field of child welfare guided by their understanding that the best interests of the children concerned and by the concern of adoptive parents to safeguard their hold over the children from interference and interruption by the children's progenitors.

The 1970's in Australia saw a rapid decline in the number of children available for adoption and an increasing trend for single mothers and relinquishing mothers to organise and have a more effective voice in achieving changes in legislation including, for instance, the abolition of the practice of stamping birth certificates of children of single mothers with the word "illegitimate".[30]

As the children adopted under the regimes of closed and altered birth registers reached their majorities in increasing numbers they began to find their own voice and in the 1980's their pain and anguish at being continually frustrated in their endeavours to establish links with their birth parents was being documented heard and acknowledged. They and birth parents seeking out lost children became increasingly organised and effective and professionals who in the past had encouraged and promoted systems of closed adoption altered in their approach and became sympathetic advocates for such children and birth parents.

Nevertheless, the change that occurred came slowly and was piecemeal. Resistance by adoptive parents organisations continue and affected the ultimate outcomes. Throughout the 1980's and 1990's there were legislative changes in all the States and to varying degrees those changes opened the previously closed registers and records to inspection by those, or at least some of those, who had an interest in knowing their contents. We annex to this paper a table that sets out the different provisions in each State and Territory with respect to the access that adopted children now have to information about their birth parents.

In Victoria, for instance, a child of 18 years or older can obtain a copy of the original birth certificate. If he or she is under 18 years that child needs the consent of the adoptive parent and if seeking information on the identity of a natural parent, that parent's consent as well.

In Queensland, irrespective of the child's age the adoptive parent and the relevant natural parent must each consent before information is provided. There are other variants in other States.

It remains the case in all jurisdictions that adoption is a process which includes replacing the original record of the birth of the child with a record that on its face purports to describe the adoptive parents as if they are the birth parents. As part of that process, access to the original accurate record is restricted so that only a limited number of persons may obtain it and in particular the child in question needs either to have obtained his or her majority and/or the consent of an adoptive parent.

The legal authority to have the day to day care of children and make decisions for the care and nurture of the child during his or her infancy is thereby bound up with the adoptive parent assuming the status or identity

[29] Quartly et al at p70.
[30] See Quartly et al at 78.

"as if" the birth parent. We for our part see no good reason for that to occur.

For our part we struggle to see how this continuation of the legislatively sanctioned assumption of a fictional procreative role in the child's life is in the child's interest when it necessarily establishes impediments to the child having a ready awareness of his or her actual origins. Arguments associated with the need to protect children from the stigma of illegitimacy certainly cannot now carry the weight they may have once.

We incline to the view that the existing legislative landscape surrounding adoption is evidence of the continuing political influence of those who seek to have children whom they can identify and claim as theirs rather than a legislative regime focussed on achieving alternate family formation in a manner consistent with the best interests of the child.

In May of this year, the Australian Child Rights Task Force published a progress report.[31] We think it appropriate to share some of the observations made within that report in relation to adoption in Australia today:

> Former provisions for 'secret and sealed' adoptions which had prevailed up to the mid 1970's were challenged from several directions and parties to adoption other than adoptive parents – namely mothers and children – were accorded more rights under these reforms. Unfortunately, the rights-based reforms made to domestic adoptions in the mid 1980's were largely ignored when it came to inter-country adoption.[32]
>
> As Cregan and Cuthbert point out, the bestowing of individual rights on children who are unable to act on these rights by themselves often leads adults to determine their best interest and to act for them ... Therefore, there are considerable obligations on governments to focus on the rights of children and not to allow these to be conflated with the interests or desires of adults, such as those seeking children for family formation.[33]
>
> The policy sands are shifting with differences between States and Territories. Articles 7, 8 and 18 of the CRC promote the right of children to stay with their families and the responsibilities of governments to support families. Adoption cuts legal ties and the 'open adoption' system which focusses on information exchange rather than maintaining relationships and post-adoption participation, is at the discretion of adoptive parents. Failures with regard to Article 8 are related to identity where the preservation of a child's name is not upheld in post-adoption birth certificates and adoptive parents can chose a new name for a child adopted from overseas. Article 18 gives children a say over what happens to them yet the emergent voices of adult adoptees in Australia are marginalised in Australian policy and practice. Research is not available on informed consent in new relinquishment processes and in mandated adoptions and adoption information is rarely accurate or complete in overseas adoptions ...

The Task Force made a number of recommendations including the following:

> Ensure children are able to retain their birth names and are supported to maintain contact with their birth families where possible.

Surrogacy

Both Commonwealth and State laws touch upon surrogacy but it is the States that regulate it. The approach differs between states, however, generally commercial surrogacy is prohibited in Australia, while altruistic surrogacy (where surrogate mothers receive some reimbursement for costs associated with the surrogacy) is permitted in certain limited circumstances prescribed by relevant (and differing) legislation in each State or Territory.

The limitations involved in altruistic surrogacy mean that many potential intended parents actively seek out the services of commercial surrogates in other (usually less regulated) jurisdictions even when it is illegal in their home jurisdiction to do so.

Surrogacy is governed by State legislation across all states and territories except for Northern Territory which has no surrogacy legislation. Generally speaking in all jurisdictions:

1. Commercial surrogacy is prohibited; and
2. Only altruistic surrogacy is legal in some very limited circumstances, once eligibility criteria is met, with respect to both the surrogate mother and the intended parents.

The current state of the law on surrogacy precludes

31 Australian Child Rights Progress Report, Australian Child Rights Task Force (UNICEF Australia and NCYLC) May 2016.
32 At p20.
33 See at p20.

in most cases intending parents who undertake commercial surrogacy being able to obtain parentage orders to declare them as parents as distinct from obtaining parenting orders (eg: "that the child live with the applicants") and parental responsibility orders.

Below is a list of most of the laws potentially relevant to a surrogacy in Australia:

Commonwealth

Family Law Act 1975 (Cth)

Limited application to surrogacy matters noting surrogacy is governed by State legislation.

"Parent", "child" especially in ss60H and 60HB, parenting presumptions. Note s60HB of the *Family Law Act* recognises transfer of parentage in State and territory laws. This status of parentage under the *Family Law Act* is adopted in other Federal Acts such as the *Child Support (Assessment) Act 1989* and the *Australian Citizenship Act 2007*.

Child Support (Assessment) Act 1989 (Cth) ss 5, 20

"Parent", "eligible child" by reference back to *Family Law Act*

Child Support (Registration and Collection) Act 1989 (Cth)

Australian Citizenship Act 2007 (Cth) – s16

"Citizenship of "child" born to Australian "parent" overseas"

Australian Passports Act 2005 - s.11:

Issuing of passports to child in absence of consent of those with "parental responsibility"

National Health and Medical Research Council, Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, 2007

Licensing, prohibition of IVF clinics engaging in commercial surrogacy nor advertising surrogacy services

Prohibition of Human Cloning for Reproduction Act 2002, s.21

Ban on commercial trade in eggs, sperm, embryos, max penalty 15 year imprisonment.

Relevant State Laws (not comprehensive)

ACT

Parentage Act 2004

Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy

Births, Deaths and Marriages Registration Act 1997

Altering birth register

Human Cloning and Embryo Research Act, 2004, s.19

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment.

NEW SOUTH WALES

Surrogacy Act 2010 (NSW)

Regulation of altruistic surrogacy, ban of commercial surrogacy

Assisted Reproductive Technology Act 2007

Regulation of IVF clinics

Births, Deaths and Marriages Registration Act 1995

Altering birth register

Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s.26

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment.

Status of Children Act 1996

Parenting presumptions

NORTHERN TERRITORY - No specific surrogacy laws in NT

Births, Deaths and Marriages Registration Act 1997

Not altering birth register

Status of Children Act 1996

Parenting presumptions

QUEENSLAND

Surrogacy Act 2010 (Qld)

Regulation of altruistic surrogacy, ban of commercial surrogacy

Status of Children Act 1978

Parenting presumptions

Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003, s.17

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment.

Births, Deaths and Marriages Registration Act 2003

Altering birth register

SOUTH AUSTRALIA

Family Relationships Act 1975 (SA)

Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy

Assisted Reproductive Treatment Act 1988 (SA)

Consent to Medical Treatment and Palliative Care Act 1995 (SA)

Advance Care Directives Act 2013 (SA)

Births, Deaths and Marriages Registration Act 1996

Altering birth register

TASMANIA

Surrogacy Act 2012 (Tas)

Regulation of altruistic surrogacy, ban of commercial surrogacy

Births, Deaths and Marriages Registration Act 1999

Altering birth register

Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s.20

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment

Status of Children Act 1974

Parenting presumptions

VICTORIA

Assisted Reproductive Treatment Act 2008 (Vic)

Regulation of altruistic surrogacy, ban of commercial surrogacy

Status of Children Act 1974 (Vic)

Parenting presumptions, parentage orders

Prohibition of Human Cloning for Reproduction Act 2008, s.17

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment.

Births, Deaths and Marriages Registration Act 1996

Altering birth register. Note: there is no stated ability to recognise interstate parentage orders.

WESTERN AUSTRALIA

Surrogacy Act 2008 (WA)

Regulation of altruistic surrogacy, ban of commercial surrogacy

Artificial Conception Act 1985

Parenting presumptions

Interpretation Act 1984 (WA)

Human Reproductive Technology Act 1991 (WA)

Ban on commercial trade in eggs, sperm, embryos, max 15 years imprisonment

Family Court (Surrogacy) Rules 2009

Surrogacy Regulations 2009

Births, Deaths and Marriages Registration Act 1998

Altering birth register

The process for intended parents to enter into surrogacy arrangements in Australia was summarised by Campbell and Young in 2013:[34]

1. The intended parents must locate a person willing to act as a surrogate who meets the legislative requirements;
2. The intended parents must engage an authorised Assisted Reproductive Treatment provider;
3. Both the intended and the surrogate parents must undergo counselling sessions prior to commencing treatment (however this can be waived in certain circumstances);
4. In all states and territories excluding the ACT, both sets of parents must receive legal advice regarding their respective legal rights, entitlements and obligations and the consequences of the surrogacy arrangement (however this can be waived in certain circumstances);
5. In Victoria and Western Australia, approval must be obtained from the regulatory body after approval by the relevant IVF clinic. In practice, this means that waiver of the requirements for counselling and legal advice is unlikely to occur as they will be required by the IVF clinic;
6. Once the child is born, the surrogate mother

[34] Campbell, J "Surrogacy: top toeing through a legal minefield" http://www.tved.net.au/index.cfm?SimpleDisplay=dsp_searchProduct_ts.cfm&PC=SUR/14/MAR&Typle=3&webcpd=true

is considered to be the child's parent. If the surrogate has a partner, and that partner consented to the procedure, that partner will also be considered at law to be the child's parent. To replace the surrogate parents with the intended parents as the child's legal parents, an application to the State or Territory court must be made. In Victoria this is referred to as an Application for a Substitute Parentage Order. There are a number of matters the Court must be satisfied of prior to making the order. For example, in Victoria, before making the order the Court must be satisfied that:

a) Making the Order is in the best interests of the child;

b) The surrogacy arrangement was commissioned with the assistance of an ART provider;

c) The Patient Review Panel approved the surrogacy arrangement before the surrogacy arrangement was entered into;

d) The child was living with the intended parents at the time the application was made;

e) The surrogate parents did not receive any material benefit or advantage from the surrogacy arrangement;

f) The surrogate mother freely consented to the making of the order.

In all cases the effect of a parentage order is that the commissioning parents will be acknowledged as the parents and the register of birth is altered so that any certificate issued will identify the commissioning parents as the parents. Hence, there is in all cases no readily accessible public record of any surrogacy arrangement or parentage order and any individual seeking to identify his or her birth mother or donor will be faced first with having had the good fortune to acquire an independent basis for knowing that there is something to look for and then finding where to look.

Again, like with births consequent upon assisted reproductive technology procedures while all States provide for a process to create a fictitious record and conceal the accurate record, they all differ as to how anyone with the relevant interest may come to know what they might rightly regard as information they are entitled to know.

For instance, in New South Wales, the *Assisted Reproductive Technology Act* provides a system for the establishment and maintenance of a register of details concerning a surrogacy arrangement and provides access for a child born by such an arrangement to such information on the same basis that it provides like information to children born as a consequence of an ART procedure.[35]

Tasmania, Victoria and Western Australis also provide such procedures. The conditions which must be fulfilled in order to obtain access to that information mirror those for obtaining information in those same States with respect to children born after ART procedures.

Queensland has established a regime whereby until a parentage order is made consequent upon the surrogacy arrangement by the Court the birth parents have the responsibility for the registration of the birth and the presumptions relating to parentage established by the Status of Children's Act, including those presumptions consequent upon assisted reproductive technology procedures apply to the child.

Upon the order being made a new register is established which results in the production of birth certificates that identify the commissioning parents as the parents of the child and a process of entitlement to inspect is established that is akin to that for children whose birth records have been altered as a consequence of adoption.

The Parent in the *Family Law Act*

The *Family Law Act 1975* (FLA) is a Commonwealth law establishing a regime for divorce, property settlement and orders for the care of children upon the breakdown of marriage or defacto relationships.

The primary provisions of the FLA dealing with children are found in Part VII, the objects of which include "ensuring the children have the benefit of both their parents having a meaningful involvement in their lives", "ensuring that parents fulfil their duties ... concerning ... the children".[36] Part VII declares principles underlying those objects including that "children have the right to know and be cared for by both their parents", "children have a right to spend time ... with both their parents", and "parents jointly share their duties and responsibilities concerning the care, welfare and development of their children".[37]

What substantive meaning one can give to the objects and principles depends upon the meaning of the words used and in particular, the meaning of the word "parent". The existence of such rights as there expressed might be thought to flow from or be associated with the relationship between the child and his or her parent as that relationship is ordinarily understood. Where the FLA

[35] See Part II Division 3.
[36] S.60B(1).
[37] S.60B(2).

admits of persons other than progenitors assuming the label of "parent" the intellectual or philosophical foundation for the propounded rights becomes unstable. Rather than being a legislative regime directed to the fulfilment of the rights there proclaimed the FLA insofar as it perpetuates the convenient fiction established to meet the emotional requirements of adults at the expense of the rights and interests of children, perpetuates a way of thinking about parenthood and responsibility for the care of children that fails to advance the interests of the child.

The FLA establishes and defines the concept of "parental responsibility" to mean all the duties, powers, responsibilities and authority which, by law, parents have in relation to children[38] and then confers it on each parent subject to any order of court.[39]

Orders which confer on any person duties, powers, responsibilities or authority in relation to a child are known as "parenting orders" but such orders only displace the parental responsibility of each parent to the extent that they so provide or is necessary to give effect to the order.[40] Elsewhere in the Part we are told that a parenting order is an order dealing with certain specified matters being:

a) the person or persons with whom a child is to live;

b) the time the child is to spend with another person or other persons;

c) the allocation of parental responsibility for a child;

d) if two or more persons are to share parental responsibility for a child – the form of consultations for those persons are to have with one another about decisions to be made in the exercise of that responsibility;

e) the communication a child is to have with another person or other persons;

f) maintenance of a child;

g) the steps to be taken before an application is made to a Court for a variation of the order to take account of the changing needs or circumstances of:

i) a child to whom the order relates; or

ii) the parties to the proceedings in which the order is made;

h) the process to be used for resolving disputes about the terms or operation of the order;

i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for the child.[41]

In addition, a parenting order may deal with the allocation of responsibility for making decisions about major long terms issues in relation to the child.[42]

A parenting order may be made in favour of the parent or some other person[43] and may be applied for by either or both parents, the child, a grandparent or any other person concerned with the care, welfare and development of the child.[44] Nevertheless, there is legislative preference in favour of parenting orders being made in favour of parents over others and in favour of orders that require time spent by children with each parent to be equal or if not equal, substantial and significant over orders which would provide for the child to spend a time of lesser duration or quality than that which is "substantial and significant".[45]

It may be seen that the scheme of Part VII on its face preferences arrangements for children that maximise the extent to which both of the parents of the child have a meaningful involvement in the life of the child.

The achievement of that object will however, only coincide with a comfortable maintenance of a connection between the child and his or her inherited identity, community and history if the word "parent" as used in the FLA coincides with parent as "biological progenitor". However most occasions where a State law has the effect of conferring the status of "parent" on someone other than a biological progenitor then so will the FLA treat that person as a parent. There are still a limited number of instances where under State laws progenitors cease to be parents but continue as such under the FLA.

Subject to certain express exceptions "parent" as used in the FLA means a child's biological or adopted parent.[46] As the FLA contemplates that a child may have no more than two parents at any one time, the fact of adoption means necessarily that one or more of the natural parents has ceased to be a parent for the purposes of the FLA. So the alteration of the identity of a "parent" achieved by adoption flows seamlessly over to the FLA.

By subdivision D of Division 12 of Part VII of the FLA a number of presumptions are established as to who

[38] S.61(B).
[39] S.61(C).
[40] S.61(D).
[41] S.64B(2).
[42] S.64B(3).
[43] S.64D.
[44] S.65C.
[45] See s.65C and s.65DAA.
[46] See s.4(1) FLA and *Donnell v Dobey* (2010) 42 FamLR 559 [92].

may be a parent which facilitate the conclusion that a man will be the parent of the child by reason of his marriage or having lived with the mother in a defacto relationship for a time prior to the birth.[47] One is also presumed to be a parent by being named in a birth certificate and prior findings of certain Courts give rise to presumptions of parentage for the purposes of the FLA.[48] Where a man under a law of the Commonwealth, a State or a Territory or a prescribed overseas jurisdiction, executes an instrument acknowledging paternity of a particular child, he is presumed to be the father.

By subdivision E of Division 12 Part VII of the FLA there are provisions empowering a court to receive evidence, including requiring genetic testing to establish parentage, again and obviously, to establish that a person is a biological progenitor. All of the above are consistent with a parent being a biological progenitor.

Children Born as a Result of Artificial Conception Procedures - FLA

By s.60H of the FLA, provision is made for identifying the parents of a child born as a consequence of an artificial conception procedure, the effect of which depends in part upon whether the procedure was undertaken at a time when the woman who gave birth was in a relationship with another person, and also in part on whether that other person and the donor of the genetic material consented to the procedure.

Under subsection (1)(b)(ii) where the woman who gave birth was at the time of the procedure married or in a defacto relationship, then provided both she and her partner consented to the procedure and any other person who provided genetic material also consented, then the woman and her partner and not the other provider of genetic material are the parents of the child or in the language of the Section "the child is not the child of the other person".[49] It may be noted that this provision operates independently of any State or Territory provision touching on such matters.

Alternatively, where it cannot be established that the woman and her partner consented to the procedure or that any other person who provided genetic material used in the procedure consented to its use, the woman and her partner may nevertheless be deemed to be the parents of the child provided under prescribed law of the Commonwealth or of a State or Territory the child is the child of the woman and her partner. Those prescribed provisions are certain of the provisions under State Assisted Reproductive Technology Statute or Acts dealing with the status of children but not all such provisions.

More has been said elsewhere about those prescribed provisions but suffice to say that many of those also require the procedure to be conducted with the consent of the woman's partner before the child is to deemed by the provision to be a child of the partner or indeed of the woman.

In the event that neither s.69H(1)(b)(i) or (ii) is satisfied and in some States an absence of consent may lead to that result, the legislation is silent as to who will be the parents of the children born to a woman or one living in a defacto relationship after an artificial conception procedure. The decision in *Groth v Banks*[50] concerning s.60H(3), would suggest that for like reasons the donor of the sperm would be father of the child, but by virtue of s.60H(2) and prescribed laws there referred to, in most cases the woman giving birth in circumstances where the child is conceived by virtue of a procedure conducted whilst the woman is in a relationship will be the mother of the child.

S.60H(2) of the FLA provides that where a child is born to a woman as a result of carrying out of an artificial conception procedure and under a prescribed law of the Commonwealth or of a State or Territory the child is the child of the woman, whether or not the child is biologically the child of the woman the child is her child for the purposes of the Act.

Curiously, this provision gives rise to one apparent hiatus because in at least one State (New South Wales) the relevant prescribed law[51] makes no provision giving a rise to the presumption that that woman is the parent of the child where that child is born after a fertilization procedure to which the woman's partner did not consent although if a donor ovum is used the donor will be deemed not to be the parent for the purposes of New South Wales legislation. That State's legislation appears not to expressly identify the birth mother as the mother. Where there is a donor ovum, the donor is deemed not to be. Perhaps the "birth mother" is the mother by being the last person standing.

In other words, the New South Wales legislation gives rise to no presumption that the woman giving birth in such circumstances is the mother of the child while excluding the woman donating the genetic material. Certainly, if she is the mother for the purposes of the laws of that State it is not because she is so "under a prescribed law" as that expression is used in the FLA.

Where the genetic material used is that of the woman

[47] S.69B and s.69Q FLA.
[48] S.69R and s.69S.
[49] See s.60H(1)(a),(b)(i), (c) and (d).
[50] [2013] FamCA 430.
[51] S.14 Status of Children Act 1996 (NSW).

giving birth then it seems likely that the child of that woman will be for the purposes of the laws of New South Wales and the FLA the mother of the child and a parent unless, by reason of reading s.60H as a whole, it is construed as precluding such a conclusion. It seems to us that such a construction gives rise to an absurdity and is unlikely.

S.60H(3) provides that where a child is born to a woman as a result of carrying out an artificial conception procedure and under a prescribed law of the Commonwealth or of a State or Territory the child is the child of a man then whether or not the child is biologically a child of the man, the child is his child for the purposes of the FLA.

The difficulty with the provision is that under the regulations there is no law prescribed and hence there is no work for s.60H(3) to do.

This is precisely the circumstance that confronted the Family Court in *Groth v Banks*. In that case at the time of the artificial conception procedure the woman was not in a relationship with any other person so s.60H(1) had no role to play either.

Cronin J determined that the relevant provisions of the *Status of Children's Act (Vic)* that would have presumed for all purposes, and irrebuttably, that a donor of the sperm was not the father of the child had no application to the consideration of the meaning of the word "parent" under the FLA (a Commonwealth Act). In those circumstances, that child was determined to be the child of the sperm donor and he was determined to be a parent for the purposes of the FLA and all Commonwealth laws, but he is not a parent under Victorian law because under s.15(1)(b) of the *Status of Children's Act* he is irrebuttably presumed not to be. As we see it, there is no reason why like results could not occur for children born to single women as a result of artificial conception procedures carried out in States other than Victoria. Much will depend upon whether anyone else is a parent for the purposes of a prescribed law of a State. State laws that deem or presume people not to be parents are not taken up by the FLA.

Children Born under Surrogacy Arrangements – FLA

S.60HB provides that where a Court has made an order under a prescribed law of a State or Territory to the effect that a child is a child of one or more persons or that each one or more person is a parent of the child then for the purposes of the FLA the child is a child of each such person.

The laws prescribed by the relevant regulation[52] are provisions within Acts of five of the States and the Australian Capital Territory that recognise and facilitate altruistic surrogacy.

As noted elsewhere commercial surrogacy is illegal in all parts of the Commonwealth and there is no provision for the recognition of any of the persons who may be involved in a commercial surrogacy transaction as a parent of the child born as a consequence of that transaction per se.

The application of laws of more general effect including the *Australian Citizenship Act* and adoption legislation may have the consequence that a child is or may become the child of one or more of the persons involved in the commercial surrogacy transaction notwithstanding the illegality.

Conclusion

It would be disingenuous to present this matrix of state and commonwealth laws with all the apparent order of a Jackson Pollock drip painting and propose no exit strategy.

If we do adhere to articles 7.1 and 8.1 of CRC and view "the Pollock" through a child's lens - by giving primacy to the child's right to their biological identity and cultural history - we may have a suitable navigational tool.

A referral of powers to the Commonwealth would be ideal, but given the way some States fiercely guard their sovereignty it seems an unlikely outcome.

The authors further respectfully suggest the following be considered:

1. That birth certificates remain a record of birth for children but further transparently cover all information that a child may require to appreciate their mode of conception and their biological history. If a donor egg was required the registration of appropriate information regarding that donor would be included;
2. A new "parenting certificate" could replace the birth certificates as the primary document that is recognised by all institutions including the passport office, schools, Medicare as the document identifying which adult or adults have responsibility for day to day care and decision making for children.
3. Upon the birth of a child the parents would be entered on both registers. Upon the happening of any event legally altering the persons with responsibility for the child the second but not the first register would alter.
4. Courts having jurisdiction under the FLA could make orders with respect to children for

[52] Family Law Regulation 12CAA

whom married persons or persons in defacto relationships were identified as responsible for the child on the second register, or if in any event they were the parents of the child.

In 2005 Australia moved away from the proprietorial concepts associated with custody and access to applying less commodified language in our parenting laws where parents came to be said to have responsibility rather than rights. There was a general acceptance of that transition. There is some reason to be optimistic that a community capable of such a transition is also capable of recognising that one can have a fulfilling relationship with the child under one's care and fully perform that care and decision making role in the child's interest without masquerading as the child's "progenitor". The practical basis for amending another human being's birth certificate falls away and hopefully with it, the urge that overcomes so many to alter a child's identity would diminish. Altering the "status" of the birth certificate as no more than a record of the information concerning the birth of the individual and the creation and elevation of a new and independent registry dealing with the identification of the persons responsible for the day to day care of children might at first appear radical but it is in line with the promotion that the interests of the child and the preservation of that child's knowledge of his or her origins. We accept that this approach runs contrary to the existing adoption practices in Australia but see that as a positive outcome. There will also have to be careful consideration given to the laws affecting inheritances and other property rights of children.

Access to Information After Adoption

VICTORIA

Request by Adopted Person

s92 (2): attained the age of eighteen may apply for information

s94: an adopted person who has not attained the age of 18 may make apply

Information Given

S92(2) If attained the age of 18;

(a) where the birth of the was registered in Victoria: apply for an extract from or certified copy of, the entry in the Register of Births relating to the adopted person;

(b) where the birth was not registered in Victoria apply for a copy of an extract from, or certified copy of, the original birth certificate.

S94: If under age 18: may obtain information other than information from which the identity of either of the natural parents be ascertained, need agreement in writing (or evidence of the death) of each adoptive parent. And If obtaining information which the identity of a natural parent may be ascertained need agreement in writing (or evidence of the death) of that natural parent.

QUEENSLAND

Request by Adopted Person

s263: request by adopted person **s256** Request by, or on behalf of, adopted child: the adopted child, but only with the consent of an adoptive parent may request information, information can be given only if written consent is given by each birth parent. consent presumed to be given if the birth parent has asked information in terms of **s257**.

Information Given

S256(4) and **s263(2)** The adopted child's name before the adoption; a parent's consent to the adoption or an order dispensing with the need for consent; an adoption order; the birth parent's name at the time of the adoption; birth parent's date of birth; the birth parent's last known name and address(need specific consent); information regarding any other adopted person, who is an adult, and who has at least 1 birth parent who is also a birth parent of the adopted child; the person's date of birth; the person's name immediately after the person's adoption; the person's last known name and address, but only with the person's written consent.

Limits on Information

s269 (1) An adopted person who is at least 17 years and 6 months old, or a birth parent of an adopted person, may give a contact statement stating the manner in which they wish to be contact, if they do wish to be contact.

s 273 (2) The contact statement continues in force until it is revoked by the person or the person dies.

WESTERN AUSTRALIA

Request by Adopted Person

s84(1)(a); s 85(1)(a); s86 (1)(a); s88: has right to have access to information.

Information Given

s84(1)(a) right to access the record of proceedings in a court.

s 85(1)(a) right to have access to the registration of an adoptee's birth

s86 (1)(a) an adoptee's adoptive parent, if the adoptee less than 18 years of age; or an adoptee if 18, can access a certified copy of that portion of the registration of the adoptee's birth that does not refer to the adoptee's

adoption or birth parents. s88: The rights to access non-identifying information held by adoption agency.

Limits on Information

s83. (1) On an application for order or after order has been made, a party to the order may apply to court to prevent information given to a person who would otherwise have a right to information

S83(2) if court satisfied that the person's access to the information would be likely to place the applicant or their spouse / de facto partner, or the children at serious risk. **s99** contact vetos are statements of wishes that were registered before the veto cut off day; and **s100(1)** are in effect for the period stated by the person who lodged it, or until person dies or cancels or varies it.

ACT

Request by Adopted Person

s68 An adopted person who has not attained the age of 18 years is not entitled to identifying information unless approval in writing has been obtained from each adoptive parent and each birth parent.

Information Given

s66: entitled to access to identifying information; a copy of, or an extract from, an entry in a register of births relating to the adopted person; or information from which a birth parent, a birth relative or the adopted person may be identified (other than information that consists of the address of a place of residence).

Limits on Information

s70 if the adoption order made before the commencement of the Adoption Amendment Act 2009.

(1) a contact veto may be made by adopted person who is at least 17 years and 6 months old;
or adoptive parent;
or a birth relative who is at least 18 years old;
or adoptive relative who is at least 18 years old;
or a child or other descendant of adopted person, who is 18 years;
or a birth parent.
(2) must state the person to whom the veto relates; must be in writing lodged with the director-general; and continues until revoked

s73 if an objection made or contact veto made under section 70/71.

s73 (2) not divulge information unless has attended counselling; and signs a declaration that will not or try themselves or procure another person to contact, attempt to contact, or attempt to arrange contact with, that person.

SOUTH AUSTRALIA

Request by Adopted Person

s27(1): Right to obtain information of an adopted person who has attained the age of 18 years

s27A if the adopted person is under 18, the information requested, can be disclosed if consent by the adoptive parents is given and if the name of a birth parent is to be disclosed—that parent's consent.

Information Given

S27: the names and dates of birth of the person's birth parents; any other information in the possession of the Chief Executive relating to the birth parents and the circumstances of the adoption; any message, information or item given to the Chief Executive by a birth parent with instructions that it be provided to the adopted person; information in the possession of the Chief Executive relating to a sibling of the person who has also been adopted and who has also attained the age of 18 years.

Limits on Information

s27B(1): A person adopted or a birth parent(2) or adoptive parent(3) of an adopted person, prior to this Act may lodge a direction that information that would enable them to be traced not be disclosed. S27B (7): A direction under this section has effect for a period of five years and can be renewed.

NEW SOUTH WALES after 2008

Request by Adopted Person

s133C: An adopted person who is less than 18 years needs consent of adoptive parents, or Director-General (if no surviving adoptive parents or they cannot be found) or opinion of Director-General, any other reason to dispense with their consent.

Information Given

S133C: The person's original birth certificate, and the adopted person's birth record, and any prescribed information relating to the adopted person held by an information source including prescribed information relating to the adopted person's birth parents, siblings and adopted brothers and sisters.

Limits on Information

s154: Adopted person who has reached the age of 17 years and 6 months or birth parent may lodge contact veto. **s155**: A person may lodge a contact veto only if the order for adoption of the adopted person was made before 26 October 1990. **s156**: lodged in writing that objects to contact being made with them by a party to

the adoption. s160 A contact veto expires if the person making it cancels it or dies.

NEW SOUTH WALES before 2008

Request by Adopted Person

s134: An adopted person who is less than 18 years of age is not entitled to receive information without the consent of his or her surviving adoptive parents and surviving birth parents as shown on the original birth certificate or adopted person's birth record, or if the Director-General dispenses with their consent.

Information Given

S134: An adopted person is entitled to receive the person's original birth certificate, and the adopted person's birth record, and any prescribed information relating to the person's birth parents held by an information source, and any prescribed information relating to a sibling or an adopted brother or sister of the person held by an information source.

Limits on Information

As above in NSW after 2008.

TASMANIA

Request by Adopted Person

s81 (1) not attained the age of 18 years may, apply to a relevant authority for information about him s18(2) accompanied by the agreement in writing, or evidence of the death, of each adoptive parent.

s82. (1) has attained 18 years may apply for info

Information Given

s18(3) not 18 no information from which the identity of a natural parent may be ascertained unless the relevant authority has obtained the in writing, or evidence of the death, of that natural parent.

s82. (1) has attained 18 years may apply to a relevant authority for information about himself and he may so apply whether or not one of his natural parents or natural relatives may be identified from that info.

S82(2) Before given any info; must undertake not to contact that natural parent or natural relative if that natural parent or natural relative has entered a contact veto.

Limits on Information

S82(2) Before given any info; must undertake not to contact that natural parent or natural relative if that natural parent or natural relative has entered a contact veto.

NORTHERN TERRITORY before Act

Request by Adopted Person

s 65 (1) (a): Where an order for adoption was made before the commencement of this Act the adopted person may only apply to the Minister for the information in respect of one or both of the birth parents, except if the adopted person is not yet the age of 16 years, the adoptive parent/ s has consented in writing to the making of the application for information.

Information Given

s62 (1) (a) the names (including a name given at birth) and last known address of a person specified in the application; (b) where the last known address is not known or is incorrect, any information that may assist in ascertaining the whereabouts of a person; (c) details of a notice of prohibition against the provision of information - if any that has been lodged with the Minister.

Limits on Information

s65(2): A relinquishing parent or an adopted person may lodge with the Minister a notice that will disallow the provision of information that would identify him or her.

S65(4) A notice of prohibition under shall remain in force for the period, not exceeding three years, may, on application be reinstated for further periods each of which shall not exceed three years.

NORTHERN TERRITORY after Act

Request by Adopted Person

S 64 (2): Where an order for adoption was made after the commencement of this Act the adopted person may only apply to the Minister for the information in respect of one or both of the birth parents, except if the adopted person is not yet the age of 16 years, the adoptive parent/ s consents or consents in writing to the making of the application.

Information Given

s62 (1) (a) the names (including a name given at birth) and last known address of a person specifies in the application; (b) where the last known address is not known or is incorrect, any information that may assist in ascertaining the whereabouts of a person he or she specifies in the application; or (c) details of a notice of prohibition against the provision of information - if any that has been lodged with the Minister.

The Future of Marriage

Patrick Parkinson*

In many countries, including the United States and Australia, the law of marriage has now been divorced from its Judaeo-Christian heritage and given a secular meaning. Can marriage itself survive this process of secularization? The paper explores the drift away from marriage as the basis for family formation and child-rearing in Europe, North America and South America and the weakening of the marriage contract in law. It goes on to examine the laws concerning the solemnization of marriage and the differences (if any) between marriage and other family forms in a number of jurisdictions. These laws are explored by evaluating the options for family formation that are available to a young couple in Amsterdam, London, Edinburgh, Melbourne and Washington DC.

The conclusion is that the law governing the entry into (and exit from) marriage is losing much of its coherence and purpose. While marriage will continue to be important to people of faith and in certain cultures, civil marriage will gradually become little more than a means of registration of intimate partnerships. This will occur because the secular State lacks any convincing narrative about what marriage is, and any justification for having a marriage celebrant who represents the authority of the State.

1. Introduction

In the United States of America, as elsewhere, the relationship between religion and government continues to be hotly debated. To the extent that this traditional view of marriage as being between a man and a woman reflects religious beliefs and values, those values no longer hold sway in the public square.

It is typical of American constitutional law, so dominated as it is by the rhetoric of individual and minority group rights,that these major decisions on the relationship of law and religion rely upon a rights discourse. In *Obergefell v. Hodges*[1] the Supreme Court did not seek to redefine a fundamental social institution, but rather to insist that certain kinds of dyadic relationship (that is the intimate personal relationship of persons of the same gender) could not be excluded from eligibility for the status. In the process though, marriage law no longer reflects a Judaeo-Christian understanding of the institution. *Obergefell v. Hodges* brings about a divorce of Church and State in one of the few areas where there was, until a few years ago, common ground. This could be seen as an aspect of the process of secularization in which government policy is seen to be based on 'public', 'neutral' or 'secular' reasons rather than the 'comprehensive doctrines' of particular religious and non-religious worldviews.[2] In the modern secular state, if there is a value system or core set of beliefs, it is to be found in human rights jurisprudence rather than a shared cultural or religious heritage.

There has been a similar secularization of marriage as a matter of constitutional law in Australia, but this has occurred as a consequence of a fundamental redefinition of marriage, rather than beliefs about human rights or equality before the law. In the Australian Constitution, the federal Parliament has the power to make laws concerning 'marriage'. At the time the Constitution was enacted, the English common law defined marriage in terms of Christian teaching. That definition was given in a famous judgment of Sir James Wilde (who later became Lord Penzance) in the 1866 case of *Hyde v Hyde and Woodmansee*.[3] The case concerned the validity of a Mormon marriage. The judge held that such a marriage would not be recognised in the English common law. Marriage, he said, is 'a union for life of one man and one woman to the exclusion of all others, as understood in Christendom'. That left no room for polygamy. It also did not allow for same-sex marriage, not that this could possibly have been in contemplation at the time.

Australia's High Court, the ultimate court of appeal, has now held that this definition does not apply to the

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[1] 135 S Ct 2071 -2015 Supreme Court.

[2] John Rawls, Political Liberalism (2005). On secularism and support for same-sex marriage see David Oppenheimer, Alvaro Oliveira and Aaron Blumenthal, *Religiosity and Same-Sex Marriage in the United States and Europe* 32 Berkeley Journal of International Law 195 (2014).

[3] *Hyde v Hyde and Woodmansee* [L.R.] 1 P. & D. 130 (1866).

word 'marriage' in the federal Constitution.[4] The Court observed that marriage had had different meanings and characteristics at different stages of history and in different cultures, and that marriage in some cultures involved polygamy. The Court wrote:[5]

> The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable.

The Court offered a new and secular definition of marriage for the purposes of constitutional law which allows both for same-sex marriage and polygamy:[6]

> Once it is accepted that 'marriage' can include polygamous marriages, it becomes evident that the juristic concept of 'marriage' cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases. Rather, 'marriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognizes as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.

The decision did not introduce same-sex marriage in Australia. It only established that should the federal Parliament choose to do so, it *could* enact a law for same-sex marriage or to recognize polygamy and that this power to legislate was exclusive to the federal Parliament. The secular constitution was not constrained by a Christian worldview.

Can marriage survive this divorce from its Judaeo-Christian meaning? That is not the same as asking whether it can survive same-sex marriage. The arguments have raged backwards and forwards on whether allowing same–sex marriage will have any effect on the heterosexual unions.[7] This paper seeks to explore a much broader question, of which the recognition of same-sex marriage is just a part – can marriage, in the form we know it, survive its conceptual separation from its religious and cultural roots? In a secularized world, will the entry into and exit from marriage continue to be regulated by law other than in terms of maintaining an evidentiary record of relationships?[8]

2. Legal Marriage and the Rise of Informal Cohabitation

Around the western world, and excepting those jurisdictions which retain a notion of 'common law marriage', the distinction between legal (*de iure*) marriage and informal cohabitation rests on four differences. First, for a legal marriage, there needs to be a celebrant who witnesses the exchange of promises and pronounces the couple to be married at the conclusion of that exchange. Second, there is registration of that union in the jurisdiction's official records. Third, to formally terminate that marriage, a State official – almost invariably a judge or someone acting on behalf of the court – must pronounce a divorce. Fourth, in most jurisdictions but not all, there are differences in terms of the legal incidents of marriage as opposed to informal cohabitation. These may include differences in terms of the division of property on marriage breakdown, maintenance obligations, and rights vis à vis the state which are consequent upon marital status and which have not been extended to informal cohabitation.

The demise of legal marriage

Legal marriage, which was once the only accepted context for sexual relations and the nurture of children in western countries, has long ceased to be central to people's sexual or reproductive lives in many parts of the world.[9]

Marriage remains the most common form of couple relationship within Western and Northern Europe, but the gap between marriage and cohabitation as a family form is narrowing. For example figures from 2006 show that in France, 26 percent of adults in the 18 to 49 age range were cohabiting, while 39 percent were married. In

[4] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. The issue arose because the Australian Capital Territory (ACT), where Canberra is located, enacted a law allowing for same-sex marriage. The High Court had to determine the question whether doing so was inconsistent with the federal *Marriage Act* 1961. The High Court held, unanimously, that it was inconsistent and therefore invalid. It decided that because the word 'marriage' in the Constitution could be interpreted to allow for same-sex marriage, the ACT's law intruded onto a field which was exclusive to the federal Parliament.

[5] Ibid at 456.

[6] Ibid at 461.

[7] See e.g. Lynn Wardle, *Is Marriage Obsolete?* 10 Michigan Journal of Gender and Law 189 (2003); MV Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?* 1 Sexuality Research and Social Policy 1 (2004); Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence From The Netherlands,* 51 Demography 317 (2014).

[8] The merits of this have been argued elsewhere. See Eric Clive, *Marriage: An Unnecessary Legal Concept?*, in J Eekelaar and S Katz eds., Marriage and Cohabitation in Contemporary Societies 71 (1980). For essays debating the abolition of the status of marriage entirely, see Anita Bernstein (ed), Marriage Proposals: Questioning a Legal Status (2006).

[9] Ron Lesthaeghe, *The Unfolding Story of the Second Demographic Transition*, 36 Population and Development Review 211 (2010).

Sweden, 25 percent were cohabiting and 37 percent were married.[10] In the United Kingdom, in 2011, 22% of adults aged between 20-34 were cohabiting, while 32% were married.[11]

In the United States, marriage is increasingly stratified by reference to educational level. The percentage of adults aged 25-60 with four years of high school education but no college education, and who were in first marriages, fell from 73% in the 1970s to 45% in the 2000s.[12] There was also a 28% decline in first marriages among the least educated adults over this same time period. While rates of marriage have declined for people of all educational levels, the rate of decline has been least among college-educated people.[13]

Perhaps the lowest rates of marriage are in Latin America, where 'consensual unions' have long been common amongst indigenous and poor communities.[14] In recent years, the practice has spread among the middle and upper classes.[15] In the Dominican Republic, Panama, Honduras, Nicaragua, Peru, Colombia and Uruguay, the proportion of consensual unions is higher than for marriages amongst women in partnerships aged 15-49.[16]

Ex-nuptial births

Not only has there been a decline in marriage as the basis for an intimate domestic partnership, but it has ceased to be the dominant context for child-rearing. In 2013, nearly 41 per cent of all births in the USA were outside of marriage, with some demographic groups recording even higher rates of ex-nuptial births.[17] Figures show that 71.5 per cent of all births to African American mothers were ex-nuptial, as were 53.2% of all births to Hispanic mothers.[18] In many parts of Europe also, rates of ex-nuptial births are high. Indeed, in the European Union, the share of extra-marital births has been on the rise in recent years in almost every member state.[19] In some countries, the majority of live births are outside marriage. In 2011, for example, Estonia (59.7%), Slovenia (56.8%), Bulgaria (56.1%), France (55.8%), Sweden (54.3%) all had a majority of births outside marriage while in Belgium the figure was 50.0%.[20] The highest rate of extramarital births in Europe is in Iceland at 65% of all births.[21]

More than half of these ex-nuptial births across Europe are in cohabiting unions, although there are significant variations between countries.[22] Many children are being born to single mothers outside of any cohabiting relationship. For example in Ireland, 35% of all births are outside marriage. Of these, nearly half (45%) are to single mothers without the other parent in the home, that is nearly 16% of all births.[23] The figure is the same in Britain.[24] In the USA, between 2006 and 2010, 24% of first births were to women who were neither married nor cohabiting.[25]

While many in the same-sex attracted community have placed a very high value on the legal right to marry[26] – whether or not they choose this status for themselves – the status of marriage has become more and more irrelevant to the intimate partnerships of heterosexual couples.[27]

In part, this reflects the very trends which have led in many countries to the acceptance of same-sex marriage.

[10] Child Trends, *World Family Map, 2014: Mapping Family Change and Child Wellbeing* Outcomes 15 (2014) http://worldfamilymap.org/2014/wp-content/uploads/2014/04/WFM-2014-Final-LoResWeb.pdf.
[11] Ibid.
[12] Bradley Wilcox and Elizabeth Marquardt (eds) The State of Our Unions, When Marriage Disappears: The New Middle America p.21 (2010).
[13] Ibid.
[14] Teresa Castro-Martín, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 J Comp. Fam. Stud. 35 (2002).
[15] Benoît Laplante, Teresa Castro-Martín, Clara Cortina, & Teresa Martín-García, *Childbearing within Marriage and Consensual Union in Latin America, 1980–2010* 41 Population and Development Review 85 (2015).
[16] Ibid at 88.
[17] Joyce A Martin et al, *Births: Final Data for 2013* 64(1) National Vital Statistics Report http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf.
[18] Ibid.
[19] Eurostat, *Europe in figures - Eurostat yearbook 2011: Population* (2011) http://ec.europa.eu/eurostat/en/web/products-statistical-books/-/CH_02_2011.
[20] European Commission, *EU Employment and Social Situation Quarterly Review: March 2013 Special Supplement on Demographic Trends* (2013) http://ec.europa.eu/eurostat/documents/3217494/5775829/KE-BH-13-0S2-EN.PDF/e99e7095-df33-42ee-9429-626e04ddec11.
[21] Eurostat, *Europe in figures - Eurostat yearbook 2011: Population* (2011) http://ec.europa.eu/eurostat/en/web/products-statistical-books/-/CH_02_2011
[22] Ibid.
[23] Ibid.
[24] Office of National Statistics, Statistical bulletin: Live Births in England and Wales by Characteristics of Mother 1 (2012) http://www.ons.gov.uk.
[25] Gladys Martinez, Chrisberly Daniels & Anjani Chandra, *Fertility of Men and Women Aged 15–44 Years in the United States: National Survey of Family Growth, 2006–2010*, 51 National Health Statistics Reports 9 (2012), National Center for Health Statistics (USA) http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf.
[26] Suzanne Goldberg, *Why Marriage?* in Marsha Garrison and Elizabeth Scott (eds), Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 224 (2012).
[27] Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe,* 15 Int. J. L. Pol. Fam. 1 (2001); Anne Barlow, Simon Duncan, Grace James & Alison Park, Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century (2005).

Marriage is being redefined in secular western societies through the prism of individualism,[28] just as it was in *Obergefell v. Hodges*. The Judaeo-Christian consensus has been that marriage has a religious and cultural meaning which transcends personal choice. That is, it is not enough that two people choose to join in an intimate partnership. In traditional Christian teaching, they must of course, be of different genders and be old enough to enter into matrimony; but they must also accept a partnership which is sexually exclusive and in principle for life. That is, while, in Judaeo-Christian thought, a marriage is to be freely chosen, the rights and obligations to which marriage gives rise are externally derived from religious values. Marriage, as understood in Christian thought, has offered only a standard form contract on a take it or leave it basis when it comes to the duration and exclusivity of the commitment.

Over time, the terms of that contract have progressively been weakened.[29] The exclusivity of the marital relationship used to be enforced by criminal prohibitions on adultery, which was also a ground for divorce. Criminal offences based on adultery have all but disappeared in liberal democracies,[30] and in many countries, divorce is now a unilateral choice that may be exercised by a party to a marriage without attribution of blame. Over time also, the idea that marriage is to be lasting has been seriously compromised by the ease with which a divorce may be obtained. The law no longer provides support for the standard form contract with regards to duration and exclusivity.

What then is the future of marriage? In answering this question, it is important to differentiate between marriage as a religious and cultural tradition and marriage as a legal institution. There is no reason to believe that marriage, as a religious tradition, will not continue; for, at least among the People of the Book (adherents to Judaism, Christianity and Islam) a public and religiously sanctioned marriage remains important. To the extent that religion and culture are closely intertwined, many will marry also because it is a cultural expectation - even if they are not themselves deeply religious. People will still commit to one another, and will register their marriages if that is what the law requires.

What about secular forms of marriage which are not reflective of a particular religious or cultural tradition? The demise of marriage and the number of children born extra-maritally across Europe and North America suggests that among those who do not have strong religious and cultural reasons to marry, legal marriage is already declining rapidly as a cultural norm.

3. Religious Heritage and the Need for a Celebrant

What distinguishes legal marriage from informal cohabitation in terms of the formation of the relationship is the need for a celebrant to pronounce the couple as married. A private exchange of vows, even before witnesses, indeed even before hundreds of witnesses at a large and expensive wedding, does not suffice to make the couple married unless there is a state-authorized celebrant in whose presence those vows are exchanged.

Why is this? And can, or should, such a requirement survive secularization? Is there any rational basis why weddings should involve the government at all, other than in terms of registration? Does the government have any legitimate interest in being present at the wedding ceremony? In practical terms the government has no role at all to play in religious weddings, other than licensing marriages and imposing various requirements which are preliminary to the celebration. Is there any reason why there should be a celebrant for civil marriages?

As will be seen, the only explanation for having a celebrant is that it is a secular imitation of Christian tradition, especially as it developed from about the 12th Century onwards in Europe. This notion of marriage as a public event with a celebrant who represents God does not have a pre-Christian history, and nor does its plagiarized secular counterpart, a wedding conducted by a state official.

Marriage in Roman law

In Roman law, marriage was based only on consent – the consent of the couple, and the consent also of a paterfamilias. As Susan Treggiari explains:[31]

> The essential characteristic of Roman marriage was the consent of each partner. (If there was a paterfamilias, his consent at the initiation of the marriage was also required: for a daughter his consent might be assumed unless he evidently dissented.) Consent was signified at the beginning of a marriage. There was no prescribed form of words or action or written contract which had to be used at all weddings. Nor did any priest or

[28] Paul Amato, *Institutional, Companionate, and Individualistic Marriages*, in Marsha Garrison and Elizabeth Scott (eds), Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 107 (2012).
[29] Mary Ann Glendon, The New Family and the New Property (1981).
[30] In American law, see Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 118 (1985).
[31] Susan Treggiari, *Divorce Roman Style: How Easy and How Frequent Was It?* in B Rawson ed., Marriage, Divorce and Children in Ancient Rome 32-33 (1991), See also HF Jolowicz, Historical Introduction to the Study of Roman Law 113 (2nd ed. 1967).

public official act as president or witness of a ceremony.

No religious figure, lawyer or public official was involved in divorce either, and no public record was kept of divorce.[32] Max Rheinstein has aptly described marriage, in Roman and indeed Greek thought, as "a secular affair, a contract, that, like any other, was concluded by the consent of the parties and that could be terminated even more easily than a commercial contract, namely, by the will of just one of the participants."[33] That is not to say that marriage was entirely without ceremony. There might well be some ritual ceremony of crossing the threshold, and gifts might be presented.[34]

Marriage was gradually transformed, through the influence of the Church, from a secular affair to a sacred institution; but its evolution from private agreement to religious sacrament was a very slow one.

Canon law rules on marriage

Through Christian influences, marriage eventually came to be seen as indissoluble, and the Church itself asserted jurisdiction in matrimonial matters.[35] In church law, as applied throughout those parts of Europe under the spiritual governance of Rome prior to the Reformation, marriage was seen as a matter of private contract. The basic rules were formulated by Pope Alexander III (1159-1181) who synthesized the canon law rules. Marriage could be entered into by consent through *verba de praesenti* — that is, words uttered by each of the parties evincing a present intent to marry — or verba de futuro subsequente copula — a promise to marry in the future which was consummated by sexual intercourse. The minimum age for capacity to marry was 14 for boys and 12 for girls. From a theological perspective, capacity and consent were all that was required to make the marriage valid.[36]

However, canon law drew a distinction between the requirements for the validity of a marriage and the evidence needed to prove the existence of a marriage. That proof, through having witnesses, was needed for a great variety of reasons - in the event of a dispute between the parties about whether there was a marriage; in the event of some uncertainty affecting, for example, the legitimacy of children, property rights or inheritance issues; and as the precondition for ecclesiastical courts to be able to punish adultery and other moral wrongs.[37]

Pope Innocent III decreed in the 13th century that the exchange of consents be witnessed by two persons.[38] The Church encouraged a form of wedding that included a priestly blessing and nuptial mass.[39] Clandestine marriages were, at various times and places, strongly discouraged; indeed penalties might be applied. [40] A marriage which was not entered into in the presence of a priest might be regarded as illicit, and the parties would need to do penance.[41]

The need for a celebrant

Eventually, the position came to be formally established that a marriage required formalities that went beyond private consent. In countries with a Roman Catholic heritage, this can be traced to the Decree Tametsi of the Council of Trent, which was promulgated in 1563. The Church therein decreed that for a marriage to be valid there needed to be three witnesses, one of whom had to be the parish priest of one of the parties; and there had to be an announcement about the prospective marriage beforehand, known as 'publishing the banns of marriage'.[42]

The notion that a marriage could be contracted by *verba de praesenti* in private survived these reforms to some extent, but only as a form of contract to marry. If proven, the ecclesiastical courts would order the couple to solemnize their marriage in Church.[43]

The requirement for a celebrant also came to be established in Protestant countries in the sixteenth century as well. One of the major concerns that led to

[32] Treggiari, *supra* at 36; A M Pritchard (ed), Leage's Roman Private Law 98-114 (3rd ed. 1967).
[33] Max Rheinstein, Marriage Stability, Divorce, and the Law 2 (1972).
[34] Mary Ann Glendon, The Transformation of Family Law 17 (1989) (hereafter, Glendon, Transformation). See also John Witte, From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (2nd ed. 2012).
[35] Glendon, Transformation, 23-31.
[36] C Donahue, *The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages*, J. Fam. Hist. 144 (1983). [37] These courts were often called the 'bawdy courts' because their jurisdiction was to police bastardy and sexual immorality. See Eleanor Fox and Martin Ingram, *Bridewell, bawdy courts and bastardy in early seventeenth-century London*, in Rebecca Probert (ed), Cohabitation and non-marital births in England and Wales, 1600-2012 (2014).
[38] lawrence stone, Road to Divorce 52 (1990).
[39] Donahue, *supra* n. 36 at 146.
[40] In the twelfth century, for example, Pope Alexander III excommunicated those who contracted clandestine marriages. See John De Reeper, *The History and Application of Canon 1098* 14 The Jurist 148, 153-4 (1954).
[41] RH Helmolz, *Recurrent Patterns of Family Law*, 8 Harv. J. of L. & Pub. Pol. 175, 178 (1985).
[42] While the Decree Tametsi established the need for a priestly celebrant in countries where Roman Catholicism was the religion of the State, this rule was not universal. It was not applicable for Catholics in protestant lands, where priests might not be available. For these believers, marriage remained a private and consensual union without the need for witnesses: De Reeper, *supra* n.40 at 155-58.
[43] Rebecca Probert, *Common Law Marriage: Myths and Misunderstandings* 20 Child & Fam. L. Q. 1 (2008).

strict regulation of marriages was a concern about clandestine marriages, entered into without parental consent, and which provided a means for unscrupulous suitors to gain access to a family's wealth as a consequence of property rights which were consequent upon marriage. Martin Luther, in particular, railed against clandestine marriages for this reason, and in some Protestant cities of what is now modern Germany and Switzerland, the presence of a minister was made mandatory, as was parental consent.[44]

In England, reforms of this kind to deal with clandestine marriages entered into without parental consent were not enacted until Lord Hardwicke's Act of 1753. This law provided that a marriage was null and void unless it was preceded by banns for three consecutive Sundays in church, or there was an official licence. It had to be carried out publicly in a church or chapel by a regular Anglican clergyman, and took place within prescribed daylight hours.[45] It was also essential for the validity of a marriage that it was recorded in a parish register and signed by the bride and groom, the officiating clergyman and at least two witnesses. Provision was made for Jews and Quakers to marry according to the rites of their own faiths, but it was only many years later that Catholics and non-conformists had an option to marry other than in the Church of England.[46]

The emergence of civil marriage

In England, civil marriage was first introduced with the *Marriage Act* 1836 which allowed for a civil form of marriage ceremony before a registrar. This offered an option for people who were not affiliated to one of the faiths which could solemnize marriages.

In France, compulsory civil marriage had been introduced much earlier. As Lloyd Bonfield observes, long before the French Revolution the monarchy had sought to exercise control over the process by which couples entered into marriage and consequently, on the eve of the French Revolution, "considerable secularization of the law concerning marriage formation had already been undertaken". [47] The Revolution continued this process of wresting control of marriage from the Church. France made civil ceremonies mandatory by means of a revolutionary decree on 20 September 1792.[48] The law denied all legal effect to religious weddings.[49] The Napoleonic Code of 1804 included these provisions for compulsory civil ceremonies. This model spread through much of Europe, in some countries as an optional alternative to religious ceremonies, and in others, such as Germany[50], as the only form of legal marriage.[51] In France and Germany, the civil ceremony had to precede a religious ceremony.[52] Many countries of continental Europe retain that position.[53]

A society in which a secular wedding ceremony was compulsory needed to imbue it with meaning, and this the French did – by imitating the sacred. The leading French scholar, Jean Carbonnier, wrote of French marriage law that "Even though secularized, marriage has a sort of religious gravity which is peculiar to it…a gravity based on the idea that man's binding himself until death is an aspect of his intimation of mortality and his struggle against the ephemeral nature of existence."[54] Mary Ann Glendon has written of the French system that "marriage formation law in France seems to be part and parcel of the country's civil religion."[55] Secular law borrowed from religion the idea of a celebrant and a ceremony, and adopted the religious terms and conditions of what marriage meant – a union of a man and a woman till death do them part.

Thus, the option of civil marriage developed as an imitation of religious marriage. Just as ministers or priests solemnized religious marriages, and pronounced a couple to be husband and wife, the State, represented by a government official, fulfilled this function for those who sought a secular wedding. In either instance, the marriage required an authorized celebrant representing either divine or human authority.

Marriage in a secular society

It is questionable how much this idea of marriage has survived secularization or will survive into the future. Two

[44] Glendon, Transformation, *supra* n.34 at 29.
[45] Lawrence Stone, Road to Divorce, *supra* n.38 at 123.
[46] Stephen Cretney, Family Law in the Twentieth Century: a History 4-12 (2003); Peter Bromley, Family Law 34-52 (1987).
[47] See Lloyd Bonfield, *European Family Law* in David Kertzer and Marzio Barbagli (eds), The History of the European Family: Family life in the long nineteenth century (1789-1913) 109 at 128 (2002).
[48] Glendon, Transformation *supra* n.34 at 33.
[49] Ibid 71.
[50] *Ehegesetz* [Marriage Act] of 20 Feb. 1946, BGB III 404-1, § 11.
[51] Bonfield, *supra* n.47.
[52] Glendon, Transformation *supra* n.34 at 71, 73.
[53] See generally Dagmar Coester-Waltjen and Michael Coester, *Formation of Marriage* in Aleck Chloros, Max Rheinstein and Mary Ann Glendon (eds), International Encyclopedia of Comparative Law: Persons and Family (vol 4) § 3-102] (2007).
[54] Jean Carbonnier, Flexible Droit – Textes pour une Sociologie du Droit sans Rigueur (1971) 137, English translation in Glendon, Transformation *supra* n.34 p.72.
[55] Glendon, Transformation, ibid.

major developments have occurred in recent years which might signal the demise of this notion of marriage. The first is the decline in the insistence that if a marriage is not solemnized in the presence of God's representative, it must instead be solemnized in the presence of the State's representative. The second is the blurring of the distinction between formal marriage and cohabitation.

These developments can be seen if one considers the options for relationship formation in five of the great cities of the world, Amsterdam, London, Edinburgh, Melbourne and Washington DC.

4. A Tale of Five Cities

Alex and Chris are in love. They are a young professional couple with options for employment in a number of the great cities in the world. At the commencement of that partnership, their options for family formation depend to a great extent on which city they choose to live in.

Amsterdam

If Alex and Chris live in Amsterdam, they have two choices for formalizing their relationship that have almost identical legal effects. Marriage, as in other countries of continental Europe, requires a civic ceremony conducted by an official of the Town Hall or equivalent.[56] Indeed it is illegal to conduct a religious ceremony of marriage unless the civic ceremony has occurred first.[57]

However, they do not actually have to marry at all in order to have a formalized legal partnership. The idea of a 'registered partnership' was introduced in 1998 as an alternative for same sex couples, to whom marriage was not available at that time.[58] When marriage was made available to same sex couples in 2001, the registered partnership became more or less redundant. It is however still a registered, legal form of cohabitation. There is practically no difference between a marriage and a registered partnership, and a registered partnership is open to both heterosexual and same-sex couples.[59] Effectively then, these represent alternative, but equivalent, forms of registering a domestic, intimate partnership with the State.

If Alex and Chris choose to live together informally, then their legal position will be very different.[60] Dutch law does not provide a property sharing regime similar to marriage for couples in informal de facto relationships. There is therefore a clear choice to be made between a registered relationship and an unregistered one.

London

If Alex and Chris live in London, they have a bewildering smorgasbord of options. They may choose to marry, but their choice of ceremony depends to a great extent on their religious affiliation, or lack thereof.

Whether or not they are devoutly religious, they have a legal right to marry in any Church of England Church, in which case notice of the marriage is given by the reading of 'banns' in church. A marriage which takes place in accordance with the rituals of the Church of England will, without more, qualify as a marriage. This is also the case if they go through a Jewish or Quaker wedding, but not if they marry in a Baptist or Catholic Church. If they choose to marry in any other religious tradition apart from that of the Church of England, or have a Jewish or Quaker wedding, then their marriage will be valid only if it is contracted in a building which is registered as a 'place of meeting for religious worship'.[61]

The validity of their marriage is subject also to compliance with certain additional formalities such as the presence of an 'authorized person', who is normally a religious leader within that faith tradition. The marriage must be registered with the superintendent registrar. This rather strange set of requirements, differing from one religious tradition to another, reflects the gradual evolution of marriage law from the time of the Lord Hardwicke's Act 1753 onwards.

If Alex and Chris do not want a religious ceremony, they can have a civil marriage. This can take place either in a registry office or on any other premises which have been approved for the purpose by the local authority. The ceremony must be a secular one.[62] A superintendent registrar, registrar and two witnesses must be present at the ceremony and a prescribed form of words must be used.

The echoes of Lord Hardwicke's Act remain in the notice requirements. Anyone who does not marry in

[56] Article 1.63 of the Burgerlijk Wetboek (Dutch Civil Code) provides: 'The marriage shall be contracted in public in the town hall before the Registrar of Civil Status in the presence of at least two and at the most four adult witnesses.'
[57] Article 1.68 of the of the Burgerlijk Wetboek (Dutch Civil Code) provides: 'No religious ceremonies may take place before the parties have shown to the foreman of the religious service that the marriage has been contracted before a Registrar of Civil Status'.
[58] Wendy Schrama, *Registered Partnership in the Netherlands*, 13 INT. J. L. POL. & FAM. 315 (1999).
[59] Wendy Schrama, *Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity*, in ANDREW BAIHAM (ED.) INTERNATIONAL SURVEY OF FAMILY LAW 2002, 277 (2002).
[60] Masha Antokolskaia, *Economic Consequences of Informal Heterosexual Cohabitation from a Comparative Perspective: Respect Parties' Autonomy or Protection of the Weaker Party?* In A. VERBEKE (ED.) LIBER AMICORUM WALTER PINTENS (2012).
[61] Places of Worship Registration Act 1855, s. 2.
[62] Marriage Act 1949, ss. 46A, 46B.

accordance with the Church of England practices (in which case the banns of marriage must be read for three weeks prior to the wedding) is required to have given notice of the intended marriage at a registry office.[63] The law provides for various other civil preliminaries for ceremonies other than those conducted by the Church of England.[64]

Thus in England, Alex and Chris will have a choice between a Church of England ceremony as of right, a secular ceremony as of right and various other kinds of religious ceremony if the religious celebrant is willing to perform the ceremony.

It follows that in English law, God's approval is sufficient if the marriage takes place in a Church of England ceremony. God's approval is almost sufficient for Quakers and Jews also, but they need a marriage licence and to give notice to the Registrar first. Once these formalities are fulfilled, the wedding ceremony alone is sufficient for the couple to be married in the eyes of the State. The approval of both God and the State is needed for a Catholic, Baptist, Methodist, Muslim, Hindu or other faith-based wedding. The marriage ceremony alone, even after satisfaction of prior formalities, is insufficient to ensure that the couple are married in the eyes of the State. The couple must have a licence and give notice, and in addition they must marry in a building registered as a place of worship and subsequently register the marriage. Only when all these demands of Caesar have been satisfied, will they be married in the eyes of the State as well as God.

The requirement that the building be registered as a place of worship causes particular difficulties in circumstances where the religious community fails to apply for registration of the building or is unaware of the need to do so.[65] The consequence is that the marriage, while valid in accordance with the religious traditions of the couple, and valid also in the eyes of family and community, is not valid in the eyes of the State.

On the other hand, the State's approval is sufficient for a civil ceremony, with the State represented by an official registrar. God is not permitted to take part. In short, English law provides the options of God without a licence, God with a licence, God with a licence and registration, and a licence and registration without God. No explanation can be given for this except history.

If Alex and Chris are a same-sex couple, then their options are more limited. They cannot be married in the Church of England, for the compromise between secularism and faith concerning 'gay marriage' was to ensure that the Church of England could not be required, contrary to its official doctrinal position, to conduct marriage ceremonies for same-sex couples. Other faith communities were given the option to conduct same-sex weddings in a registered building if the appropriate authorities apply for registration to do so.[66] An option that remains open to Alex and Chris, as a same-sex couple, is to enter into a civil partnership which will have all the same consequences as marriage.[67] Unlike in the Netherlands, heterosexual couples do not have this option.

It is reasonable to ask why there are such differences in the law governing different faith communities. Why does the State need to insist that the building be registered for certain kinds of marriages? And why it is that celebrants must either be religious leaders or state-employed officials? The position is rather different just north of the border in Scotland.[68]

Edinburgh

If Alex and Chris live in Edinburgh, then they may choose a religious marriage or a civil marriage.[69] However, the concept of religion has been extended to other belief systems that are not religious. In particular, the practice has emerged since about 2005 for leaders of a humanist society also to be allowed to solemnize marriages.[70] As a consequence, whereas the legislation itself refers to 'religious marriages' as opposed to civil ones, the language is now used in official documents of 'religious and belief marriages'.[71] The Humanist celebrations are now reportedly the third largest category of wedding after the

[63] Marriage Act 1949, ss. 5 and 27.
[64] Marriage Act 1949, ss. 53-57.
[65] John Eekelaar, *Marriage – A Modest Proposal*, 43 FAM. L. 82 (2013).
[66] Marriage Act 1949, s. 43A, inserted by Marriage (Same Sex Couples) Act 2013.
[67] Civil Partnership Act 2004.
[68] Scotland has long had a different tradition of family law to England, reflected in different marriage laws: D W R Brand, *The Marriage Law of Scotland* 25 QUIS CUSTODIET 178 (1969).
[69] Marriage (Scotland) Act 1977.
[70] This is by means of a temporary authorization under section 12 of the Marriage (Scotland) Act 1977. The Humanist Society Scotland says of itself that it includes "atheists and agnostics who make sense of the world using reason, experience and shared human values." They seek to make the best of the one life they have by creating meaning and purpose for themselves, individually and together. http://www.humanism-scotland.org.uk/.
[71] Citizens Advice Scotland, *Advice for Scotland: Getting Married* (2015) Citizens Advice Scotland <https://www.citizensadvice.org.uk/scotland/relationships/living-together-marriage-and-civil-partnership-s/getting-married-s/>.
[72] John Eekelaar, 'Marriage and Religion', paper given at ESRC seminar, May 2014, p. 9.

Church of Scotland and civil marriages.[72] In 2010 there were more humanist weddings than Catholic marriage ceremonies.[73]

Melbourne

If Alex and Chris were to begin their family life in Melbourne, they have a range of options for formalizing their relationship as well. They may choose a religious wedding. They may get married in a registry office, or they may purchase the services of a private marriage celebrant. By authorizing marriage celebrants, Australia has partially privatized the solemnization of marriages. It need not be a state official who pronounces the couple duly married. It is sufficient that it is someone who has been authorized by the government to take weddings. For secular celebrants it is a professional occupation, or a business.

If Alex and Chris do not want to marry (and if they are a same-sex couple that is not currently an option) then there may be other options. In Melbourne, (Victoria) as in many other parts of the country, for example Queensland,[74] they can enter into a "registered relationship".[75] A registered relationship has the same effects as marriage for the purposes of the law of that jurisdiction.[76] In federal law, the relationship will be treated as a '*de facto* relationship'.

While these are all options for Alex and Chris to formalize their relationship, actually they have no need to do so, for they will be treated as married just by living together – at least for some period of time. There is now almost no difference at all between being married and living in a '*de facto* relationship' in any area of state or federal law. The trajectory of law reform at both state and federal levels over 20 years has been to insert the words "or *de facto*" wherever the word 'marriage' or 'spouse' appears in legislation. Initially this was to address the issues for heterosexual couples who do not marry, and later the term "*de facto*" was extended to include same-sex couples.

There are some legal consequences of living in a *de facto* relationship which require a minimum period, for example two years or having a child. However once these thresholds are crossed, the de facto relationship has exactly the same effects as marriage. In New Zealand, there has also been a substantial assimilation of the legal consequences of marriage and informal cohabitation.[77]

In Australia, then, whether Alex and Chris choose to marry, have a registered relationship, or live together as a couple without formalizing or registering their relationship, the effects are much the same.

Washington DC

If Alex and Chris live in Washington DC, they can get anyone to solemnize their marriage. Indeed, they may even solemnize it themselves. The *Marriage Officiant Amendment Act* of 2013 amended Chapter 4 of Title 46 of the Code of the District of Columbia to provide that the following people may solemnize a marriage as long as they are at least 18 years old: a judge or retired judge, the Clerk of the Court or such deputy clerks as are approved by the Chief Judge of the Court; A minister, priest, rabbi, or authorized person of any religious denomination or society; A civil celebrant (defined as a person of a secular or non-religious organization who performs marriage ceremonies); a temporary officiant who is authorised by the Clerk of the Court to solemnize a particular wedding, members of the City Council; the Mayor; or the parties to the marriage.

A religious organisation is widely defined. The term 'religious' is defined as including or pertaining to a belief in a theological doctrine, a belief in and worship of a divine ruling power, a recognition of a supernatural power controlling man's destiny, or a devotion to some principle, strict fidelity or faithfulness, conscientiousness, pious affection, or attachment."[78] This goes far beyond the Scottish embrace of humanism as a religion. It is broad enough to include an organization or society which holds a belief in, or commitment to, almost anything.

The provision allowing a temporary officiant to solemnize a marriage with authorization from the court gives a basis upon which a family friend could be authorized to solemnize the wedding.

The idea that parties can marry themselves is not unique to the country's capital. What are now called 'self-uniting marriages' have their religious origins in the Quaker tradition, and have long been possible in Pennsylvania. Couples may marry themselves in Colorado as well.[79]

[73] Mike Wade, 'More Humanists Weddings Will Outstrip the Kirk' *The Times* 23 April 2015 at http://www.thetimes.co.uk/tto/news/uk/scotland/article4419931.ece.
[74] Registered Relationships Act 2011 (Qld).
[75] Relationships Act 2008 (Vic).
[76] For example, the Civil Unions Act 2012 (ACT), s.6(2) provides: "A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage."
[77] Bill Atkin, *The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in recent New Zealand Legislation* 39 VUWLR 793 (2008).
[78] Code of the District of Columbia § 46-406.
[79] Colorado Revised Statutes 14-2-109.

5. What then is Marriage?

This brief survey of just five jurisdictions shows how confused the law of marriage is becoming in secularized societies. Civil marriage was only ever a pale imitation of the ritual and ceremony of the Church. Most people wanted to be married in the eyes of God, but the State provided an alternative form of ceremony for those of a minority faith or none at all, and an alternative source of authority to the divine. The State had an official celebrant because the Church had an official celebrant – the priest or minister. Civil marriages gained a derivative sense of meaning and solemnity from the religious meaning of marriage as a covenant under God, and a sacrament.

There is no compelling justification – maybe no justification at all - for insisting on an official celebrant in a secular society other than by way of imitation of the religious nature of marriage. And so it has been that in various different ways, the modern law of marriage in various countries has drifted away from its former insistence that to be valid, a marriage had to be solemnized either by Church or State.

Scottish law provides one illustration. The concept of a religious wedding in the law has now been extended to irreligious weddings by a practice of authorizing members of the Humanist Society to conduct weddings under the religious wedding provisions. The humanist celebrant stands in the shoes of neither God nor Government. Is there something about marriage that it has to be solemnized either by a state official or by someone with a worldview on the meaning of life and the origins of human existence?

If the humanist or atheist has no special authority for pronouncing a couple to be married, there may be some logic in the government just licensing private individuals to be marriage celebrants, as in Australia. To be sure, they are authorized by the Government but they do not represent the Government any more than the humanists in Scotland do. They are essentially running a private business under licence from the State.

And so there is a somewhat charming *reductio ad absurdum* logic in the law of Washington DC, which provides that anyone can solemnize a particular marriage with authorization from the clerk of the court, or indeed that the parties can have their own DIY wedding and declare themselves to be married. Why not? In a secular worldview, there is neither need for celebrant nor ceremony. As the High Court of Australia perceptively observed,[80] there is no intrinsic reason why a wedding should not be very simple – just the exchange of promises before witnesses.

Yet if this is so, where is the boundary line between marriage and non-marriage? Is a registered partnership in the Netherlands really just a marriage by a different name? What about a registered relationship in Victoria, Australia? Is the intent involved in registering one's partnership with a government office materially different to the expression of intent that is necessary in Washington DC for someone to be married? In reality, all that Washington DC requires is that the parties obtain a licence before making their private commitment to one another.

The law in Australia and certain other countries, including jurisdictions that recognize 'common law marriage' raises a question whether people should be deemed to be married by the fact of cohabitation in an intimate domestic partnership. As Stephanie Coontz has observed, the wall separating marriage from non-marriage is breaking down.[81] If the consequences of non-marriage are the same as for marriage, then what is marriage in civil law but a form of registration?

And if marriage is simply a form of registration which is sufficient, (but not, in Australia even necessary), to confer upon a couple the rights, privileges and observations of marriage, should divorce be anything more than a form of deregistration?[82] In practice, that is all it is in countries with unilateral no-fault divorce statutes such as Sweden and Australia. The divorce still goes through the court, but in Australia, for example, divorces are pronounced by registrars (equivalent to clerks of the court) in a quasi-administrative process. Issues concerning property division, maintenance and parenting arrangements for children are dealt with separately from the divorce itself, with the consequence that a divorce is of no significance other than as a right to remarry. In certain other countries, many divorces are dealt with by administrative process also.[83]

In a secular society, which does not hold to the belief that the State has any role in keeping people together, why

[80] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 462.
[81] Stephanie Coontz, *The World Historical Transformation of Marriage,* 66 J. MARR. & FAM. 974 (2004).
[82] For discussion, see e.g. Richard Ingleby, *Regulating the Termination of Marital Status: Is It Worth the Effort?,* 17 MELB. U. L. REV. 671 (1990)
[83] Katherina Boele-Woelki, et al. Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses (2004).

wouldn't divorce become simply an administrative act of deregistration of a marriage?[84]

6. Conclusion

Can marriage survive secularization? Yes, as the echo of a distant voice reverberates around a canyon for some time after the speaker has ceased to emit sound. Yet marriage has little meaning except insofar as it is rooted in history, faith and culture. Marriage was not first of all a legal institution in any society of the world; it was grounded in culture, custom and faith. To the extent that civil marriage derives its identity, meaning and solemnity from being an echo of the sacred, it will surely not long survive secularization. It may be that it will develop its own identity within a secular culture. Sociologist Andrew Cherlin has observed that as marriage has become deinstitutionalized in American life, it has become more symbolically important, having "evolved from a marker of conformity to a marker of prestige."[85] It is perhaps evolving to become a capstone of a successful intimate domestic relationship, not the foundation stone.[86] This may explain the comparative strength of marriage among the most educated members of American society whose identity is partly defined by the world of work and who, to some extent at least, live out their private lives in public.

This may perhaps put a different perspective on the intense debates about same-sex marriage. For advocates of same-sex marriage the goal has been to obtain access to a status which carries prestige. Marriage is the ultimate form of acceptance of the legitimacy and value of same-sex partnerships. Opponents of same-sex marriage have sought to preserve the historic connection between the religious meaning of marriage and its secular meaning. In the United States, as in many other countries, the former arguments have prevailed, but the opponents of same-sex marriage may prove to be right – that it is another stepping stone towards the eventual decline and fall of the idea of marriage as a civil institution.

At the heart of the problem is not that same-sex couples can marry in many countries. The bigger problem is that the secular State is utterly unable to provide any convincing narrative about what marriage *is*. Yes, marriage is a commitment between two people made before family and friends; but that can happen without the regulatory infrastructure of marriage law. If once marriage was an enforceable contract or covenant, it is no longer in countries which allow for unilateral no-fault divorce.

Like an ancient civilization that loses its battle with the encroaching jungle, we are slowly returning as a society to a pre-Christian state in which the ruins of a stable and healthy marriage culture, deeply embedded in the soil of the Judaeo-Christian tradition, are covered over with the dense leaves and tangled branches of secular confusion about what marriage really means.

Civil marriage, divorced from its religious and cultural heritage, and no longer involving a commitment to a lifelong union, may end up being little more than the name that is given to an intimate domestic partnership which is registered with the State.

Will this mean the end of the wedding industry? Not at all. For the public commitment of one person to one another, and the celebration of love, will long be popular. For some time to come, no doubt, marriage will continue to be a marker of prestige. Nor will secularization mean the complete end of marriage as we now understand it, for where it has deep religious and cultural roots, marriage will continue to matter. However, it will be only one of the accepted forms of intimate dyadic partnership, with non-marital cohabitation and 'living together apart' relationships also becoming established social institutions.[87]

What may not long survive secularization is non-religious marriage in its traditional form, with the State providing an official celebrant and the law regulating the form of the exchange of promises. Marriage without a religious or cultural underpinning has no clear meaning or identity. The echo of the sacred is fading now, and sooner or later, the canyon will lapse back into silence.

[84] Britain's leading family law judge, Sir James Munby, has asked: "May the time not come when we should at least consider whether the process of divorce still needs to be subject to judicial supervision?" Sir James Munby, *21st Century Family Law*, The 2014 Michael Farmer Memorial Lecture, p. 14, available at https://www.judiciary.gov.uk/wp-content/uploads/2014/10/munby-speech-bangor-10102014.pdf

[85] Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marr. & Fam. 848. (2004).

[86] Pamela Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. Marr. & Fam. 966 (2004).

[87] Jan Trost, *The Social Institution of Marriage* 41 J Comp. Fam. Stud. 507 (2010).

FGM and Cutting: An International Response
Culture, Dispute Resolution and the Modernised Family
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1. Introduction

The World Health Organisation defines female genital mutilation (FGM) as '*all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.*' It is usually regarded a customary practice by some cultures and faiths and as a result most procedures are not conducted in surgically safe environments, which usually means that the risk of physical harm to the girls undergoing the knife is further heightened.

FGM is internationally recognised as a violation of women's human rights and a form of child abuse. Just like other forms of gender-based violence, 'it constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and physical and mental integrity'[1] . It also violates the rights of the child as defined in the United Nations Convention on the Rights of the Child.[2]

1.1 Types of FGM

FGM is classified into four major types.[3]

Type 1: Often referred to as **clitoridectomy**, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).

Type 2: Often referred to as **excision**, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).

Type 3: Often referred to as **infibulation**, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).

Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

The complete typology with sub-divisions is described below:[4]

Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy). When it is important to distinguish between the major variations of Type I mutilation, the following subdivisions are proposed:
Type Ia, removal of the clitoral hood or prepuce only;
Type Ib, removal of the clitoris with the prepuce.

Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision). When it is important to distinguish between the major variations that have been documented, the following subdivisions are proposed:
Type IIa, removal of the labia minora only;
Type IIb, partial or total removal of the clitoris and the labia minora;
Type IIc, partial or total removal of the clitoris, the labia minora and the labia majora.

Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation). When it is important to distinguish between variations in infibulations, the

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[1] Council Conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence adopted on 6 December 2012.

[2] European Commission Communication: Towards the elimination of female genital mutilation, Brussels, 25 Nov 2013, page 4

[3] http://www.who.int/mediacentre/factsheets/fs241/en/

[4] http://www.who.int/reproductivehealth/topics/fgm/overview/en/

following subdivisions are proposed:
Type IIIa, removal and apposition of the labia minora;
Type IIIb, removal and apposition of the labia majora.

Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.

1.2 The FGM Procedure and Facts:

The FGM procedure usually involves the partial or total removal or injury of a girl's external genitalia for non-medical reasons and the procedure itself usually is practiced in non-medical or unhygienic conditions and the person undertaking the procedure is not usually medically trained. As mentioned above there are four types of FGM, what this means is the procedure can range from 'pricking or removing parts of the clitoris to removing the clitoris, inner or outer labia and sewing the labia together to close over the majority of the vaginal opening.'[5] Thereby placing the girl who is subjected to the procedure at grave risk of physically injury or in the worst case scenario, the girl could bleed to death.

For those who do survive the procedure, they can live to face many physical health problems and emotional trauma, examples of the health problems include the following[6]:

- Severe bleeding
- Difficulties passing urine or menstruation
- Complications in pregnancy or child birth
- Psychological effects such as post-traumatic stress
- Anger and shame

Despite the obvious health risks, both physical and emotional, FGM is still practiced by different communities and there are many reasons for this, some of the common reasons include the following[7]:

- To preserve cultural identity or maintain tradition
- Social expectations which include recognition, belonging and increasing marriage prospects
- To protect a girl's virginity, decrease her sexual desire or prove that she has not had sex before marriage
- Misinterpretation of religious beliefs
- To symbolise that the girl has become a woman
- Misconceived notions that it enhances a girl's beauty or has hygiene related benefits

The age at which girls undergo FGM varies enormously according to the community. The procedure may be carried out when the girl is newborn, during childhood or adolescence, just before marriage or during the first pregnancy. However, the majority of cases of FGM are thought to take place between the ages of five and eight.[8]

2. Global Response to FGM

'It is estimated that more than 200 million girls and women alive today have undergone female genital mutilation in the countries where the practice is concentrated. Furthermore, there are an estimated 3 million girls at risk of undergoing female genital mutilation every year. The majority of girls are cut before they turn 15 years old.'[9] As a response to such high figures in 2016 the UN set a new theme in 2016 which is to achieve the Global Goals by eliminating FGM by 2030.[10] (This will be discussed in more detail below.)

The World Health Organisation records that the practice of FGM is most prevalent in 29 countries; these are based in the African and Middle Eastern region. The graph below shows the percentage distribution of ages at which girls have undergone FGM and the diagram below shows the regions where women and girls (between the ages of 15 – 49) have undergone FGM in the prevalent areas.

It should be noted that the practice of FGM is not limited to the areas and countries mentioned below. 'Some forms of female genital mutilation have also been reported in other countries, including among certain ethnic groups in Asia and South America. Moreover, growing migration has increased the number of girls and women living outside their country of origin who have undergone female genital mutilation or who may be at risk of being subjected to the practice, including in Europe and North America.'[11]

[5] Engaging Schools on Female Genital Mutilation and Forced Marriage: A Guide for Education Professionals, Create Youth Net, March 2015, page 4
[6] Engaging Schools on Female Genital Mutilation and Forced Marriage: A Guide for Education Professionals, Create Youth Net, March 2015, page 4
[7] Engaging Schools on Female Genital Mutilation and Forced Marriage: A Guide for Education Professionals, Create Youth Net, March 2015, page 5
[8] Serious Crime Act 2015 Factsheet, Female Genital Mutilation, Ministry of Justice/Home Office March 2015
[9] http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/
[10] http://www.un.org/en/events/femalegenitalmutilationday/
[11] http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/

Figure 1
Percentage distribution of ages at which girls have undergone FGM (as reported by their mothers)

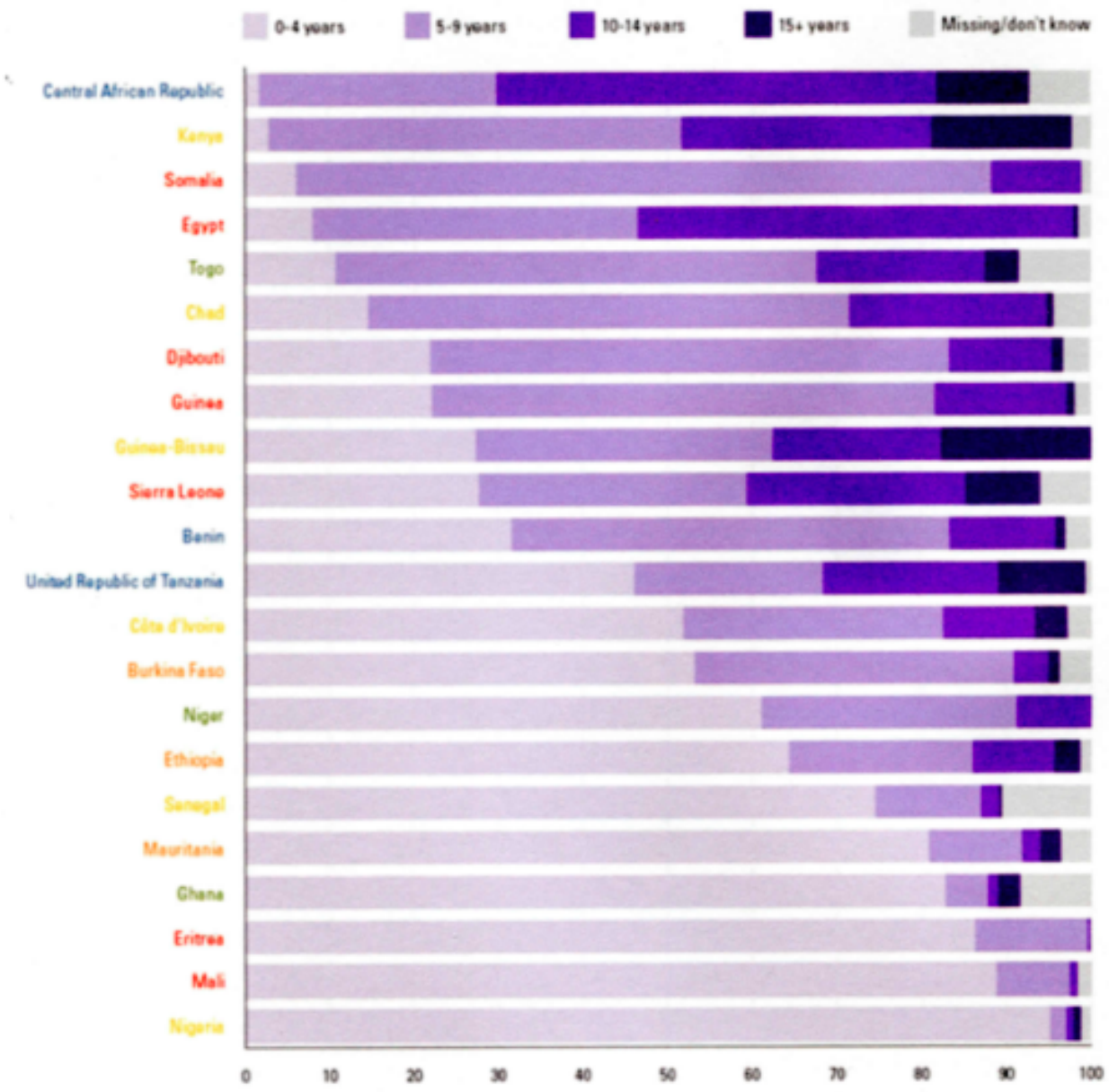
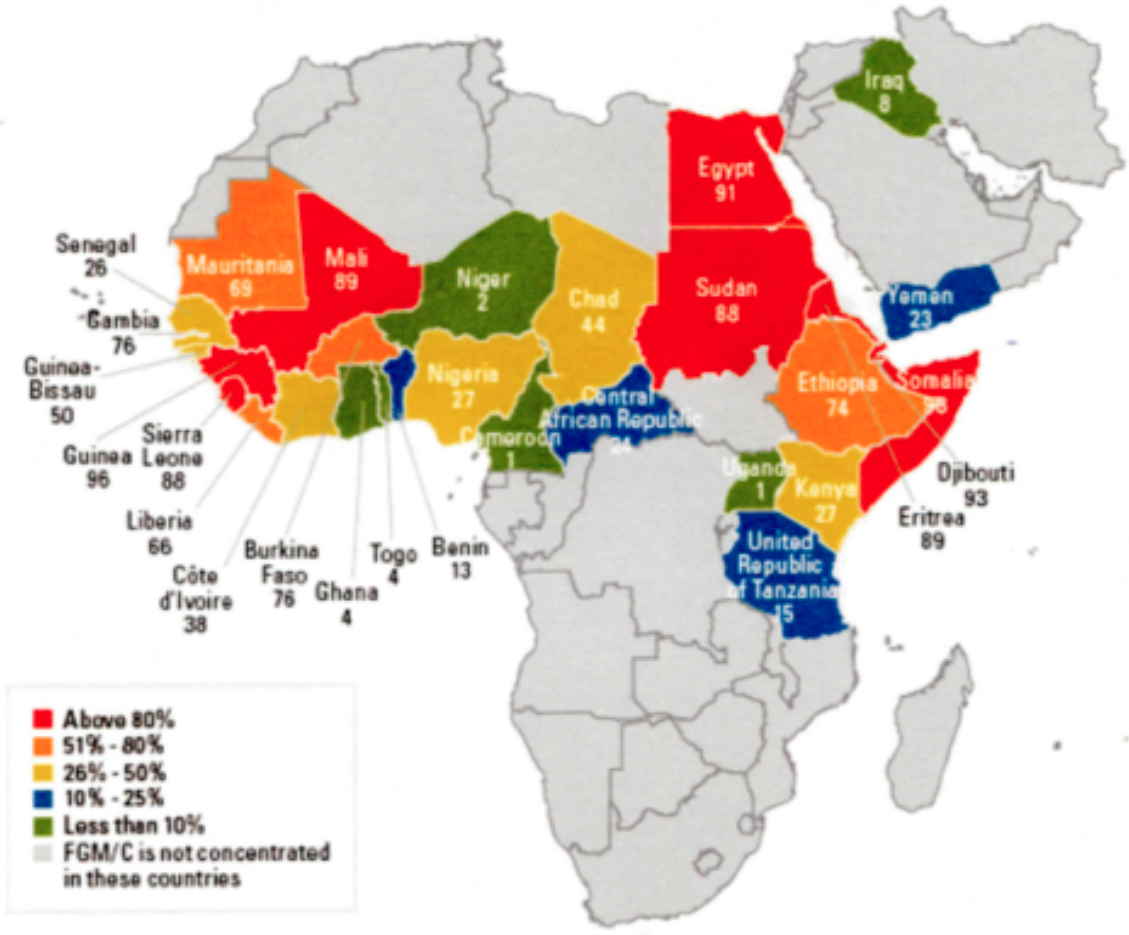


Figure 2
Percentage of girls and women aged 15 to 49 years who have undergone FGM, by country



2.1 United Nations Global Goal[12]

It is estimated that if current trends continue, 15 million additional girls between ages 15 and 19 will be subjected to FGM by 2030[13]. On the International Day of Zero Tolerance for FGM in 2016 the UN set a new theme which is to achieve the Global Goals by eliminating FGM by 2030. In doing so it will mean that many of the Global Goals will also be tackled, in particular Goal 3 on health, Goal 4 on education and Goal 5 on gender equality. According to the UN, '[t]o promote the abandonment of FGM, coordinated and systematic efforts are needed, and they must engage whole communities and focus on human rights and gender equality. These efforts should emphasize societal dialogue and the empowerment of communities to act collectively to end the practice. They must also address the sexual and reproductive health needs of women and girls who suffer from its consequences.'[14]

United Nations Population Fund (UNFPA), jointly with UNICEF, leads the largest global programme to

[12] The 17 goals – known as the Sustainable Development Goals, or simply the Global Goals – aim to transform the world over the next 15 years. They build on the success of the Millennium Development Goals, global objectives adopted in 2000 that have helped to improve the lives of millions of people around the world.
[13] http://www.un.org/en/events/femalegenitalmutilationday/
[14] http://www.un.org/en/events/femalegenitalmutilationday/

accelerate the abandonment of FGM. The programme was initiated in 2007, the first phase of the programme run from 2008 – 2013 and was delivered in the following countries: Djibouti, Egypt, Ethiopia, Guinea, Guinea-Bissau, Kenya, Senegal, Sudan, Burkina Faso, Gambia, Somalia, Uganda, Eritrea, Mali and Mauritania. The results of phase one was as follows[15]:

- National policy or legislation adopted in 12 of the 15 programme countries.
- Protocols for FGM survivors integrated into ante- and post-natal care at 5,500 health facilities
- Training of over 100,000 health practitioners on FGM prevention, response and care
- Public declarations of abandonment in over 12,700 communities
- Public declarations from 20,000 religious and traditional leaders disavowing any religious requirements for FGM

Phase two of the programme started in 2014 and it expanded its work to 17 countries, which included Nigeria, and Yemen, as well as the 15 countries who were involved in phase one. It should be noted that the programme also supports regional (Africa and the Arab States) and global efforts to eliminate FGM.[16]

The stated goal of phase two is 'to build on the momentum toward abandonment established in the first phase. Specifically, it aims for a 40 per cent decrease in prevalence among girls 14 and younger in at least five countries, with at least one country declaring total elimination of the practice by the end of 2017.

While continuing to use the holistic, culturally sensitive and human rights-based approach initiated in phase one, the second phase also focuses on the responsiveness of health and child protection systems to care for women and girls affected by FGM.'[17]

2.2 Global Legislations, Prohibition and Ban

A majority of the countries which participated in the UNFPA-UNICEF joint programme 'accelerating change', either adopted national policy or legislation to tackle FGM, however it must be noted that such measures are not exclusive to those participating countries. Set out below is a list of all countries in Africa that have legislation which either ban, prohibit or criminalise the practice of FGM:

Togo (Law no. 98-016 was enacted to prohibit FGM)

Tanzania (The Penal Code was amended in 1998 which criminalized FGM at Article 169A Penal Code)

Senegal (In January 1999 the Penal Code was amended, article 299 of the Penal Code criminalizes FGM)

Niger (Law no. 2003-025 made an amendment to the Penal Code which criminalized all forms of FGM)

Mauritania (Ordinance no. 2005-015, Chapter II Article 12 Penal Code prohibits the practice of FGM on infants and children, defined as those below the age of 18)

Mali (On 24th June 2002 law no. 02-044 was passed on reproductive health, this outlawed FGM while ordinance 04-019 incorporated the Maputo Protocol into law)

Kenya (The Children's Act No. 8 of 2001 prohibits FGM of persons under the age of 18 years at section 14)

Guinea (In February 2006 legislation was passed against FGM)

Ghana (In 1994 an amendment to the criminal code made FGM a criminal offence)

Egypt (Ministerial decree 1996 prohibits FGM)

Djibouti (In 1995 the Penal Code was amended to include prohibition on FGM)

Cote d'Iviore (In 1998 legislation was passed to prohibit FGM)

Chad (Law no 6/PR/2002 on the promotion of reproductive health has provisions prohibiting FGM)

Central African Republic (In 1996 the then president issued an ordinance prohibiting the practice of FGM)

Burkina Faso (On 13th November 1996 law no. 43/96/ADP was enacted)

Uganda (On 10th December 2009 the Ugandan Parliament passed a law banning the practice of female genital mutilation) [18]

Benin (On 3rd March 2003 law was passed banning all forms of FGM)

Nigeria (Violence Against Persons (Prohibition) Act 2015, section 20 prohibits 'harmful traditional practices'[19])

Eritrea, Ethiopia, Gambia, Liberia, Sierre Leone, Somalia and Sudan do not have specific legislation or provisions which tackle the issue of FGM. Guinea Bissau, also does not have any FGM specific laws but their penal provisions may be applicable. Cameroon does not currently have FGM laws; however there is provision to deem FGM as grievous bodily harm at article 277 –281 of the Penal Code. In the Democratic Republic of Congo there is no FGM specific legislation but the Penal

[15] http://www.unfpa.org/joint-programme-female-genital-mutilationcutting#
[16] http://www.unfpa.org/joint-programme-female-genital-mutilationcutting#
[17] http://www.unfpa.org/joint-programme-female-genital-mutilationcutting#
[18] http://www.loc.gov/law/foreign-news/article/uganda-new-law-bans-female-genital-mutilation/
[19] Prior to this legislation being enacted, certain states in Nigeria had already banned FGM, namely, Abia, Bayelsa, Cross River, Delta, Edo, Ogun, Osun and Rivers (http://www.ecoi.net/local_link/144821/259833_de.html)

Code article 46-48 on 'intentional bodily injury' can be used to address FGM. [20]

3. EU Response to FGM

According to the World Health Organisation, every year, millions of women and girls in the EU and around the world are subjected to the brutal practice of FGM and many more are at risk. In the EU, the figure of 500,000 victims is commonly cited[21].

Research was conducted by the European Institute of Gender Equality (EIGE) in 2013, where they set out to obtain an idea of the estimated number of women and girls in Europe who were victims and potential victims. The findings are set out below:

On 6th February 2013 on the occasion of the International Day of Zero Tolerance against FGM, a joint statement was made by the European Commission and the European External Action Service to remain fully

Country	Criminal law provisions against FGM	Estimated no. of women with FGM (date of study) 6,260 (2011)	Estimated no. of girls at risk of FGM	Estimated no. of women from FGM-affected regions living in the EU (where no FGM-specific data is available)
Belgium	Specific	No data available	**1,975**	
Bulgaria	General	No data available	No data available	
Czech Republic	General	No data available	No data available	
Denmark	Specific	**19,000 (2007)**	No data available	15,116
Germany	General	No data available	**4,000**	
Estonia	General	**3,170 (2011)**	No data available	
Ireland	Specific	**1,239 (2006)**	No data available	
Greece	General	No data available	No data available	
Spain	Specisic	**61,000 (2007)**	No data available	30,439
France	General	**35,000 (2009)**	No data available	
Italy	Specific	No data available	**1,000**	
Cyprus	Specific	No data available	No data available	1,500
Latvia	General	No data available	No data available	
Lithuania	General	No data available	No data available	
Luxembourg	General	**170-350 (2012)**	No data available	
Hungary	General	No data available	No data available	
Malta	General	**29,210 (2013)**	No data available	
Netherlands	General	**8,000 (2000)**	**40-50 each year**	
Austria	Specific	No data available	No data available	
Poland	General	No data available	No data available	
Portugal	General	No data available	No data available	9,263
Romania	General	No data available	No data available	
Slovenia	General	No data available	No data available	
Slovakia	General	No data available	No data available	
Finland	General	No data available	No data available	4,400
Sweden	Specific	65,790 (2007)	No data available	91,420
UK	General	No data available	**30,000**	
Croatia	Specific	No data available	No data available	

[20] http://www.npwj.org/FGM/Status-african-legislations-FGM.html

[21] European Parliament: Resolution on ending female genital mutilation from 16/06/2012 (2012/2684(RSP)).

committed to combat all forms of gender based violence, this included FGM.[22] It was stated that priority should be given to prevention of FGM in order to ensure that no girl will ever again have to experience this traumatic breach of their rights.

It was also suggested that there would be provisions to complement existing national legislation and awareness raising programmes would be devised. The programmes would highlight the detrimental effects of FGM both on the psychological and physical health of women and girls and there would also be support services created for victims.

A commitment was made that *'[w]ithin the EU, the new victims' directive will make sure that victims of violence against women, including victims of this harmful practice, get the specialised support and attention they need.*

Particular attention is also given to this group in our asylum legislation. Women who are at risk of female genital mutilation, or parents who fear persecution because they refuse to have their child undergo this practice can be granted international protection in the EU.'

This commitment encompasses the breadth of protection and support which a potential victim or an existing survivor of FGM may require.

Notably some Member States (such as Belgium, France, Italy, Sweden and the UK[23]) have set up health centres specialising in care for victims of FGM, providing mostly gynaecological services, in particular for pregnant women. This is useful for existing adult survivors, however services would need to be adapted for younger girls.

3.1 EU Services Available

The European Commission has funded projects to support Member States' and civil society organisations in raising awareness of FGM. Some of these included:

The French Women's Rights and Gender Equality Administration to create a campaign aimed at raising awareness of measures recently introduced to combat FGM.

The UK Home Office developed a project that raised awareness about FGM as a child protection issue and also the need to combat the practice.

The National Commission for the Promotion of Equality for Men and Women in Malta raised awareness of and provided information on FGM, including among professionals who work with victims or perpetrators.

The project "CREATE YouthNet" implemented by FORWARD (UK) aimed to safeguard young people from harmful practices, in particular FGM and forced marriage, by empowering them to be confident advocates for change and peer mentors within their communities.

The project "Change: Promoting Behaviour Change Towards the Eradication of FGM" run by Terre des Femmes (Germany) which enabled practising communities across the EU to advocate against FGM by empowering influential members within these communities.

Coventry University developed a project where they worked with the original Somali and Sudanese communities from the REPLACE project, which took a health behaviour change approach, combined with participatory action research methods to identify particular behaviours and attitudes that contribute to FGM within the EU.[24]

These are examples of some of the projects and initiatives which were set up on European Commission funding, however each Member State has various internal initiatives and projects which also raise awareness and provide support to FGM survivors.

3.2 Prosecuting FGM

FGM is a prosecutable offence in all EU Member States, either through general criminal legislation or through specific criminal law provisions. Belgium, Denmark, Ireland, Spain, Italy, Cyprus, Austria, Sweden, UK and Hungary have specific provision or FGM specific legislation.[25] The general provision will also include a principle of extra-territoriality in order to ensure that it is possible to prosecute FGM when it is committed abroad, if the victim and /or the person(s) exercising or planning the procedure are nationals of the investigating country.[26] Although the legislation may provide the relevant sanctions, the relevant court cases help to highlight the core legal issues around FGM. For instance, there was a case in Spain, where the parents were recently sanctioned for mutilating their child before her migration to Europe. This case highlighted that

> *the issue of* ***the best interest of the child*** *should be raised as a primary concern throughout any criminal proceeding (from investigation through to sentencing), e.g to prevent a child from becoming a victim twice, first due to FGM and then due to being removed from parental care.*[27]

[22] The full memo can be found on this link: http://europa.eu/rapid/press-release_MEMO-13-67_en.htm?locale=en
[23] EIGE 2013.
[24] International Day for Elimination of Violence Against Women: European Commission takes action to combat Female Genital Mutilation, European Commission Press Release, 25 Nov 2013, page 5
[25] http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf page 7
[26] http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf page 8
[27] http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf page 8 - 9

The EU's Qualification Directive[28] ensures eligibility for international protection for women who have a well-founded fear of persecution or who face the risk of suffering FGM. FGM would be considered persecution under 'acts of physical or mental violence, including acts of sexual violence;' and 'acts of a gender-specific or child-specific nature.' The protection is extended to parents who fear persecution or face a real risk of suffering serious harm because they refuse to consent to their child undergoing FGM.[29] The 'revised Qualification Directive'[30] strengthens protection for those fearing FGM.[31]

3.3 FGM and Asylum in the EU

In 2013, over 25,000 women and girls sought asylum on the basis of FGM within an EU country and there have been a growing number of cases which were reported since 2008. The women and girls came from various countries, but a majority of the cases came from Somalia, Eritrea, Nigeria, Iraq, Guinea, Egypt, Ethiopia, Mali and Côte d'Ivoire.

The intriguing fact about the cases from Iraq was that the number of women and girls seeking asylum from the country had in fact decreased between 2008 – 2013 and it has been identified that the FGM prevalence was mostly concentrated in the Kurdistan region. However the other regions had shown an increase of cases, "from Eritrea (two-fold), Guinea (four-fold) and Egypt (14-fold). The number of Ethiopian and Ivorian female applicants ha[d] also steadily increased. Lastly, the number of women and girls seeking asylum from Mali ha[d] been multiplied by over 40." Notably these asylum applications were spread across a few European countries, namely Germany, Sweden, the Netherlands, Italy, France, the UK and Belgium.[32]

3.4 EU Qualification Directive Checklist (Duties)

The recast Directive on Reception Conditions for Asylum Seekers[33] introduced gender specific reception conditions which will also apply to those fearing FGM, namely:

The special needs of all vulnerable female applicants will need to be identified in a timely manner;

Those subjected to serious acts of violence should have access to rehabilitation services to obtain the necessary psychological and medical support; and

Accommodation facilities should be gender sensitive

The EU Qualification Directive ensures eligibility for international protection for women and girls with a well-founded fear of persecution or facing the risk of suffering FGM. To fulfil its provisions Member States must:

1. Take into account the individual position and personal circumstances of the applicant such as background, gender and age;
2. Recognise asylum claims based on acts of persecution such as acts of sexual violence and acts of a gender specific or child-specific nature – with FGM falling under this scope;
3. Cooperate with the applicant in order to assess the relevant elements of the asylum application;
4. Take into account the situation of vulnerable persons such as minors, pregnant women, single parents with minor children, persons who have been subjected to physical or sexual violence, as well as the best interests of the child;
5. Give special consideration to applications from children and to have regard to child-specific forms of persecution;
6. Not apply the cessation of refugee status to a refugee who is able to provide compelling reasons arising from previous persecution for refusing to seek protection of their country of nationality;
7. Uphold the principle of family unity, especially when assessing the best interests of the child;
8. Ensure that staff in charge of implementing the directive are properly trained and bound by the confidentiality principle.[34]

3.5 Istanbul Convention 2014

The Council of Europe Convention on preventing and combating violence against women and domestic

[28] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[29] http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf page 9
[30] Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
[31] http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf page 9
[32] This represents a slight change from the distribution of asylum countries in the EU in 2011 (France, Italy, Sweden, UK, Belgium, Germany, Netherlands) due mainly to the inclusion of applicants from Iraq in this update (they sought asylum in Germany in the main); the increase in the number of Somali female applicants (Netherlands, Sweden, Germany); the increase in Eritrean applicants who sought asylum in Sweden, Germany and Italy; the increase in the number of female asylum-seekers from Egypt (Germany, Italy, France); and the reduction in the number of applicants from Guinea in Belgium. (Too Much Pain, Female Genital Mutilation & Asylum in the European Union, a Statistical Update, March 2014)
[33] Directive 2013/33/EU laying down standards for the reception of applicants for international protection.
[34] FGM in EU Asylum Directives on Qualification, Procedures and Reception Conditions, END FGM Network Guidelines for Civil Society, March 2016, page 17

violence (Istanbul Convention), which entered into force on 1 August 2014, provides an additional level of protection on top of the existing national, EU and international legal instruments aimed to combat violence against women. Crucially, the Istanbul Convention specifically lists FGM as a form of gender-based violence which it aims to combat.[35]

The Istanbul Convention is legally binding to those Member States of the Council of Europe who have ratified it, currently only 22 EU countries have ratified the Istanbul Convention. These include Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Denmark, Spain, Finland, France, Italy, Malta, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Sweden and Turkey.[36] The UK signed the Istanbul Convention in 2012 but has not yet ratified it. Therefore it appears that one way to strengthen the level of protection available to survivors or potential victims of FGM, would be for all members states to ratify the Istanbul Convention.

4. FGM in the United Kingdom

In England between January and March 2016 there were 1,242 newly recorded cases of FGM including on 11 girls born in the UK[37] and at least two per cent of all new cases were girls under the age of 18.[38] Between March – June 2016 more than 1,200 cases of FGM have been recorded.

5 Criminalisation - v - Civil Law Remedies

FGM is recognised as a crime throughout the UK. The Female Genital Mutilation Act 2003 ("the 2003 Act") replaced the Prohibition of Female Circumcision Act 1985 in England, Wales and Northern Ireland. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 replaced the 1985 Act in Scotland.[39] Under the 2003 Act a person is guilty of an offence (under section 1) if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris. A person is also guilty of an offence (under section 2) if he aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris. The 2003 Act stated under section 3 that it only concerns acts done by UK nationals and permanent UK residents to girls or women who are also UK nationals or UK residence.

In July 2014, the UK Government and UNICEF hosted the first Girl Summit[40], aimed at mobilising domestic and international efforts to end FGM. The Government made a number of commitments for new legislation to tackle FGM.[41] Consequently, in 2015 the Female Genital Mutilation Act 2003 was amended by the Serious Crime Act 2015. Notably the general offences from the 2003 Act still remain in all cases of FGM. Section 70 of the 2015 Act amended sections 1 - 3 of the 2003 Act to add an extra territorial aspect, so that the provisions apply to offences relating to UK nationals and those habitually resident rather than only to UK nationals. Under section 71 of the 2015 Act, the amendments make a provision of anonymity for the victim; this prevents any material which would lead to the public knowing the identity of the victim from being published in the victim's lifetime.

Section 72 of the 2015 Act inserted section 3A into the 2003 Act, which sets out the new offence of failing to protect girls from risk of genital mutilation. This new offence is in respect of individuals such as parents/guardians or those with *locus parentis* who fail to protect girls under the age of 16 from genital mutilation. Therefore if an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time of the FGM will be liable under this new offence. The maximum penalty for the new offence is a seven years' imprisonment or a fine or both.

Under section 73 of the 2015 Act it is now possible to obtain civil injunctive remedies in the form of female genital mutilation protection orders (FGMPO). Section 74 of the Act also introduced a mandatory reporting duty upon specified professionals, who must notify the police if they discover an act of FGM appears to have been carried out on a girl who is aged 18 and under.

These amendments have changed the way individuals and practitioners are now accountable in ensuring that girls are protected from FGM.

5.1 Duty on Individuals to Protect Girls

Section 3A of the FGMA 2003 sets out the offence of failing to protect a girl from risk of genital mutilation and section 3A(1) states the following: *If a genital mutilation offence is committed against a girl under the age of 16, each person*

[35] Article 38a, Council of Europe Convention on preventing and combating violence against women and domestic violence.
[36] http://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/210/signatures
[37] This is reported across the NHS in England, according to newly released data from the Health and Social Care Information Centre
[38] http://www.independent.co.uk/life-style/health-and-families/health-news/more-than-1200-cases-of-fgm-recorded-in-england-in-just-three-months-a7069901.html
[39] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416323/Fact_sheet_-_FGM_-_Act.pdf
[40] https://www.gov.uk/government/topical-events/girl-summit-2014
[41] Serious Crime Act 2015 Factsheet, female genital mutilation, Ministry of Justice/Home Office March 2015

who is responsible for the girl at the relevant time is guilty of an offence.

Section 3A (2) further states that: *For the purposes of this section a person is "responsible" for a girl in the following two cases.*

(3) The first case is where the person—

(a) has parental responsibility for the girl, and

(b) has frequent contact with her.

(4)The second case is where the person—

(a) is aged 18 or over, and

(b) has assumed (and not relinquished) responsibility for caring for the girl in the manner of a parent.

Therefore this now places a clear duty on parents with parental responsibility or those in *locus parentis* of a girl under the age of 16 to protect a girl from FGM.

There is also a duty on parents who are still caring for a female of age 18 and above to protect the female from FGM, this provision awards protection to vulnerable adults.

There is no clear guidance on the duty in relation to a protected party who is the over the age of 18. However it would be reasonable to assume that this provision would cover a vulnerable adult who suffers from a mental health condition and is still being cared for by their parents/guardians. The other practical scenario which it would cover would be when the parents/guardian of a female adult threatens to make the female adult homeless or withdraw financial support if she does not undergo FGM. This type of pressure or coercion is very common in honour based crimes.

Should the parents be found guilty of either organising an FGM procedure in the UK or abroad or arranging a trip abroad of a girl, knowing that the relatives will subject the girl to FGM, then the parents/guardians will be guilty of an offence.

5.2 Female Genital Mutilation Act 2003 - New Protection Powers

Section 73 of the 2015 inserted section 5A into the FGMA 2003 which states the following:

(1)The court in England and Wales may make an order (an "FGM protection order") for the purposes of—

(a)protecting a girl against the commission of a genital mutilation offence, or

(b)protecting a girl against whom any such offence has been committed

Now it is possible to apply for Female Genital Mutilation Protection Orders (FGMPO) for the purposes of protecting a girl against the commission of a genital mutilation offence or protecting a girl against whom such an offence has been committed. It is a criminal offence to breach an FGMPO and the maximum penalty for the breach is five years' imprisonment, or as a civil breach is punishable by up to two years' imprisonment.[42]

An application for an FGMPO may be made by the girl who is to be protected by the order, or a relevant third party. The potential respondents to the application would be the girls parents/guardian, relatives or any other person who may be a party to arranging or subjecting the girl to an FGM procedure.

An application for an FGMPO can be lodged at a county court or at the high court, the first application will usually be an ex-parte (without notice) application. Where there are complex issues and ancillary orders such as passport orders are required, the application **must** be made at the high court.

5.3 Mandatory Reporting Duty

Section 74 of the 2015 Act introduced section 5B into the FGMA 2003 which states the following which states the following:

(1)A person who works in a regulated profession in England and Wales must make a notification under this section (an "FGM notification") if, in the course of his or her work in the profession, the person discovers that an act of female genital mutilation appears to have been carried out on a girl who is aged under 18.

This amendment effects specified professionals, as there is now a mandatory duty upon them to report FGM if they discover it on a girl under the age of 18. The remit of the duty, the professionals effected and the impact will be further discussed below.

5.4 The Children Act 1989

Although FGM is a crime in the UK, as the primary victims are children namely young girls, this matter is usually treated as a child protection issue. It would be highly unusual where there is a real threat of FGM or where it has occurred where the general child protection jurisdiction was not also invoked.

Therefore in England and Wales[43] where a child is at risk of being subjected to FGM or has been subjected to FGM, the starting point would be the Children Act 1989. Section 1 of the Children Act states:

'(1)When a court determines any question with respect to—

(a)the upbringing of a child; or

(b)the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.'

[42] https://www.gov.uk/government/consultations/female-genital-mutilation-proposal-to-introduce-a-civilprotection-order

[43] The discussion on the legislation will focus on England and Wales. In Scotland the main legislation which tackles the issue of FGM is the Prohibition of Female Genital Mutilation (Scotland) Act 2005, as amended by the Serious Crimes Act 2015.

Section 31 (2) states that a court may make a care or supervision order if it is satisfied that the child concerned is suffering or is likely to suffer significant harm **and** the harm or likelihood of harm is attributable to the care given to the child or likely to be given to them if the order were not made.

If a child is at risk or has already been subjected to FGM and is aged 17 or under they will be perceived to have met the threshold of risk, in such a case the Local Authority/Social Services could obtain the relevant orders. Furthermore if the protected person is under 17 years of age and the risk of FGM is proved or the child has been subjected to the FGM then under section 37 (1) of the Act the court has the power to take protective actions in relation to the younger siblings in the family who could also be at risk. Section 37 *(1)* states:

'Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.'

In emergency situations where the police have to intervene, for instance if there is a report that there is imminent risk of a child being subjected to FGM, then in order to protect the child the police can make an application for an Emergency Protection Order under section 44 of the Act.

5.5 Senior Courts Act 1980

In England and Wales it is recognised that minors under the age of 18 may require additional protection, if they are at risk of being subjected to FGM. Therefore it is possible to make an application under the inherent jurisdiction of the high court and pursuant to section 41 of the Senior Courts Act to protect minors. The high court can make the minor a Ward of the high court and make ancillary orders, such as passport orders, which can order the removal of the minor's passport to prevent them from being removed from the jurisdiction of England and Wales. The high court can also order a port alert to be put into place, so that the minor cannot leave England and Wales from any port.

If the minor is taken outside of England and Wales prior to any immedate injunctive action being taken, the habitual residence of the minor still remains within England and Wales and the court can exercise the wardship jursidiction. The case of *A v A* [2013] EWHC 3554 (Fam) stated that if there is a British national overseas the high court still has jurisdiction and can order protective measures in relation to that child. This is a useful tool in FGM cases where the child is a British national but may not have lived here or not lived here for a long time or has lawfully been sent to another jurisdiction and the child becomes at risk of FGM.

It should be noted that there are restrictions on use of the wardship jurisdiction, these are set out at section 100 of the 1989 Act which states the following:

> *(1)Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.*
>
> *(2)No court shall exercise the High Court's inherent jurisdiction with respect to children—*
>
> *(a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;*
>
> *(b) so as to require a child to be accommodated by or on behalf of a local authority;*
>
> *(c) so as to make a child who is the subject of a care order a ward of court; or*
>
> *(d)for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.*

Therefore under section 100(3) no application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority has obtained the leave of the court. The court may grant leave if it is satisfied under section 110 (4) that:

> *(a)the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5)[44] applies; and*
>
> *(b)there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.*

Therefore the court will exercise its wardship jurisdiction in cases where the local authority is involved, only where a care or supervision will not award a relevant child the required protective measures.

5.6 Forced Marriage Act 2007

In many cases where a vulnerable adult is at risk of FGM, there may also be a risk of a forced marriage, in those circumstances an additional application can be made for a Forced Marriage Protection Order. In England and Wales early and forced marriages will be dealt with under the Forced Marriage Act 2007. Under section 63A (1) of this legislation it is possible to obtain a Forced Marriage Protection Order, to either prevent a

[44] Section 110 (5) states the following: This subsection applies to any order—
(a)made otherwise than in the exercise of the court's inherent jurisdiction; and
(b)which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)

forced marriage from taking place or to protect someone who has already been forced into a marriage.

5.7 FGM Case Study

A working case study is set out below in which Dawson Cornwell were instructed by the father, this is an example of a case where proceedings should be initiated at the high court.[45]

There was a British girl (GB) of age 7, she was ethnically Somalian. Her primary carer was her maternal aunt (AB) and the father (FB). Her mother (MB) was in Somalia. MB returned from Somalia and stated that she wanted to care for the daughter. She removed the daughter from the AB's care and took her to Somalia, without FB's consent.

FB was concerned that GB was at risk of FGM, as MB and AB had undergone the procedure and this was viewed as a normal practice in their family. FB issued FGM and Wardship proceedings at the high court. Dawson Cornwell obtained the following orders in order to protect GB:

- FGM orders to prevent the procedure
- GB was made a Ward of the high court
- Order for the return of GB to the UK
- Passport orders against the maternal aunt in order to find out the location of the child

Through these mechanisms FB was able to locate GB in Somalia and negotiate with MB. MB also provided medical confirmation that GB was not subjected to FGM.

It should be noted that it is possible to envisage a situation where in all other respects the parents are good parents and there are no other risks should that child remain in the family home with the parents. The FGMPO should prevent any risk of FGM in the future, the child could live with the family, so long as the parents accept the action is wrong, co-operate with authorities and support workers and submit to an order.

5.8 FGM Prosecution

The first prosecution for an offence of FGM came to light in England in March 2014. Dr. Dhanuson Dharmasena from Ilford, Essex, was arrested and charged, it was alleged that he had carried out FGM while working at Whittington Hospital in North London in November 2012. Hasan Mohamed from North London, faced a charge of aiding and abetting FGM. It was alleged that Dr. Dharmasena "repaired" FGM on a patient after she gave birth. By repairing the FGM he allegedly conducted the mutilation himself. It was alleged that he was encouraged to do so by Mr. Mohamed.[46] They appeared at Westminster Magistrates Court on 15th April 2014 and pleaded not guilty.

Dharmasena stitched up the mother following the birth of her first child at the Whittington hospital in London in November 2012. Dharmasena told the court: "I decided to put in a suture to stop the bleeding."[47] He said he had sutured her with a single stitch to stop her bleeding from an incision required for childbirth, because she had previously been subjected to FGM in Somalia (this was her place of ethnic origin). After the birth, he repaired the cut. The jury found both Dr Dharmasena and Mr Mohamed not guilty in February 2015. Consequently, there have still not been any criminal convictions from FGM in England and Wales.

This case highlighted the onus on health care professionals in such a situation to ensure that they are adequately trained to follow the proper procedure so they do not conduct a medical procedure which may constitute FGM.

6: Implications of Reporting Obligations

In England and Wales there is a high burden on healthcare professionals and the local authority to protect FGM victims. Therefore in order to mitigate the risk of FGM and also to protect young girls, there is now a mandatory duty on those in a regulated profession to notify police of FGM. Section 5B of the FGMPA states the following:

> *'(1)A person who works in a regulated profession in England and Wales must make a notification under this section (an "FGM notification") if, in the course of his or her work in the* ***profession****, the person* ***discovers*** *that an act of female genital mutilation appears to have been carried out on a girl who is aged under 18.'*

6.1 Professionals Effected

A person works in a "regulated profession" if the person is:

> *a healthcare professional, (a person registered with any of the regulatory bodies mentioned in section 25(3) of the National Health Service Reform and Health Care Professions Act 2002 (bodies within remit of the Professional Standards Authority for Health and Social Care))*
> *a teacher, or*
> *a social care worker in Wales*

[45] This is a real case, however the names of the parties and child have been anonymised in order to protect the identity of the child and parties.
[46] http://www.theguardian.com/society/2014/apr/15/fgm-first-suspects-charged-court
[47] http://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena

6.2 Duty Arises at Point of 'Discovery'

A person "discovers" that an act of FGM appears to have been carried out on a girl in either of the following two cases.

- Where the girl informs the person that an act of FGM (however described) has been carried out on her.
- Where

(a) the person observes physical signs on the girl appearing to show that an act of FGM has been carried out on her, and

(b) the person has no reason to believe that the act was, or was part of, a surgical operation within section 1(2)(a) or (b).

6.3 Notification Procedure

When an FGM has been discovered either through direct disclosure from the girl or if the professional has observed the physical signs on a girl, then the notification procedure is set out under section 5B(5). An FGM notification must be made to the police in the following way:

(a) is to be made to the chief officer of police for the area in which the girl resides;

(b) **must** identify the girl and explain why the notification is made;

(c) **must** be made before the end of one month from the time when the person making the notification first discovers that an act of FGM appears to have been carried out on the girl;

(d) may be made orally or in writing.

Although the legislation sets out that the notification must be made to the chief officer of police, the practical guidance states that the report can be made via a 101 call and by reporting the discovery to the local police station.[48]

The duty of a person working in a particular regulated profession to make an FGM notification does not apply if the person has **reason** to believe that another person working in that profession has previously made an FGM notification in connection with the same act of FGM. However to be on the safe side, in practice it is better to report the matter then not act.

The map on p. 63 sets out when the mandatory reporting duty applies and when the matter is a safeguarding issue and therefore the safeguarding procedure of the relevant organisation should be used.[49]

6.4 Failure to Comply With the Duty

Cases of failure to comply with the duty will be dealt with in accordance with the existing performance procedures in place for each profession. FGM is child abuse and employers and the professional regulators are expected to pay due regard to the seriousness of breaches of the duty.

6.5 Health and Social Care Professionals

For health and social care professionals, failure to comply with the duty may be considered through fitness to practice proceedings by the regulator with whom the professional is registered.

Regulators will use their frameworks to consider a professional's ability to practice safely. This will therefore take all aspects of the circumstances of the case into consideration, including the safety of the individual child and her immediate needs. This may result in a wide variety of recommendations as to suitable action (e.g. re-training or supervision). Regulators may wish to issue guidance to their registrants as to how to act and when action may be taken.

6.6 Teachers

For teachers, schools will need to consider any failure to comply with the duty in accordance with their staff disciplinary procedures. Where the school determines it is appropriate to dismiss the teacher as a result of the failure to comply, or the teacher would have been dismissed had they not resigned, the school must consider whether to refer the matter to the National College of Teaching and Leadership (NCTL) in England or the Education Workforce Council (EWC) in Wales, as regulators of the teaching profession.

For teachers in England, the NCTL will consider referrals to determine whether the facts presented in respect of the individual's failure to comply with the duty are proven and whether they amount to unacceptable professional conduct or conduct likely to bring the profession into disrepute. If proven, the NCTL will consider whether it is appropriate to make a prohibition order which prevents the individual from carrying out teaching work in any school, children's home, sixth form college, and relevant youth accommodation in England.

For teachers in Wales, in considering cases the EWC will look at the individual's conduct and consider whether their failure to comply with the duty was so serious that it should affect their registration, which may include initiating fitness to practise proceedings.

7. Development of Case Law in the UK

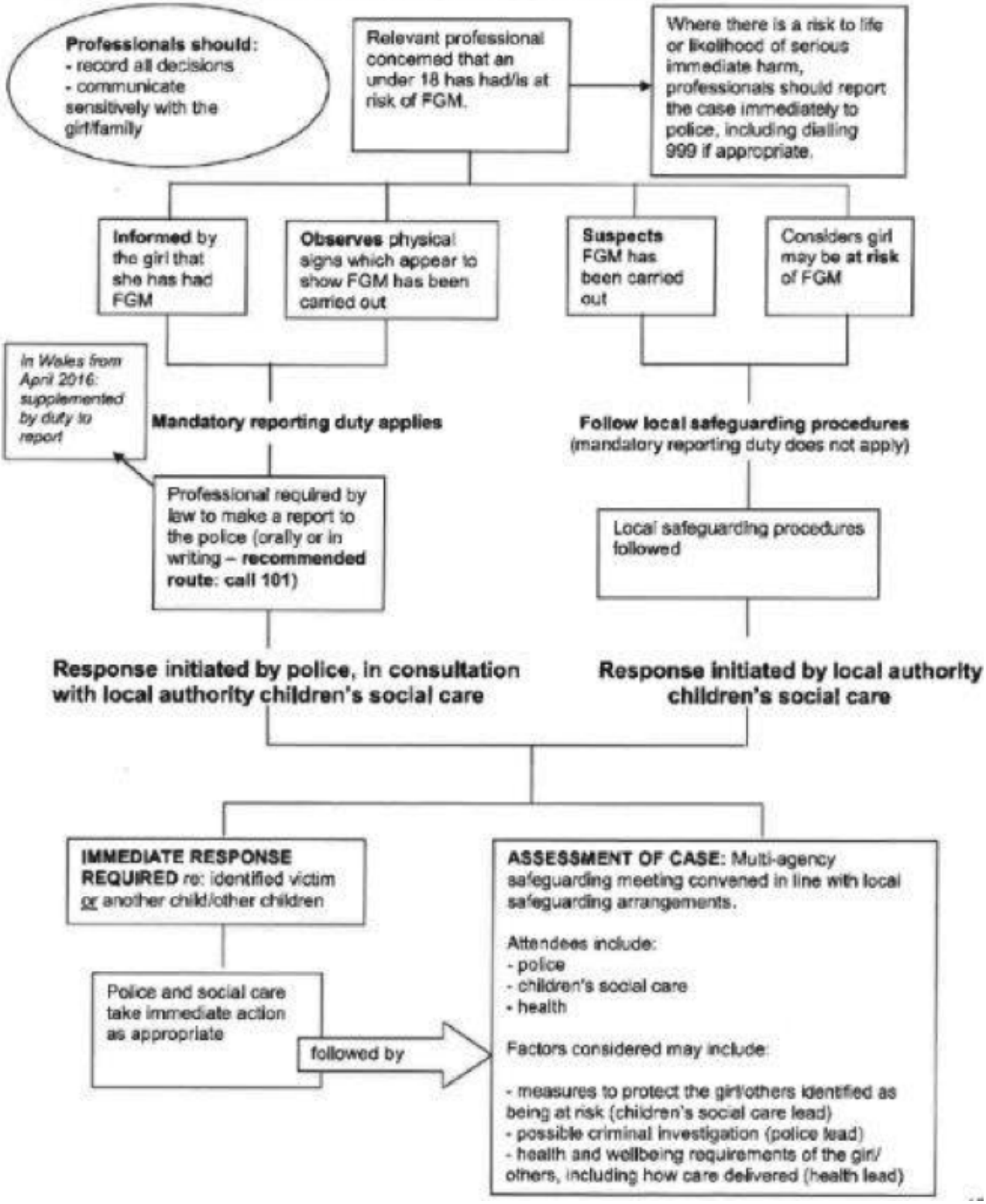
There have been various cases which have been brought before the high court that have sought to tackle

[48] Mandatory Reporting of Female Genital Mutilation – procedural information, Home Office, 20 Oct 2015, page 6

[49] Mandatory Reporting of Female Genital Mutilation – procedural information, Home Office, 20 Oct 2015, page 12

Annex A – FGM mandatory reporting process map

This process map is intended to demonstrate where the FGM mandatory reporting duty fits within existing processes. It is not intended to be an exhaustive guide, and should be considered in the context of wider safeguarding guidance and processes.



the issue of FGM, either to determine whether FGM was a risk in the case and if so, the level of risk. The tone of how FGM is viewed as an issue within the judicial remit was set out in the case of *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2005] 1 FLR 308, where Sir James Munby, President of the Family Division described the act as "*barbarous*".

Following this sentiment, when the case of *B and G (Children) (No 2)* [2015] EWFC 3 appeared before the President, although he found it difficult to identify that the young girl in this case had been subjected to FGM, he used this opportunity to provide guidance on how to handle suspected cases of FGM, both for legal practitioners in care matters and for health care practitioners in ways to examine a suspected FGM survivor.

7.1: B and G (Children) (No 2) [2015] EWFC 3

The background of the case was that there were care proceedings in relation to two children, B, a boy, born in July 2010 and G, a girl, born in July 2011 (these are not their real initials). In terms of their ethnic origin, both the father, F, and the mother, M, come from an African country, although the mother was born and brought up in a Scandinavian country. The family were of the Muslim faith. The proceedings were commenced in November 2013 and were triggered by M's seeming abandonment of G in the street. B and G were placed in foster care the same month and remained with the same foster carer throughout the proceedings.

It was alleged that G had been subjected to FGM, she was subsequently medically examined. '*The Local Authority submitted this would nonetheless constitute significant harm for the purposes of section 31 of The Children Act 1989. Initially, it was the position of the Local Authority that a finding of FGM would alone be sufficient to justify care proceedings for both children. The President queried this position, and, the argument that FGM alone would render adoption proportionate was withdrawn.*'[50]

The key issues in the case were as follows:

- Was G subjected to FGM as alleged?
- Did this amount to significant harm?
- What would the implications be for G and B's future in the context of care proceedings?

During the course of these proceedings the President heard evidence about the FGM from three separate experts and found on the balance of probabilities that G was not subjected to FGM. Although the practical necessity to address question 2 and 3 were rendered obsolete at this point, the President addressed these issues nonetheless due to the public importance of the issues.

In addressing his reasoning the President created a distinction between FGM and male circumcision [para 72]*:*

> *FGM has no basis in any religion; male circumcision is often performed for religious reasons. FGM has no medical justification and confers no health benefits; male circumcision is seen by some (although opinions are divided) as providing hygienic or prophylactic benefits. Be that as it may, "reasonable" parenting is treated as permitting male circumcision.*

He then further states that based on this distinction,

> *FGM in any form will suffice to establish 'threshold' in accordance with section 31 of the Children Act 1989; male circumcision without more will not.*

The President found that there were two problems in setting out the implications of what a finding of FGM would have to determine the future of G and B. These were set out at paragraph 76:

> *The first is that once a girl has been subjected to FGM, the damage has been done but, on the evidence I have heard, she is unlikely to be subjected to further FGM (though of course female siblings who have not yet been subjected to it are likely to be at risk of FGM). How does that reality feed through into an overall welfare evaluation? The other problem is that, by definition, FGM is practised only on girls and not on boys. In a case where FGM is the only 'threshold' factor in play, there will be no statutory basis for care proceedings in relation to any male sibling(s). Suppose, for example, that the FGM is so severe and the circumstances so far as concerns the girl are such that, were she an only child, adoption would be the appropriate outcome: what is the appropriate outcome if she has a brother who cannot be made the subject of proceedings? Is her welfare best served by separating her permanently from her parents at the price of severing the sibling bond? Or is it best served by preserving the family unit? I do not hazard an answer. I merely identify the very real difficulties that can arise in such a case. In cases where there are other threshold factors in play, balancing the welfare arguments as between the girl(s) and the boy(s) may be more than usually complex, particularly if FGM is a factor of magnetic importance.*

The President also stated that for these reasons local authorities and judges should not jump to the conclusion that a proven FGM should lead to care proceedings.

The President further provided guidance for health practitioners regarding the best practice in examining and reporting FGM based on comments and suggestions made by Professor Creighton. The following was highlighted: [51]

- There is a dearth of medical experts in this area,

[50] The impact of FGM on care proceedings, Zimran Samuel and Thomas Haggie, The Law Society, 25 Feb 2015
[51] As summarised in 'The impact of FGM on care proceedings'

particularly in relation to FGM in young children. Specific training and education is highly desirable. There is an awareness problem and a need for more education and training of medical professionals, including paediatricians.

• Knowledge and understanding of the classification and categorisation of the various types of FGM is vital. For forensic purposes, the WHO classification is the one that should be used.[52]

• Careful planning of the process of examination is required to ensure that an expert with the appropriate level of relevant expertise is instructed at the earliest opportunity. Wherever feasible, referrals should be made as early as possible to one of the specialist FGM clinics. If that is not possible, consideration should be given to arranging for a suitably qualified safeguarding consultant paediatrician to carry out an examination recorded with the use of a colposcope, so that the images can be reviewed subsequently by an appropriate expert.

• Whoever is conducting the examination, the colposcope should be used wherever possible.

• Whoever is conducting the examination, it is vital that clear and detailed notes are made, recording (with the use of appropriate drawings or diagrams) exactly what is observed. If an opinion is expressed in relation to FGM, it is vital that (a) the opinion is expressed by reference to the precise type of FGM that has been diagnosed, which must be identified clearly and precisely and (b) that the diagnosis is explained, clearly and precisely, by reference to what is recorded as having been observed.

The President expressed very strongly in his judgment that local authorities need to be pro-active and vigilant in taking appropriate protective measures to prevent girls being subjected to FGM. And, he further stated that the court must not hesitate to use every weapon in its protective arsenal if faced with a case of actual or anticipated FGM.

7.2 Re E (Female Genital Mutilation) [2016] EWHC 1052 (Fam)

In this case an allegation of FGM was made in family proceedings and then also used as the basis of an asylum claim. England and Wales along with the other EU countries are committed to ensuring that in the case of a real threat of persecution in the form of FGM an asylum application would be processed with the relevant gravitas. This case highlighted to practitioners how an allegation of FGM should be treated with caution and properly investigated.

In the case of *Re E (Female Genital Mutilation)* [2016] EWHC 1052 (Fam) the mother used an allegation of FGM to bolster her immigration application and to wrongfully exaggerate the actual risks in a care case in order to detract from the main issues in the case.
Proceedings were initiated by the mother CE who on 22nd July 2015, secured a without notice FGM order out of hours from Hogg J in respect of the parties' children, SE, born in March 2003 and aged 13, FE, born in November 2005 and aged 10, and CE, born in October 2008, aged 7. The mother and the children resided in this jurisdiction since 2012. In a statement of the same date the mother made the following assertions regarding the position of herself and the children:

1. Her marriage to the father, NE, in Nigeria in 2001 was a forced marriage;
2. Immediately prior to her being forced into marriage the father's family forced her to undergo FGM and she was subjected to Type II FGM whereby her clitoris and labia were removed;
3. During the course of the marriage the father regularly physically abused her by beating, including beating with belts, resulting in scars all over her body, threatened to kill her and told the children that he would kill her;
4. During the course of the marriage the father regularly raped her vaginally, orally and anally;
5. During the course of the marriage the father regularly physically abused the children by beating them and threatened to kill the children;
6. The father had requested that the children be sent to Nigeria in order that FGM could be carried out on SE and FE and in February 2015 the father had sent white ceremonial robes to England in preparation for this;
7. The father was planning to kidnap the children from the United Kingdom with a view to returning them to Nigeria in order that FGM could be carried out on SE and FE.

The matter appeared before Holman J on 24th July 2015. Relying on the information set out in the mother's statement dated 22nd July 2015, the FGM order was renewed, however it was treated as being without notice given the limited notice period the father had been given by reason of his being in Nigeria. The father submitted evidence in the form of a statement dated 24th August 2015.

[52] The definition and the classifications which are referred to are set out above at pages 4 and 5.

By reason of the concerns raised by the mother and, latterly, regarding the level of care given to the children by the mother, the Royal Borough of Greenwich became and remained involved with the family. The children became subjects of a child protection plan on 25th August 2015 and various assessments were conducted by the local authority. This included an independent social work assessment of the father dated 26th October 2015 completed in Nigeria by Henrietta Coker to inform the section 37 report of the Royal Borough of Greenwich. The father travelled to the UK in January 2016 in order to engage in the proceedings.

In April 2016 MacDonald J found the mother to have fundamentally and dishonestly misrepresented the true position before Hogg J and Holman J in July 2015. He stated that *"I am satisfied that it is more likely than not that the mother made the allegations that she did and sought the orders that she did as part of what is known colloquially as an 'immigration scam'."*

On 14th January 2014 the mother had made an application to the Home Office for leave to remain in the United Kingdom on the basis of EU national spousal rights, she allegedly married a Lithuanian national. This application was rejected by the Home Office on 4th June 2015 on the grounds that the purported marriage was a sham, designed to secure leave to remain in the United Kingdom. The mother appealed that decision and that appeal was dismissed on 26th June 2015 with all further rights of appeal exhausted.

Notably 19 days after the mother's appeal was dismissed she made the FGM allegation on 15th July and the matter was brought before the high court on 22nd July 2015. On 20th October 2015 the mother took the children for an interview at the Home Office in connection with her asylum application. The mother herself had undergone the procedure and she alleged that this was because the father's family had forced her to undergo FGM in order for her to marry the father. This was found to be untrue. The father was also asked about the risk of FGM in Nigeria in his village and he admitted that his mother had been subjected to FGM, but it was a practice that no longer took place in their village and his sisters had not been subjected to FGM. Although the social worker was not instructed to do an FGM risk assessment when she visited Nigeria she noted the following points in relation to FGM:

(i) Generally speaking, FGM is not widely practised amongst the Delta Igbo, the father's ethnic group;
(ii) The paternal grandmother said that FGM was practised historically and that she had been subjected to FGM but this was not done to the father's sisters;
(iii) The paternal grandmother said that when FGM was practised, it would be performed when the child was seven months' old and that SE, FE and CE are past this age;
(iv) The Delta was one of the first states in Nigeria to run widespread public education campaigns against FGM;
(v) Nigeria has introduced legislation outlawing FGM by way of the Violence against Persons Prohibition Act 2015 s.20;
(vi) The father is an educated man who has promoted education for the foster children of the family and who has high aspirations for each of his daughters.

Despite the fact that the social worker was not qualified to conduct an FGM risk assessment, MacDonald J did rely on the information from her report which he thought was relevant. During the proceedings the father also made an application for permission for leave to remove the children to Nigeria. Macdonald J was satisfied that the children could return to the care of their father in Nigeria and that this would not carry with it a risk that they would be exposed by him to FGM.
Although the issue of FGM did arise as a point to be considered in this case, following an investigation it was found that the children were not at risk of FGM. Notably the FGM point on this case masked wider risks of harm to the children, which came to the surface through the proceedings. Therefore although as practitioners we should be cautious when dealing with such cases which prima facie appear to be 'immigration scams', we should not overlook this opportunity to actually engage with the case and investigate whether there are wider welfare issues in relation to the children who may require protection.

7.3 Buckinghamshire County Council v MA and Another [2016] EWHC 1338 (Fam)

Despite the fast nature and urgency of the work in this area, as practitioners it is also essential for us to not to be too quick to judge who we perceive to be at risk without carrying out proper investigation and rightfully engaging with any victims or suspected families. The case of *Buckinghamshire County Council v MA and Another* [2016] EWHC 1338 (Fam) is an example of a case where all the triggers existed, but this did not necessarily mean that the relevant children were at risk of being subjected to FGM.

The case involved parents of Somali background who were brought up in Somalia. The father travelled to Britain as a refugee in 2002 and has lived here ever since. The mother, as his wife, was enabled to join him here in 2005. She also has lived here ever since. The parents have altogether seven children, of whom five are daughters and two are sons. Three of those children were born here in England after the mother arrived here in 2005. The eldest four were all born in Somalia.

It is a fact that the two eldest daughters had been

subjected to FGM in Somalia, which was almost ten years ago. The father says that it took place without his knowledge, let alone his consent, in the period after he had travelled to Britain, whilst the mother and the four eldest children were still living in Somalia.

Over the last several years the family had lived in the area of several different local authorities. There was a clear history of different local authorities at various times having acute concerns that the youngest three daughters might similarly become the victims of FGM. As a result, there were proceedings in 2012 and 2014 and again in 2016. It is said that the consequence of a rather last minute application by another local authority in 2014 was that the mother and children were unable at the last minute to travel on a planned holiday to Somalia. Holman J stated that

> *If that was the necessary and inevitable consequence, it is obviously a matter of the utmost regret; more so as, before the actual booked date of travel, a judge sitting as a High Court Judge had given permission to go.*

What gave rise to the current proceedings was that in early April 2016 Buckinghamshire County Council learned that the mother and two of the daughters, together with one of the sons, had travelled to Somalia without their prior knowledge, even though at that time there was quite considerable engagement between the family and that local authority. This resulted in a without notice order being made on 8th April 2016 and these proceedings ultimately coming before Holman J on 16th May 2016.

This family were known to the local authority and it was found that on this occasion if the father was aware of the requirement to notify the local authority in advance of the holiday he would have done so.

Holman J stated

> *I must, and do, make quite clear that if, at some future date, some local authority - whether Buckinghamshire County Council or any other local authority - do have a current concern that any of these children are at risk of female genital mutilation, they are under a very high duty to take whatever steps then appear to them to be necessary and appropriate to protect the child or children concerned.*

He further stated that

> *It is obviously highly undesirable if there are late or last minute applications, particularly if made without notice, for orders shortly before a proposed trip or, as in this case, whilst a planned holiday is already under way and the children are already abroad. So there is a very clear tie in between the expectation, on the one hand, that the parents will be open and up front with any relevant local authority and give to them very good notice (i.e. not less than twelve clear weeks) of any proposed trip by any of the children to the continent of Africa; and, on the other hand, an expectation that if, having been given that notice, the local authority are sufficiently concerned, they really must bring legal proceedings very promptly and not leave it to the last minute.*

At the time of the proceedings Holman J found that there was no risk of these children being genitally mutilated. However he further stated that as two of their older siblings already had been, it was impossible to exclude all future risk of FGM. The emphasis on this case became the issue of balancing the parents' rights to leave the jurisdiction with the children for the purpose of a holiday versus the local authority's duty to act in order to protect children at potential risk of harm. The local authority were not criticised for bringing this application, the concern was the timing of when the matter was brought before the court. Therefore in cases which involve children who are going on a planned holiday to an FGM risk country where there are other signs to indicate a risk of FGM, the application should be brought to a court as soon as the local authority is made aware of the holiday.

8. Conclusion

There has been global unity amongst many countries in declaring FGM as a violation of human rights of women and girls. The Girls Summit in 2014 was a useful forum which enabled many countries to make commitments and as a response take action within their own countries, to work towards a reality where FGM will eventually become eradicated. Many EU countries have also adopted this position and have also incorporated ending FGM in their agenda. The way forward in Europe would be for all Member States of the European Commission to ratify the Istanbul Convention 2014, which lists FGM specifically as one of the forms of gender based violence.

The UK has implemented legislation to prevent FGM and the progression of the case law has demonstrated the practical scope and measure required by professionals when conducting such cases. The mandatory reporting duty has also placed a higher onus on professionals who are most likely to have contact with potential victims to report the crime. Failure to do so will not only risk their job, but the bigger fear is that a potential FGM victim could be overlooked. When approaching FGM work, it must always be remembered that there are no cultural barriers or religious notions that should prevent us from saving young girls from being subjected to a cutting blade.

Literature Review

European Parliament: Resolution on ending female genital mutilation from 16/06/2012 (2012/2684(RSP)).

Council Conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence adopted on 6 December 2012.

UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Summary Report of Phase I, 2008 - 2013

European Commission, Joint Statement on the International Day against Female Genital Mutilation, Brussels, 6 Feb 2013

European Commission Communication: Towards the elimination of female genital mutilation, Brussels, 25 Nov 2013

Press Release: International Day for Elimination of Violence Against Women: European Commission takes action to combat Female Genital Mutilation, 25 Nov 2013

Advisory Committee on Equal Opportunities for Women and Men: Advisory Committee opinion on an EU initiative on female genital mutilation, 14 Nov 2014

Too Much Pain, UNHCR Female Genital Mutilation & Asylum in the European Union, March 2014

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul convention), Nov 2014

The impact of FGM on care proceedings, Zimran Samuel and Thomas Haggie, The Law Society, 25 Feb 2015

Engaging Schools on Female Genital Mutilation and Forced Marriage: A Guide for Education Professionals, Create Youth Net, March 2015

Serious Crime Act 2015 Factsheet, Female Genital Mutilation, Ministry of Justice/Home Office, March 2015

Mandatory Reporting of Female Genital Mutilation – procedural information, Home Office, 20 Oct 2015

FGM European Network Strategic Plan 2015-2017, Towards a strong and sustainable European movement to end FGM, Oct 2015

Legal Implications of EU accession to the Istanbul Convention, Kevät Nousiainen and Christine Chinkin, December 2015

Websites

http://www.un.org/en/events/femalegenitalmutilationday/
http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-261
http://www.unfpa.org/sites/default/files/resource-pdf/67th_UNGA-Resolution_adopted_on_FGM_0.pdf
https://www.gov.uk/government/consultations/female-genital-mutilation-proposal-to-introduce-a-civilprotection-order
http://www.who.int/mediacentre/factsheets/fs241/en/
http://www.who.int/reproductivehealth/topics/fgm/overview/en/
http://www.unfpa.org/joint-programme-female-genital-mutilationcutting#
http://www.loc.gov/law/foreign-news/article/uganda-new-law-bans-female-genital-mutilation/
http://www.endfgm.eu/editor/files/2016/05/End_FGM_Asylum_Guide.pdf
http://www.independent.co.uk/life-style/health-and-families/health-news/more-than-1200-cases-of-fgm-recorded-in-england-in-just-three-months-a7069901.html
http://www.theguardian.com/society/2014/apr/15/fgm-first-suspects-charged-court
http://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena
http://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/210/signatures
http://www.npwj.org/FGM/Status-african-legislations-FGM.html
http://www.ecoi.net/local_link/144821/259833_de.html

International Famiy Law, Policy and Practice

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Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

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Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

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> Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

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Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

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1 May 2010
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pp 100–102 (not pp 100–2)

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Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

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The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

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– Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

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Schedule 1 to the Children Act 1989
rule 4.1 of the Family Proceedings Rules 1991
Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1
Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
Art 8 of the European Convention

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Command papers

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(Title) Cm 1000 (20--) NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

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J.Bloggs and J. Doe 'Title' [2010] Fam Law 200

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